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Judge's Improper Questions To Witness Upset Convictions (NYLJ)

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A new trial has been ordered in federal court for two defendants on charges of conspiracy in the manufacture and sale of cocaine because the presiding judge in the case improperly challenged the credibility of witnesses.

The U.S. Court of Appeals for the Second Circuit held that although the trial judge is entitled to question witnesses to insure that the issues are clearly presented to the jury, "the court must exercise caution to maintain an appearance of impartiality." Judge Roger J. Miner stated in writing for the court.

Impression of Incredulity

In a unanimous opinion for the Court, Judge Roger J. Miner wrote that Judge Henry Bramwell of the Eastern District court "exceeded proper bounds by conveying the distinct impression that he considered" two witnesses' testimony "incredible." Although the Federal Rules of Evidence provide that any party may attack the credibility of a witness, "it is at least open to question whether impeachment is a proper function of the trial judge," the Court noted.

In the case, *U.S. v. Victoria*, 87-1068, 87-1070, Judge Bramwell, who was not mentioned in the Court's opinion but was listed in court papers, questioned two defendant-witnesses, who were later convicted on one count each of conspiracy to manufacture and distribute cocaine.

"There can be no doubt that the

court's interruption" of one witness "did not have as its purpose the clarification of ambiguities, the correction of misstatements or the development of information used to make rulings," the Court said in its 14-page opinion handed down this week.

The court also disputed Judge Bramwell's questioning of a defendant-witness who was directed to characterize the testimony of a government agent as right or wrong. At trial, after hearing the testimony of a defendant-witness, the judge repeated an agent's earlier testimony, and asked the defendant, "So, the agent was wrong?"

The appeals court found that it is "improper" for a trial judge "to require a witness, especially a defendant, to characterize the testimony of a government agent as right or wrong," the opinion stated.

The three-member panel, including Judges Miner, Richard J. Cardamone and Ralph K. Winter, reversed the convictions and remanded to the district court for a new trial.

Robert L. Herbst and Justin Levine represented the defendant-witnesses. Julie Copeland, Assistant U.S. Attorney for the Eastern District of New York, appeared for the government.