



Advocacy and the Litigation Process in Hong Kong

Fourth Edition

Michael Wilkinson
Vandana Rajwani
Raymond Pierce



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Advocacy and the Litigation Process in Hong Kong

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**Michael Wilkinson, Vandana Rajwani,
Raymond Pierce**

Advocacy and the Litigation Process in Hong Kong provides an introduction to the basic rules, conventions, and techniques that every advocate must know and apply when practicing in both the civil and criminal courts of Hong Kong. It takes the reader through the complex litigation process from first interview with the client, through the preparation of the case for trial, interlocutory applications, the trial itself, and finally appeals. It also highlights the skills required to be successful and emphasises the ethical duties of advocates. The content extends beyond relevant topics for front-line advocates, but encompasses much guidance on how to run a successful litigation practice.

The fourth edition incorporates many new developments in the rules and techniques of practice and introduces many new cases and practice directions relevant to practice, in particular the new Bar Code of Conduct and the Civil Justice Reform.

This book, which is essential reading for all PCLL students, is also likely to be of interest to practising advocates and all involved in the trial process. It is a one-stop-shop of ethics, practical tips, procedural law, evidence law, and skills essential for litigation practitioners in Hong Kong.

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ADVOCACY AND THE LITIGATION PROCESS IN HONG KONG

Fourth Edition

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LexisNexis honours the significant contributions of Professor Michael Wilkinson (1945-2019) to this publication and above all, his passion and tenacity which has inspired us. He will be deeply missed.

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CONTENTS

| | <i>Page</i> |
|--|---------------|
| <i>Foreword to Second Edition</i> | <i>v</i> |
| <i>Preface to the First Edition</i> | <i>vii</i> |
| <i>Preface to the Second Edition</i> | <i>ix</i> |
| <i>Preface to the Third Edition</i> | <i>xi</i> |
| <i>About the Authors</i> | <i>xiii</i> |
| <i>Table of Cases</i> | <i>xxxi</i> |
| <i>Table of Statutes</i> | <i>lxix</i> |
| <i>Table of Practice Directions</i> | <i>lxxvii</i> |
| <i>Table of Codes</i> | <i>lxxix</i> |

| | |
|---|----------|
| Chapter 1: Introduction | 1 |
| 1. Conventional Litigation, Arbitration and Mediation..... | 2 |
| 1.1 The reason for the shift away from the conventional litigation process in the civil arena..... | 2 |
| 1.2 Arbitration..... | 2 |
| 1.3 Mediation..... | 3 |
| 2. The Advocates — Barristers and Solicitors..... | 6 |
| 3. Rights of Audience..... | 7 |
| 3.1 Barristers..... | 7 |
| 3.2 Solicitors..... | 8 |
| 3.3 Solicitor-Advocates..... | 8 |
| 4. The Language of the Courts..... | 9 |
| 5. The Qualities of the Advocate..... | 10 |
| 5.1 The ability to collect, organise and analyse material..... | 10 |
| 5.2 The ability to persuade in writing..... | 11 |
| 5.3 The ability to persuade orally out of court..... | 11 |
| 5.4 The ability to present a case persuasively in court..... | 12 |
| 5.5 The ability to think on one's feet..... | 12 |
| 5.6 Wisdom as to human nature and the ways of the world..... | 13 |
| 5.7 The ability to get on well with people and instil in others trust in oneself..... | 13 |
| 5.8 Mental and physical stamina..... | 13 |
| 6. Attraction to the Profession of Advocacy..... | 14 |
| 7. How Does One Learn to be an Advocate?..... | 14 |
| 8. The Scope of an Advocate's Work..... | 15 |

| | |
|--|----|
| Chapter 2: The Professional Ethics of the Advocate..... | |
| 1. Introduction | 17 |
| 2. The Sources of Lawyers' Ethical Responsibilities | 17 |
| 2.1 Solicitors' ethical responsibilities | 17 |
| 2.2 Barristers' ethical responsibilities | 21 |
| 2.3 What to do if in doubt..... | 22 |
| 3. Enforcement of Professional Standards by the Profession and by the Courts | 22 |
| 3.1 Enforcement of professional standards by the profession..... | 22 |
| 3.2 Enforcement of professional standards by the court | 23 |
| 4. Self-Interest in the Maintenance of Professional Standards of Conduct by Advocates..... | 23 |

Chapter 3: Preparation of the Case.....

| | |
|--|----|
| 1. The Roles of Solicitor and Counsel in the Advocacy Process..... | 27 |
| 1.1 Clients may not approach counsel directly..... | 27 |
| 1.2 The circumstances in which counsel should be briefed | 28 |
| 1.3 The point of time at which a solicitor should brief counsel | 28 |
| 1.4 The division of work between instructing solicitor and counsel | 30 |
| 1.5 Counsel interviewing the client and witnesses..... | 31 |
| 2. The Solicitor's Retainer | 31 |
| 2.1 Effect of the retainer | 31 |
| 2.2 Duration of the retainer | 35 |
| 2.3 Form of the retainer | 35 |
| 2.4 Cases in which a solicitor is obliged to decline a retainer | 37 |
| 3. Preparations for the Interview | 37 |
| 3.1 The office environment..... | 38 |
| 3.2 Preparations for each individual client..... | 38 |
| 4. The Interview with the Client..... | 38 |
| 4.1 Access to a client who is in custody..... | 40 |
| 4.2 The purpose of the interview | 43 |
| 4.3 The technique of conducting the interview | 43 |
| 4.4 Confidentiality and legal professional privilege..... | 48 |
| 4.5 Facts to be ascertained at the interview..... | 48 |
| 4.6 Damages: quantification, pleading and proof..... | 48 |

| | |
|---|-----|
| 4.7 Witnesses | 50 |
| 4.8 The proof of evidence..... | 57 |
| 4.9 Costs | 62 |
| 4.10 Further interviews..... | 62 |
| 4.11 Recording of interviews..... | 63 |
| 4.12 Traditional or participatory relationship between client and lawyer..... | 63 |
| 5. The Post-Interview Stage: Ascertaining the Facts and Law | 63 |
| 5.1 Ascertainment and checking of the facts..... | 64 |
| 5.2 Discovery: civil proceedings | 72 |
| 5.3 Discovery: Criminal proceedings | 79 |
| 5.4 Research into the law and relevant procedural and evidential considerations..... | 89 |
| 6. Arriving at a Satisfactory Case Theory | 100 |
| 7. Communicating with One's Client and Others..... | 101 |
| 7.1 Communication with one's client..... | 101 |
| 7.2 Communicating with the opposing party and others..... | 102 |
| 7.3 The modes of communication | 102 |
| 8. Negotiating a Settlement in a Civil Action | 108 |
| 8.1 The desirability of settlement | 108 |
| 8.2 Authority to settle..... | 109 |
| 8.3 Preparing for settlement negotiations | 110 |
| 8.4 Conducting settlement negotiations..... | 112 |
| 8.5 The forms of the settlement..... | 113 |
| 8.6 Other statutory aids to negotiation of a settlement..... | 115 |
| 9. Preparing For Court..... | 117 |
| 9.1 Books to take into court..... | 117 |
| 9.2 Chronologies, dramatis personae, skeleton arguments and lists of authorities | 117 |
| 9.3 Personal relationships..... | 120 |
| 9.4 Pre-trial consultations with counsel for the prosecution and the judge in criminal proceedings; ethical restrictions on 'plea bargaining' | 121 |
| 9.5 Pre-trial hearings and reviews | 124 |
| 10. Preparing the Case as Duty Lawyer | 126 |
| 10.1 The introduction and scope of the Duty Lawyer Scheme | 126 |

| | | |
|--|---|-----|
| 10.2 | The functions of the advocate instructed by the Scheme..... | 127 |
| 10.3 | Taking instructions and representing the client..... | 128 |
| Chapter 4: Briefing Counsel, Counsel's Opinion and Conferences..... 128 | | |
| 1. | Briefing Counsel..... | 128 |
| 1.1 | Choice of counsel..... | 128 |
| 1.2 | Instructing senior counsel..... | 128 |
| 1.3 | The necessity for a brief and backsheet..... | 130 |
| 1.4 | Negotiation of counsel's fee..... | 131 |
| 1.5 | Counsel has no contractual rights against either the lay client or instructing solicitor..... | 131 |
| 1.6 | The scope of counsel's authority..... | 131 |
| 1.7 | Acceptance, refusal and return of the brief by counsel..... | 134 |
| 1.8 | The contents of the brief and backsheet..... | 135 |
| 1.9 | The brief must be signed by instructing solicitor and delivered to counsel..... | 140 |
| 1.10 | Marking of brief on completion of the work..... | 140 |
| 2. | Counsel's Opinion..... | 140 |
| 2.1 | The purpose and nature of counsel's opinion..... | 140 |
| 2.2 | The form and content of counsel's opinion..... | 140 |
| 2.3 | Drafting the opinion..... | 140 |
| 3. | Conferences..... | 140 |
| 3.1 | The venue for the conference..... | 140 |
| 3.2 | The purpose of the conference..... | 140 |
| 3.3 | Conducting the conference..... | 140 |
| 3.4 | Pre-conference meeting between counsel and instructing solicitor..... | 140 |
| 3.5 | Conferences with expert witnesses..... | 140 |
| Chapter 5: Court Etiquette..... 151 | | |
| 1. | Dress..... | 151 |
| 2. | Promptness..... | 151 |
| 3. | Posture Whilst Addressing the Court..... | 151 |
| 4. | Manner of Addressing the Court..... | 151 |
| 4.1 | Courtesy to the court..... | 151 |
| 4.2 | Courtesy to witnesses..... | 151 |
| 4.3 | Inflammatory remarks before a jury..... | 151 |
| 4.4 | Professional courtesy to opposing counsel..... | 151 |

| | | |
|---|--|-----|
| 5. | Mode of Address of Judicial Officers..... | 154 |
| 5.1 | Mode of address in court..... | 155 |
| 5.2 | Mode of address outside court..... | 156 |
| 5.3 | Mode of address by letter..... | 156 |
| 6. | Use of Appropriate Language when Addressing the Court..... | 156 |
| Chapter 6: Chambers Applications Before Masters..... 161 | | |
| 1. | The Jurisdiction of the Masters..... | 161 |
| 2. | Chambers Proceedings Normally Open to the Public..... | 162 |
| 3. | Administrative Division of Chambers Applications..... | 164 |
| 3.1 | Ex parte applications..... | 164 |
| 3.2 | Three-minute applications..... | 166 |
| 3.3 | Fixed-time applications ('special chambers hearings')..... | 167 |
| 4. | Procedure and Advocacy Technique in Making Chamber Applications..... | 168 |
| 4.1 | Procedural rules governing the making of fixed time chamber applications..... | 168 |
| 4.2 | Drafting and filing affidavits and affirmations..... | 171 |
| 4.3 | Advocacy techniques in chambers applications..... | 174 |
| 4.4 | The making of an application for summary judgment..... | 175 |
| 5. | Appeals from Masters' Interlocutory Judgments and Orders to a Judge in Chambers..... | 183 |
| Chapter 7: Bail Applications..... 185 | | |
| 1. | Jurisdiction to Admit to Bail..... | 185 |
| 1.1 | Police bail..... | 185 |
| 1.2 | Bail in a magistrate's court..... | 187 |
| 1.3 | Bail in the District Court..... | 189 |
| 1.4 | Bail in the Court of First Instance..... | 189 |
| 1.5 | Bail in the Court of Appeal..... | 190 |
| 1.6 | Bail pending appeal or sentence..... | 190 |
| 1.7 | Other jurisdiction to grant bail..... | 191 |
| 2. | Multiple Applications For Bail in the Court of Appeal, Court of First Instance, District Court and Magistrates Courts..... | 192 |
| 2.1 | Multiple applications for bail in the Court of First Instance, District Court and magistrates courts..... | 192 |
| 2.2 | Multiple applications for bail in the Court of Appeal..... | 193 |

| | | |
|--|--|-----|
| 3. | Revocation of Bail | 193 |
| 4. | Application for Review by the Secretary for Justice | 194 |
| 5. | The Bill of Rights: Presumption in Favour of Granting Bail | 195 |
| 6. | The Criminal Procedure (Amendment) Ordinance 1993: The Right to Bail | 196 |
| 6.1 | The right to bail | 196 |
| 6.2 | The circumstances in which a person may be refused bail | 196 |
| 7. | Considerations the Court may Take into Account when Granting or Refusing Bail | 199 |
| 7.1 | Considerations in favour of granting bail | 199 |
| 7.2 | Considerations against granting bail | 200 |
| 8. | The Terms upon which Bail may be Granted | 200 |
| 8.1 | Cash bail | 200 |
| 8.2 | Cash deposit or recognisances by sureties | 202 |
| 8.3 | Other conditions | 202 |
| 8.4 | No jurisdiction to order person admitted to bail to enter into recognisances (no 'self-recognisances') | 203 |
| 9. | Preparing to Make the Application for Bail | 203 |
| 10. | Making the Application for Bail | 203 |
| 10.1 | Procedural considerations | 203 |
| 10.2 | Evidential considerations | 203 |
| 10.3 | The application | 203 |
| 11. | Arrest of Bailed Person | 203 |
| 12. | Default in Appearance by the Bailed Person | 203 |
| 12.1 | Offence for failing to surrender to custody and issue of warrant for arrest | 203 |
| 12.2 | Forfeiture of any cash deposit from the bailed person and the surety or sureties | 203 |
| 12.3 | Forfeiture of recognisances taken from surety or sureties | 203 |
| Chapter 8: The Opening Address for the Prosecution..... | | |
| 1. | Introduction: Setting the Scene | 204 |
| 2. | The Ethical Duties of the Prosecutor at the Trial | 204 |
| 3. | The Contents and Style of the Opening Speech | 204 |
| 3.1 | Jury trials | 204 |
| 3.2 | Non-jury trials | 204 |

| | | |
|---|--|------------|
| Chapter 9: The Opening Speech for the Plaintiff | | 223 |
| 1. | The Function of Counsel in a Civil Trial | 223 |
| 2. | The Contents of the Opening Speech For the Plaintiff | 226 |
| 2.1 | Who opens? | 226 |
| 2.2 | Use of skeleton arguments in opening | 227 |
| 2.3 | The contents of the opening speech | 227 |
| Chapter 10: General Points on the Examination of Witnesses | | 231 |
| 1. | The Principle of Orality and the Day in Court | 231 |
| 2. | The Purpose of Examination of Witnesses — Laying the Foundation for Your Submissions | 232 |
| 3. | The Selection of Witnesses | 232 |
| 4. | Tampering with Evidence and Preparation of Witnesses | 235 |
| 4.1 | Tampering with evidence | 235 |
| 4.2 | Coaching witnesses | 236 |
| 4.3 | Proper preparation of witnesses | 237 |
| 5. | The Order of Calling Witnesses | 237 |
| 6. | Presence of Witnesses in the Courtroom | 239 |
| 7. | General Hints on Technique in Questioning a Witness | 239 |
| 7.1 | Use language intelligible to the witness, jury and interpreter | 240 |
| 7.2 | Questions should be specific and short | 240 |
| 7.3 | Only one question at a time — one fact per question | 240 |
| 7.4 | Only ask questions | 241 |
| 7.5 | Preparing in advance for expected answers | 241 |
| 7.6 | Questioning through an interpreter | 241 |
| 8. | Never Ask a Question to Which You Do Not Know the Answer | 243 |
| 9. | Do Not Display Emotion at a Response Given by a Witness | 244 |
| 10. | Proceed at an Appropriate Pace for the Judge to Record the Testimony or Take Notes | 245 |
| 11. | Making Objections to Questions Put by Your Opponent | 245 |
| 11.1 | When to make an objection | 245 |
| 11.2 | The appropriate manner in which to make an objection | 246 |
| 12. | Questions to Witnesses from the Bench and Jury | 247 |
| 12.1 | Questions and comments from the Bench | 249 |
| 12.2 | Questions from the jury | 251 |

| | | |
|--|--|-----|
| 12.3 | Counsel have a further right to examine on fresh material revealed — 'Matters Arising' | 251 |
| 13. | Taking Notes of the Examination of Witnesses during the Trial | 252 |
| 13.1 | The purpose of taking notes | 252 |
| 13.2 | The technique of note-taking | 252 |
| Chapter 11: Examination-in-Chief..... | | |
| 1. | The Purpose of Examination-in-Chief and the Choice of Method of Presentation of Your Witnesses' Evidence | 255 |
| 2. | Examination-in-Chief in Civil Cases by Way of Presentation of Witness Statements | 255 |
| 2.1 | The order for exchange of witness statements | 255 |
| 2.2 | Preparation of witness statements | 256 |
| 2.3 | Examination-in-chief upon a witness statement | 257 |
| 2.4 | Examination-in-chief of a witness whose witness statement has been exchanged but not ordered to stand as evidence-in-chief | 257 |
| 3. | Preparation for Examination-in-Chief | 258 |
| 3.1 | The need for attention to detail | 258 |
| 3.2 | Dealing with previous convictions and establishing good character | 258 |
| 3.3 | Special circumstances affecting the presentation of the evidence | 260 |
| 4. | The Technique of Conducting Examination-in-Chief | 262 |
| 5. | Leading Questions | 262 |
| 5.1 | What are leading questions? | 262 |
| 5.2 | When are leading questions permitted? When should they be used? | 263 |
| 5.3 | Examples of leading questions and ways to avoid them | 263 |
| 5.4 | Answers to leading questions | 265 |
| 5.5 | Leading questions to hostile witnesses and in cross-examination permitted | 265 |
| 6. | Questions which Assume the Existence of a Fact in Issue | 266 |
| 7. | Dock Identifications | 266 |
| 7.1 | First-time dock identifications where witness does not know the accused | 267 |
| 7.2 | First-time identifications where the witness knows the accused | 267 |
| 7.3 | Dock identification where witness has previously identified the accused | 267 |

| | | |
|---|--|-----|
| 8. | Counsel Should Avoid Questions which are Likely to Have the Effect of Eliciting Testimony that is Inadmissible | 267 |
| 9. | Counsel Should Ensure that Witnesses Do Not Use Expressions that are Improper in their Evidence-in-Chief | 268 |
| 10. | Witnesses in Criminal Trials Should not be Asked to Reveal their Addresses | 269 |
| 11. | Witnesses Refreshing their Memory | 270 |
| 11.1 | Refreshing memory out of court | 272 |
| 11.2 | Refreshing memory in face of the court | 272 |
| 11.3 | Evidential value of document used to refresh witness' memory once put in evidence | 274 |
| 12. | Hostile Witnesses | 274 |
| 12.1 | Unfavourable witnesses | 275 |
| 12.2 | Meaning of 'hostile' | 275 |
| 12.3 | Can counsel deliberately call a witness they know will prove hostile? | 275 |
| 12.4 | The right to cross-examine hostile witnesses | 276 |
| 12.5 | Leave of the Court | 277 |
| 12.6 | A witness may be declared hostile either during examination-in-chief or re-examination | 277 |
| 12.7 | Discretion of the court | 278 |
| 12.8 | Manner of seeking leave and weight to be accorded to witness' testimony after witness declared to be hostile | 278 |
| 12.9 | Limits upon permitted cross-examination | 279 |
| 12.10 | Recalling a hostile witness after the witness has been charged with perjury | 280 |
| 12.11 | Re-examination of a hostile witness | 280 |
| 12.12 | Effect of adducing the previous inconsistent statement | 280 |
| 13. | Concluding Your Examination-in-Chief | 282 |
| Chapter 12: Cross-Examination..... | | |
| 1. | Preparation for Cross-Examination | 283 |
| 1.1 | Is there any need to cross-examine at all? | 283 |
| 1.2 | Define your objectives | 285 |
| 1.3 | Preparation for cross-examination before trial and during examination-in-chief | 285 |
| 2. | Some Ethical Considerations | 286 |
| 3. | Application of the Rules of Evidence to Cross-Examination | 288 |

| | |
|---|------------|
| 4. Letting in Unwanted Evidence as a Result of Ill-Considered Cross-Examination..... | 289 |
| 5. The Functions of Cross-Examination..... | 290 |
| 5.1 To strengthen your case by eliciting favourable material in support of your case..... | 290 |
| 5.2 To destroy or weaken the evidence adduced in favour of your opponent or to discredit the creditworthiness of your opponent and your opponent's witnesses..... | 291 |
| 5.3 Identifying inherent improbabilities..... | 291 |
| 5.4 Putting one's case..... | 317 |
| 6. Techniques of Conducting the Cross-Examination..... | 320 |
| 6.1 The length of cross-examination..... | 320 |
| 6.2 One question too many..... | 321 |
| 7. The First Question..... | 322 |
| 8. The Scope of Cross-Examination and Some Questions Not to Ask; a Witness' Privilege from Answering Questions..... | 324 |
| 8.1 Cross-examination generally 'at large'..... | 324 |
| 8.2 Questions which should not be asked..... | 328 |
| 8.3 Privilege from answering a question..... | 330 |
| 9. The Order of Cross-Examination..... | 331 |
| Chapter 13: Re-Examination..... | 331 |
| 1. Introduction..... | 331 |
| 2. The Purposes of Re-Examination..... | 332 |
| 2.1 Repairing the damage..... | 332 |
| 2.2 Taking advantage of documentary evidence that has now become admissible..... | 333 |
| 3. Preparing for Re-Examination..... | 334 |
| 4. Whether to Re-Examine at All..... | 335 |
| 5. The Rules Governing Re-Examination..... | 336 |
| 6. The Technique of Re-Examination..... | 336 |
| 7. Further Examination by the Bench..... | 337 |
| 8. Concluding Your Re-Examination..... | 337 |
| Chapter 14: Further Evidence Adduced After Close of Case..... | 337 |
| 1. Further Evidence Called by Prosecution After Close of Their Case..... | 337 |
| 1.1 The general principle..... | 341 |
| 2. Further Evidence Called by Parties in Civil Action after the Close of their Cases..... | 341 |

| | |
|--|------------|
| Chapter 15: Expert Evidence..... | 343 |
| 1. The Admissibility of Expert Evidence..... | 344 |
| 1.1 Who is an expert?..... | 344 |
| 1.2 The role of the expert..... | 346 |
| 1.3 What evidence may the expert give?..... | 349 |
| 1.4 The evidence given by the expert witness must fall within a recognised field of expertise..... | 350 |
| 2. Common Areas in Which Expert Evidence is Useful..... | 350 |
| 2.1 Medical evidence..... | 351 |
| 2.2 Fingerprint evidence..... | 352 |
| 2.3 Government Chemist's evidence..... | 353 |
| 2.4 Handwriting evidence..... | 355 |
| 2.5 Ballistics evidence..... | 355 |
| 2.6 Surveyors' and valuers' evidence..... | 355 |
| 2.7 Engineers' evidence..... | 355 |
| 2.8 Accountants' evidence..... | 356 |
| 2.9 Actuarial and other expert evidence in personal injury and fatal accident actions..... | 356 |
| 2.10 Evidence of identification from video recording..... | 357 |
| 2.11 Proof of foreign law..... | 357 |
| 2.12 Membership of a triad society..... | 359 |
| 2.13 Gambling cases..... | 359 |
| 2.14 Child custody and care cases..... | 359 |
| 2.15 Evidence as to the standards applicable to members of a profession..... | 360 |
| 2.16 Other situations in which expert evidence has been admitted..... | 361 |
| 3. Appointment of An Expert by the Court..... | 361 |
| 4. Selecting Your Expert and Establishing the Qualifications of the Expert in Court..... | 362 |
| 4.1 Counsel's task in establishing the witness as an expert..... | 362 |
| 4.2 Matters to look for when selecting your expert..... | 362 |
| 5. Counsel's Conference With the Expert..... | 364 |
| 6. The Form and Content of the Expert's Report..... | 364 |
| 7. Supplementary Report..... | 364 |
| 8. Disclosure of Expert Evidence..... | 367 |
| 8.1 Civil litigation..... | 367 |
| 8.2 Criminal litigation..... | 367 |
| 9. Opinion and Hearsay in Expert Evidence..... | 368 |
| 9.1 Opinion on facts observed by the experts themselves..... | 369 |

| | | |
|------|--|-----|
| 9.2 | Opinion on facts admitted or not in dispute | 366 |
| 9.3 | Opinion on facts in dispute based on evidence of others | 370 |
| 10. | The Role and Duty of the Expert Witness in Testifying Before the Court | 371 |
| 11. | Examination-in-Chief of Expert Witnesses | 372 |
| 12. | Are Expert Witnesses Permitted to Express Their Opinion on the Ultimate Issue? | 374 |
| 13. | Cross-Examination of the Expert Witness | 375 |
| 13.1 | Cross-examination as to qualification and experience | 376 |
| 13.2 | Challenging the witness' knowledge of his subject | 377 |
| 13.3 | Challenging the soundness of the expert's opinion | 377 |
| 13.4 | Challenging the expert's method of research | 377 |
| 13.5 | Putting your case | 377 |
| 14. | The Court is Free to Accept or Reject Expert Opinion Evidence | 378 |
| 15. | Legal and Scientific Proof | 379 |
| 16. | Immunity of Expert Witnesses? | 379 |

Chapter 16: Submission of No Case to Answer and the Opening Speech for the Defence in Criminal Trials

| | | |
|-----|---|-----|
| 1. | The Submission of No Case to Answer | 381 |
| 1.1 | The test to be applied | 382 |
| 1.2 | The test applied in Hong Kong | 383 |
| 1.3 | The current situation | 384 |
| 1.4 | Procedure for making the submission | 384 |
| 2. | The Opening Address for the Defence | 384 |
| 2.1 | Entitlement to an opening address | 385 |
| 2.2 | Content of the opening address | 385 |
| 2.3 | The advantages and disadvantages of making an opening address | 386 |
| 2.4 | The equality of arms argument | 386 |

Chapter 17: Submission of No Case to Answer and the Opening Speech for the Defence in Civil Cases

| | | |
|----|------------------------------------|-----|
| 1. | Submission of No Case to Answer | 389 |
| 2. | The Opening Speech for the Defence | 390 |

| | |
|---|-----|
| Chapter 18: Making Closing Submissions: Some General Principles | 391 |
| 1. Evidence Comes from the Witnesses Not the Advocate | 391 |
| 1.1 Facts which counsel need not prove | 393 |
| 2. Counsel Must Never Express Their Own Opinion of the Case Before the Court | 396 |
| 3. The Manner of Making Submissions | 397 |
| 3.1 Clarity and speed of delivery | 397 |
| 3.2 Comprehensibility | 398 |
| 3.3 Brevity | 398 |
| 4. Drawing the Court's Attention to Relevant Authorities, Citing Authorities and Quoting from Cases | 399 |
| 4.1 Advocate's duty to provide authority | 399 |
| 4.2 Duty to bring to court's attention all relevant authorities | 399 |
| 4.3 List of authorities to be provided to court and opposing party in advance of hearing | 400 |
| 4.4 Selecting the best authorities | 400 |
| 4.5 Citing and quoting from case authorities | 402 |

Chapter 19: Closing Speeches in Criminal Cases

| | |
|--|-----|
| 1. Is There a Right to a Closing Speech? | 403 |
| 2. The Contents of the Closing Speech | 404 |
| 2.1 Submissions permissible only where the proper foundations have been laid | 404 |
| 2.2 Submissions on law | 405 |
| 2.3 Submissions on fact and evidence by the prosecution | 406 |
| 2.4 Submissions on fact and evidence by defence counsel | 409 |
| 3. Effective Technique in Making the Closing Speech | 410 |
| 3.1 Jury trials | 410 |
| 3.2 Trials before a judge alone | 412 |
| 4. Matters Which Must not be Mentioned in the Closing Address | 412 |
| 4.1 No comment on failure of the accused or his spouse to testify | 413 |
| 4.2 No reference to inadmissible evidence | 414 |
| 4.3 No reference to irrelevant material that might improperly influence the jury | 414 |
| 5. Interruptions by Opposing Counsel During the Closing Speech | 414 |

| | |
|---|-----|
| Chapter 20: The Duties of Counsel During the Summing-up | 415 |
| 1. The Function and Content of the Summing-Up and Consultation with Counsel | 415 |
| 1.1 The function and content of the summing-up | 415 |
| 1.2 Consultation with counsel as to the contents of the summing-up..... | 416 |
| 2. Duty of Counsel to Note What Has Been Said for Appeal Purposes | 417 |
| 3. The Duty of Counsel to Bring Any Misdirection to the Attention of the Judge..... | 417 |
| 3.1 The duties of counsel for the prosecution..... | 417 |
| 3.2 The duties of defence counsel | 418 |
| 3.3 Duty of judge to correct any misdirection..... | 420 |
| Chapter 21: Closing Speeches in Civil Cases | 421 |
| 1. The Order of Speeches | 421 |
| 2. The Content of Closing Speeches..... | 422 |
| 2.1 The closing speech for the defendant..... | 422 |
| 2.2 The closing speech for the plaintiff..... | 424 |
| 2.3 The reply..... | 424 |
| Chapter 22: Appellate Advocacy | 425 |
| 1. Introduction | 425 |
| 2. Preparation and Preliminary Matters..... | 425 |
| 2.1 Whether to appeal at all?..... | 425 |
| 2.2 Procedural considerations..... | 426 |
| 2.3 Pre-hearing appellate procedure and the grounds of appeal | 428 |
| 2.4 Skeleton arguments..... | 431 |
| 2.5 List of authorities..... | 434 |
| 2.6 Chronology of events..... | 434 |
| 2.7 List of dramatis personae..... | 434 |
| 2.8 Legibility of documents..... | 435 |
| 3. Introducing Fresh Evidence on Appeal | 437 |
| 3.1 Criminal trials..... | 437 |
| 3.2 Civil trials | 440 |
| 3.3 Conclusion..... | 440 |
| 4. Arguing the Appeal..... | 440 |
| 4.1 The order of speeches..... | 440 |
| 4.2 Issues raised in the Court of Appeal for the first time..... | 440 |

| | |
|---|-----|
| 4.3 Submissions of counsel for the appellant | 442 |
| 4.4 Submissions of counsel for the respondent | 445 |
| 4.5 The reply..... | 447 |
| 4.6 Interacting with the Bench..... | 447 |
| Chapter 23: Advocacy in the Sentencing Process | 451 |
| 1. Establishing the Facts Upon which the Sentence will be Based | 451 |
| 1.1 The facts established in the trial together with any additional evidence adduced..... | 452 |
| 1.2 The facts established by the plea together with any additional evidence adduced | 453 |
| 1.3 The summary of facts | 455 |
| 1.4 The antecedent statement | 455 |
| 1.5 Reports..... | 456 |
| 1.6 Evidence in mitigation..... | 457 |
| 2. The Rules of Evidence During the Sentencing Process | 457 |
| 3. The Role of Prosecuting Counsel in the Sentencing Process | 458 |
| 4. The Role of English and Other Common Law Authorities | 459 |
| 5. The Plea in Mitigation | 460 |
| 5.1 The purpose of the plea | 460 |
| 5.2 Factors to be considered when making a plea | 461 |
| 5.3 Preparing for the Plea..... | 471 |
| 5.4 Making the Plea..... | 471 |
| 5.5 Plea in mitigation following trial..... | 473 |
| 6. Duty of Counsel to Ensure that the Court has Power to Make the Proposed Order..... | 473 |
| 7. Appeals Against Sentence | 474 |
| 7.1 Some preliminary considerations | 474 |
| 7.2 Use of case authority in appeals against sentence | 474 |
| 7.3 The role of the prosecution in appeals against sentence | 474 |
| 7.4 Grounds for interfering with the sentence and powers of the Court of Appeal..... | 475 |
| Index | 481 |

TABLE OF CASES

References are to paragraph numbers

香港特別行政區 v 陳英傑 [2013] HKCU 96 (unreported,
HCMA 381/2012, 11 January 2013) (CFI)..... [12-4]

A

- A (a Minor), Re [1988] NLJLR 79 (CA)..... [3-6]
- A Barrister, Re [1959] HKLR 512..... [3-88]
- A Barrister, Re [1966] HKLR 181, [1966] HKCU 15 (OJ)..... [3-88], [4-31]
- A Barrister, Re [1968] HKLR 585, [1968] HKCU 39 (FC) [4-1]
- A Barrister, Re [1980] HKC 203 [4-1]
- A Barrister, Re (1986) MP No 2087 of 1986..... [1-15]
- A Barrister, Re (1989) NLJ 10 March,
[1989] HKLR 442..... [3-278], [4-29], [5-17]
- A Solicitor v Law Society of Hong Kong (unreported,
CACV 302/2002, 2004) [12-105]
- A Solicitor, Re [1956] HKLR 186, [1956] HKCU 19 [2-23]
- AB Volvo (A Swedish Corpn) v Tanfory Co Ltd (t/a Club Volvo)
[1990] 1 HKC 158, [1990] 2 HKLR 203..... [9-1]
- Abse v Smith [1986] 1 All ER 350 (CA)..... [1-17]
- AG v Chow Chuen Fu and Anor (unreported,
HCMA 351/1984, 7 January 1985)..... [14-5]
- A-G v Yuen Man Pang [1969] HKLR 355, [1969] HKCU 24..... [16-2], [16-10]
- A-G's Reference [1988] 1 HKLR 375, [1988] HKCU 319 [16-2]
- Allson Classic Hotel (HK) Ltd v Abundance Assets Ltd
[1994] 2 HKC 154 [3-200]
- AM & S Europe Ltd v Commission of the European Communities
[1983] 1 QB 878 (European Court of Justice)..... [3-50], [12-146]
- Annabell Kin Yee Lee v Lee Wing Kim (unreported,
HCA 9522/1997, 6 December 2001) [15-67]
- Applications for Review of Certain Sentences by the
Attorney-General, Re [1972] HKLR 370 [23-62]
- Aqua-Leisure Industries Inc v Aqua Splash Ltd (unreported,
CACV 175/2002, 2003) [22-42]
- Arias v Metropolitan Commissioner of Police
[1984] The Times 1 August (CA) [3-170]
- Arthur JS Hall & Co (a firm) v Simmons [2000] 3 All ER 673 (HL)..... [2-26]
- Ash v Buxsted Poultry Ltd [1989] The Times 29 November [3-113]
- Ashmore v The Corporation of Lloyds
[1992] 1 WLR 446, [1992] 2 All ER 486 (HL) [3-207], [18-29], [22-61]
- Asia Television Ltd v Oriental Daily Publisher Ltd [2002] HKCU
786 (unreported, HCA 6124/2000, 2 July 2002) [9-1]

CHAPTER 3

PREPARATION OF THE CASE

[3-1] It has been said time and time again that preparation is the single most important facet of the advocate's work. The effect that preparation has on the outcome of litigation was memorably summed-up by that famous solicitor-advocate, Sir David Napley, when he said:

A carefully prepared case may be brought to a successful conclusion by one who, by nature or otherwise, is a poor advocate when on his feet; but an inadequately prepared case is unlikely to be won unless presented by an unusually able advocate, on one of his lucky days, before either a singularly good or a singularly bad judge.¹

[3-2] We will, therefore, deal with the subject of preparation at some length. Some of what follows will apply only to the barrister, whom we will refer to as counsel; some applies only to the solicitor-advocate. We trust that it will be clear from the context to whom the comments apply.

1. THE ROLES OF SOLICITOR AND COUNSEL IN THE ADVOCACY PROCESS

[3-3] In the context of litigation in Hong Kong, the inter-relationship of solicitor and counsel is symbiotic; one could not function without the services of the other. On the one hand, counsel may usually appear only when instructed by a solicitor; on the other hand, in many cases, the solicitor is able only to fulfil the client's goals by instructing counsel. Let us look at some of the rules and conventions which govern their inter-relationship.

1.1 Clients may not approach counsel directly

[3-4] The first step in the complex legal machinery of the trial will be the meeting between the solicitor and client. It is, of course, a fundamental rule of ethics that a lay client may not instruct a barrister directly.² Only

¹ Sir David Napley, *The Technique of Persuasion* (4th edn, Sweet & Maxwell (London) 1991), p 10.

² Paragraph 5.17 of the Bar Code.

the professional client, the solicitor, certain persons and members of recognised professional bodies have been authorised by the Bar Council chambers or at a dinner party, should politely refer that person to a solicitor

1.2 The circumstances in which counsel should be briefed

[3-5] There are two general situations in which a solicitor should instruct counsel; first, where a solicitor considers that litigation is likely to ensue and he has no right of audience in the appropriate forum, counsel must be instructed. Secondly, a solicitor should call in counsel where special advice or assistance is required. That advice may be as to whether or not to commence proceedings or as to the appropriate evidence to be adduced to prove the case. Counsel might be briefed to provide an opinion on a technical point of law or, in an appropriate case, to settle the pleadings.

[3-6] There will be other situations in which a solicitor might choose to brief counsel. For trials in courts in which solicitors have a right of audience, they might nevertheless prefer to brief counsel. Not only might counsel bring with them greater forensic expertise, but, where counsel is briefed, this course of action might be cheaper for the client. If the case is likely to require considerable research, it might be more appropriate to brief counsel to carry out this task; it will also be sensible to brief counsel to settle pleadings and prepare skeleton arguments in a case in which the issues involved are likely to be complex or lengthy. It is also good practice to call for counsel's opinion when solicitors are given their advice to the client but the client wishes to proceed in disregard of this advice. A word of warning to solicitors, however. It used to be thought that, by calling in competent counsel⁴ and acting on their advice, solicitors would absolve themselves from any charge of negligence. The Court of Appeal in *Davy-Chiesman v Davy-Chiesman* [1984] 2 WLR 1000 [1984] 1 All ER 321 (CA) has, however, held that, although solicitors in many circumstances protected from personal liability if they have acted

³ Paragraph 5.17(a) & (b), 5.18 (a)-(c) and Annex 3-6, of the Bar Code set out the respective terms and conditions where barristers accepting instructions from members of a recognised direct access body. There are 13 professional bodies which are recognised as statutory bodies as set out in Annex 4 of the Bar Code.

⁴ Instructions from members of recognised direct access bodies are governed by the Direct Access Rules as set out under Annex 5 and Annex 6A-J of the Bar Code. As to the solicitor's duty to ensure that only counsel who is competent in the particular field of expertise required is briefed, see *Re A (a Minor)* [1988] NLJR 79 (CA). In *Heywood v Wellers* [1976] 1 QB 446 at p 449 the court said: 'Further a solicitor will not be liable if he acted on counsel's advice, but he must show that he acted properly instructed counsel, and that he faithfully carried out counsel's advice.'

on the advice of experienced counsel, they would not be exonerated if they blindly follow the views expressed by counsel without exercising their own independent judgment.⁶

[3-7] Instructing solicitors should bear in mind, however, that counsel should be briefed only after the client has been consulted and has consented to counsel being briefed,⁷ since such is likely to involve considerably increased fees.⁸ The solicitor's duties do not end once counsel is briefed, of course. They have a continuing duty to keep counsel informed of all pertinent information coming to their attention whether as a result of subsequent discovery, exchange of experts' reports or otherwise.⁹

1.3 The point of time at which a solicitor should brief counsel

[3-8] All too often in civil matters, counsel is instructed after the pleadings have been drafted and served. Counsel's first task lies in seeking to amend the statement of claim or defence which is an inelegant and

⁶ See also Principle 12.03, Solicitors' Guide, which provides that a solicitor cannot abrogate his responsibility to his client by instructing a barrister. A good illustration of the application of the principle is found in *Darvall McCutcheon v HK Frost Holdings Pty Ltd* (2002) 4 VR 570 (Vict CA). The plaintiff sued a bank for breach of contract and breach of confidence and secured an award of damages. The plaintiff appealed, but counsel did not pursue the claim for damages for breach of confidence on the appeal. The plaintiff then sued his solicitors, claiming damages for the lost opportunity to press the breach of confidence claim on appeal. The court at first instance held that the solicitors were liable in negligence for failing to press the breach of confidence claim on appeal and this decision was upheld on appeal. The Court of Appeal said that it was clear that the solicitors had not themselves turned their minds to the claim for breach of confidence and they were not entitled to rely on counsel's failure to do so. It was solicitors' responsibility to instruct counsel on the matter and, even if counsel had advised against the course of action, they had a duty to form their own opinion on it.

⁷ See Commentary 3 of Principle 5.17, Solicitors' Guide.
⁸ See *Hawkins v Harwood* (1849) 4 Exch 503. See also *Locke v Camberwell Health Authority* [2002] Lloyd's Rep PN 23, [1991] 2 Med LR 249 and 254 (CA) in which counsel instructed to advise on the merits of a negligence case gave his opinion that an action should be commenced. An expert's report was subsequently conveyed to the instructing solicitor which cast doubt on the likelihood of success of the action but this report had not been brought to counsel's attention. At first instance, the court held that the failure of the solicitor to ensure that this pertinent information was before counsel, constituted a gross dereliction of the solicitor's duty as an officer of the court and rendered the solicitor liable for the defendant's costs thereafter thrown away. On appeal, the Court of Appeal, having admitted fresh evidence, ruled that the document had only come to the solicitor's attention during the trial and the order was set aside.

unnecessarily costly step in the proceedings. It will, however, be justified if solicitors feel there is a sound chance of settlement without the need to call in counsel and they delay on this ground. As a general rule in civil actions, counsel should be instructed as soon as the solicitor concludes that counsel's assistance will be required either to argue the case or advise on the evidence. In criminal litigation, counsel should likewise be briefed as soon as it has become clear that their services will be needed. The sooner counsel's diary is marked, the less likely it is that they will be unavailable on the day of trial.¹⁰

1.4 The division of work between instructing solicitor and counsel

[3-9] In cases where counsel is briefed, it is clearly essential that counsel and instructing solicitor work closely and harmoniously together in order to achieve the goals of the client. There are no precise rules as to which tasks in the litigation process up to the hearing are performed by counsel and which are performed by instructing solicitor. It is for them to decide. Counsel will, however, assume general control of the case; indeed, the brief must be such that they are left free to conduct the trial in the manner they think best,¹¹ subject, of course, to counsel's duty always to have regard to the best interests of their client.¹²

[3-10] Counsel's implied authority was clearly explained by Blackburn in *Strauss v Francis* (1866) LR 1 QB 379 at p 381:

[Counsel] has ventured to suggest that the retainer of counsel in a case simply implies the exercise of his power of argument and eloquence. But counsel have far higher attributes, namely, the exercise of judgment and discretion on emergencies arising in the conduct of a cause, and a client is guided in his selection of counsel by his reputation of honour, skill and discretion. Few counsel, I hope, would accept a brief on the unwelcome terms that he is simply the mouthpiece of his client. Counsel, therefore, being ordinarily retained to conduct a cause without any limitation, the apparent authority with which he is clothed when he appears to conduct the cause is to do everything which, in the exercise of his discretion, he may think best for the interests of his client in the conduct of the cause.

10 As to the right of counsel to return a brief on the grounds that they are unavailable for the trial, see Chapter 4 'Return and Refusal of Brief by Counsel' paras [4-19]-[4-32].

11 Paragraph 6.2(c), Bar Code provides that a barrister must not accept any instructions which limit or seek to limit his ordinary authority or discretion.

12 Paragraph 10.37, Bar Code provides that, subject to the provisions of the Bar Code, a barrister should conduct cases in such manner as in his discretion he thinks most to the advantage of his client.

[3-11] Discretion rests, for example, upon counsel to decide which witnesses to call¹³ and what evidence to adduce and they will decide on the pre-trial tactics to be adopted. A wise counsel, however, will consult the instructing solicitor and the client, as a team effort is more likely to produce successful results.¹⁴ Further, counsel are well advised to explain to their client the tactics they intend to adopt, especially if they intend to leave out some aspect of the evidence which the client might reasonably feel should be introduced at the trial. Remember that it is counsel's duty to visit the client after conviction, if such be the outcome,¹⁵ and an unpleasant accusation at this meeting to the effect that counsel should have acted differently should be avoided if at all possible, by counsel getting the client to agree to the tactics beforehand. Indeed, there is now quite a substantial body of jurisprudence identifying the occasions on which a conviction may be set aside on appeal on the ground of counsel's mishandling of the defence.¹⁶

[3-12] In a civil action, instructing solicitors will carry out the task of gathering information; they will take the witnesses' proofs and assemble the evidence; they will arrange for discovery of documents and inspect and take copies of documents from the other party. They will usually draft interlocutory applications and in most cases, appear themselves before the Master. There will be cases, however, in which counsel may wish to draft an interlocutory application, especially in a case involving special

13 See *Briscoe v Briscoe* [1966] 1 All ER 465, in which Lane J said at p 466, 'I have always thought that the duty of deciding which witnesses should be called and in what order they should be called is solely a matter for counsel. It is a grave responsibility and it rests on him and on him alone'.

14 The role of conferences between counsel, instructing solicitor and the client is dealt with in Chapter 4 at paras [4-66]-[4-74].

15 Paragraph 10.64, Bar Code.

16 See, for example, *R v Lau Chun-biu* (1987) Cr App No 613 of 1987; *R v Yu Fung-wei* [1990] 1 HKLR 355, [1990] HKCU 302 (CA); *R v Ho Whu Chung* [1990] 1 HKLR 180, [1990] HKCU 287 (CA); *R v Irwin* [1987] 1 WLR 902; *R v Ensor* [1989] 2 All ER 586, [1989] 1 WLR 497; *R v Rodolpho de Los Santos* (1992) PC App No 42 of 1991 (PC); *R v Tam Kwok Wai* (1992) Cr App No 414 of 1990; *R v Willem Atalia Vincent van Campen* (1992) Cr App No 495 of 1989; *R v Clinton* [1993] 1 WLR 1181, [1993] 2 All ER 998; *R v Joannis* (1995) 102 CCC (3d) 35; *R v Ho Ling* [1996] 1 HKC 733 (CA); *R v Li Wan Keung* [1996] 4 HKC 546 (HC) and *HKSAR v Lam Wing Lit* [2003] 1 HKLRD 385. The principle now seems settled that a court will set aside a conviction only on the ground of counsel's incompetence when it has been established that counsel has demonstrated 'flagrantly incompetent advocacy'. For a detailed discussion of the case law, see Sandor and Wilkinson, *An Advocate's Mishandling of a Defence as the Basis for an Appeal against Conviction*, (1989) HKLJ 193 and Sandor and Wilkinson, *Further Authorities on an Advocate's Mishandling of the Defence as the Basis for an Appeal against Conviction*, (1991) HKLJ 200. For counsel to have an accusation of such a nature made against him in a public forum will, of course, do considerable harm to his reputation.

difficulty. If counsel decides to appear on an interlocutory application, instructing solicitors must not forget to ask the Master for a certificate for counsel so that their costs will be recoverable on a taxation.¹⁷ Counsel may be asked to settle the pleadings and they might request instructions to a solicitor to make an application to amend, if the pleadings have already been filed and served. Any conference between counsel and the client will be held in counsel's chambers,¹⁸ in the presence of instructing solicitor, of course.

1.5 Counsel interviewing the client and witnesses

[3-13] The initial interview with the client and witnesses will be conducted by the solicitor and the proof of evidence taken. This process will come to counsel together with their instructions and, as counsel will rely heavily on proper instructions and proofs, it is essential that this work be undertaken thoroughly by the solicitor. There are, however, occasions where counsel will themselves wish to interview the client and witnesses. When may they do so? The first point to note is that counsel should always interview the client, but only in the presence of the instructing solicitor. There is a special provision in the case of criminal litigation, however, allowing counsel to interview the client in the absence of instructing solicitor, if the solicitor has given his approval or the circumstances render this action to be necessary. As far as the interviewing of witnesses other than the client is concerned, counsel should always interview expert witnesses in view of the technical complexity of their likely testimony. Further, in *Hong Kong*, counsel may, on occasions, interview other witnesses when the

17 Paragraph 2(3) of Part II of the First Schedule to RHC Order 62. A certificate is also required when two or more counsel appear before a judge in chambers. Instructing solicitors should however, before instructing counsel on matters, give consideration to the question whether counsel's fees will be allowed on a party/party taxation. If not, the client should be forewarned. An illustration is *Lui Kam-heung v 4ESpeckmeier* [1969] HKDCLR 48, [1969] HKLR 45 (OJ) in which the taxing master ruled that counsel's fees for approving an application to strike out for failure to answer interrogatories, would not be allowed. Oliver DR said at p 55: '[I]t is neither necessary or proper for Counsel to be employed unless a complication should exist and no such complication has been brought to my attention in this case. For too long in litigation in Hong Kong the dividing line between what is solicitor's work and what is counsel's work has been blurred with the result that bills are being filed all too frequently which necessitate items being disallowed.'

18 Paragraph 10.11, Bar Code provides that a barrister should not, unless there is a reason for departing from the general rule, attend a conference at or visit the residence of the person authorised to instruct them in the matter.

19 Paragraph 10.20 & 10.21, Bar Code.

feel that this course of action might be necessary.²⁰ A good example would be where counsel is appearing in a case involving a child witness. It would be prudent for counsel to meet the child in a relaxed environment before trial so as to judge for themselves the intelligence and likely degree of cooperativeness of the child. A meeting of this nature, delicately handled, would be likely to render the child more amenable to testifying subsequently in the rather forbidding arena of the court or by video-link. There are specific guidelines in the Bar Code governing the rights of counsel for the prosecution to interview prosecution witnesses.²¹

2. THE SOLICITOR'S RETAINER

[3-14] As no solicitor may act without a retainer, it is important to have a clear grasp of the rules regulating the effect, form and duration of the retainer. We shall also look at the situations in which a solicitor is obliged to decline a retainer.

2.1 Effect of the retainer

[3-15] The retainer brings into being a contractual relationship between the solicitor and client whereby the solicitor is engaged to represent the client according to the terms of the retainer. It imposes on the solicitor legal and ethical obligations, including the important duties of giving the client honest and candid advice,²² acting expeditiously and with reasonable care and skill in the best interests of the client²³ and of keeping confidential matters coming to the notice of the solicitor as a result of the relationship.²⁴

[3-16] The duties of the solicitor once retained, have been summarised concisely by Scott LJ in *Groom v Crocker* [1938] 2 All ER 394 (CA) at p 413 as being:

20 Paragraph 10.19(b), Bar Code says that a barrister may, if necessary, interview his own client's potential witnesses and discuss the case or clarify matters with them provided that the instructing solicitor or his representative is present. Paragraph 10.21(b) allows exceptionally for the interviewing and taking of proofs from witnesses in the absence of the instructing solicitor when counsel arrives at court but the solicitor fails to come. In this case, they should inform their opponent that this has occurred.

21 Paragraph 10.67, Bar Code provides, inter alia, that counsel for the prosecution may see and confer with investigator witnesses but only if they have discharged some supervisory responsibility in the investigation. Counsel should not, however, confer with investigators on particular aspects of evidence. Counsel should not, however, confer there is known to be, or reasonably may be anticipated to be, a dispute.

22 Principle 5.18, Solicitors' Guide.

23 *ibid*, Principle 5.12.

24 *ibid*, Chapter 8.

- (i) to carry out the client's instructions and the matters to which the retainer relates by all proper means;
- (ii) to consult with the client on all questions of doubt which do not fall within the express or implied instructions left to the solicitor and
- (iii) to keep the client informed to such an extent as may be reasonably necessary.²⁵

[3-17] The retainer is of particular importance to the solicitor in the event of his authority to act being challenged in the proceedings.²⁶

2.2 Duration of the retainer

[3-18] In Hong Kong, the 'entire contract' principle applies. This principle has been explained in *Underwood, Son and Piper v Lewis* [1894] 2 Q.B. 306 in which the court made it clear that, when solicitors are retained to conduct an action, they make an 'entire contract' in that they undertake to complete all the work for which the retainer has been given. A contentious action is not completed until judgment has been given or a settlement reached and formally recorded. As Goff LJ said in *Gamlem Chemicals (UK) Ltd v Rochem Ltd* [1980] 1 WLR 614 at p 624:

The engagement between a solicitor and client is simply a contract for services in return for remuneration. In the case at least of a retainer in respect of an uncomplicated action, such a contract is ordinarily entire; that is to say, the solicitor is, apart from agreement to the contrary, bound to do what is necessary to institute the litigation and bring it to a conclusion before he becomes entitled to payment of his fees.²⁷

[3-19] The effect of the entire contract rule is that, in the absence of an agreement to the contrary, solicitors cannot discharge themselves by

²⁵ *ibid*, Principle 5.17.

²⁶ A solicitor who acts without authority may be held responsible to pay the party's costs: *Babury Ltd v London Industrial Plc* [1989] The Times 20 (1989) NLJ 1596. In this case, Steyn J ruled that, although there was no authority, the opposing party wasted costs must expect to pay those costs personally. The situation arose in *Mercury (London) Ltd and Mercury (Hong Kong) Ltd v Shipping and Trading Ltd* (1990) Comm L Case No 75 of 1990, in which a company had been instructed by the majority shareholders of a company with no directors' resolution. The solicitors were ordered to pay the costs thrown overboard.

²⁷ There are two exceptions to the entire contract rule. The first is where the solicitor agrees that the rule will not apply to their retainer and the second is where the entire contract rule is inapplicable. An illustration of the latter situation is *Warmingtons v McMurphy* [1936] 2 All ER 745, where the institution of bankruptcy proceedings formed part of the overall work that the solicitor was retained to undertake for his client.

the conclusion of the litigation except for good cause and upon reasonable notice being given.²⁸

2.3 Form of the retainer

[3-20] As a matter of law, the retainer in a civil action may be either written, oral or implied from conduct; as a general principle of good practice, however, the retainer should always be reduced to writing at the earliest possible moment.²⁹ A written retainer is necessary where the solicitor wishes to enter into an agreement to represent the client for a 'special fee'.³⁰ It should be remembered, however, that this 'special fee' will only be enforced by the court if it is in all respects fair and reasonable.³¹

[3-21] It is also prudent for a solicitor conducting civil litigation to specify in writing either in the retainer or in another document signed by the client any unusual expenses which are likely to be incurred by the client. The reason for this is that solicitors will not be allowed on a solicitor and own client taxation costs of an unusual nature, unless they can persuade the taxing master that they expressly informed the client before the costs were incurred that they might not be recoverable on a party and party taxation;³² otherwise, the Master will assume that they have been unreasonably incurred.

[3-22] The position is different, however, in respect of retainers for criminal litigation. In an attempt to stifle touting and the improper receipt of 'introduction money' by clerks, the Law Society has required that, where a firm acts in a criminal case for a client, the firm must, as soon as practicable and not more than 7 days after receiving instructions, confirm by letter to the client, (i) the instructions given; (ii) the services to be provided; (iii) the name of the solicitor in charge of the matter; (iv) the solicitor's fee

²⁸ See the judgment of Goddard J in *Warmingtons v McMurray* [1936] 2 All ER 745 and Principle 5.22, Solicitors' Guide.

²⁹ As to the form of the retainer, Blair-Kerr J said in *Shing Hai-doing v Shing Ho-yung* [1961] HKLR 331: 'I do not agree that a solicitor must have a power of attorney under seal before he commences legal proceedings. He must be authorised to commence the proceedings. To this end his instructions can be taken in any way he likes. The onus is on him to prove that he has authority to act, and it is very much easier for him to do so, especially when he is acting for a client who is absent from the country or when he is taking instructions through an intermediary, if he has general instructions in writing. A solicitor does not have to produce precise instructions from his client to support every step he takes. If, on all the evidence, it is clear that he has authority from his client to institute the action, that is sufficient.'

³⁰ According to section 58, Legal Practitioners Ordinance, a solicitor may make with his client an agreement in writing as to his remuneration in respect of contentious business which provides that the solicitor shall be paid at a greater or lesser rate than he would otherwise be entitled to receive.

³¹ Section 60(2), Legal Practitioners Ordinance.

³² RHC Order 62 rules 29(1) and (2).

CHAPTER 6

CHAMBERS APPLICATIONS BEFORE MASTERS

[6-1] As most advocates will gain their initial experience of civil litigation from chambers applications, these merit separate consideration.

1. THE JURISDICTION OF THE MASTERS

[6-2] The increase in the jurisdiction and influence of the masters¹ in Hong Kong over the last 35 years has been considerable, and they now play a fundamental role in the civil adjudication process. Under the 1967 Rules of the Supreme Court, the registrars in Hong Kong were empowered to exercise jurisdiction only over judgments in default of appearance, discovery, summons for directions and substituted service. In 1971, they were granted an equivalent status to that enjoyed by the masters in England and they now have power to transact all such business and exercise all the authority and jurisdiction of a judge in chambers² except:

- (a) matters relating to criminal proceedings, other than matters relating to conditions of admission to bail and an application under Order 70 (obtaining evidence for requesting court) relating to criminal proceedings;³
- (b) matters relating to the liberty of the subject, other than orders for arrest and imprisonment to enforce, secure or pursue civil claims for the payment of money and orders prohibiting persons from leaving Hong Kong;⁴
- (c) proceedings for the grant of an interlocutory injunction,⁵ although they do have jurisdiction to order the detention, custody and preservation of property on terms agreed;⁶

¹ The Registrar of the High Court, the Senior Deputy Registrar, the Deputy Registrar and the Assistant Registrar are masters of the High Court: RHC Order 1 rule 4(1).

² A judge in chambers has jurisdiction to hear all applications in interlocutory matters: see section 33(1), High Court Ordinance (Cap 4).

³ RHC Order 32 rule 11(1)(a).

⁴ *ibid.* Order 32 rule 11(1)(b).

⁵ *ibid.* Order 32 rule 11(1)(d).

⁶ *ibid.* Order 32 rule 11(2).

- (d) application under section 27A of the High Court Ordinance (Cap 4) for leave to institute or continue legal proceedings and
- (e) any other matters which by any rule are required to be heard by a judge.⁸

[6-3] Additionally, masters have jurisdiction to: (i) give final judgment in the assessment of damages;⁹ (ii) try cases following directions in Order 14, but only with the consent of the parties;¹⁰ (iii) hear and determine any civil action with the consent of the parties;¹¹ (iv) examine the debtor;¹² and (v) make order for imprisonment of a judgment debtor. These additional matters are, however, dealt with in open court, outside the scope of this chapter.

[6-4] It can be seen that the jurisdiction of the masters is diminishing as they are playing an increasingly significant role in the civil adjudication process. No action can progress to trial until it has undergone their scrutiny and the parties have satisfied them that it is fit and proper for a hearing; in effect, they are the gatekeepers to civil justice. As such, they cannot, therefore, afford to neglect their skills in chambers' administration.

2. CHAMBERS PROCEEDINGS NORMALLY OPEN TO THE PUBLIC

[6-5] It is a fundamental principle of adversarial justice that the proceedings of the courts must be heard and disposed of in open court, although this principle is subject to any legislative exception or practice of the courts permitting the hearing to be conducted in private in chambers.¹³ It is the usual practice for all chambers proceedings to be conducted in private, but this practice had been the subject of severe criticism.¹⁴ In 2005, a Working Party, chaired by Nazareth JA (as he then was), recommended that most chambers hearings should be open to the public and subject to public reporting. This recommendation was implemented by two Practice Directions issued in 2005.

7 *ibid*, Order 32 rule 11(1)(da).
 8 *ibid*, Order 32 rule 11(1)(f).
 9 *ibid*, Order 37 rule 1.
 10 *ibid*, Order 14 rule 6(2).
 11 *ibid*, Order 36 rule 1.
 12 *ibid*, Order 48 rule 1 and Order 49B rule 1.
 13 *ibid*, Order 49 rule 3(3).
 14 Practice Direction No 14.2 'Proceedings before Masters', [6].
 15 Section 32A, High Court Ordinance (Cap 4).
 16 See *Forbes v Smith* [1998] 1 All ER 973, in which the judge said that the giving of a secret judgment was one which he believed to be inherently abhorrent.

[6-6] According to the first Practice Direction – Practice Direction 25.1, all chambers hearings in the High Court, District Court and Lands Tribunal must be held in public (this includes the presence of the press) save in certain instances which have been specifically excepted from this rule.¹⁷

[6-7] Those hearings which are listed in the first schedule to the Practice Direction must be closed to the public, since statute so requires.¹⁸ Other hearings, which are listed in the second schedule to the Practice Direction, will usually not be open to the public. This is because of the nature of the proceedings. However, in respect of those hearings listed in the second schedule, the court may, either upon the application of a party or upon its own motion, order that the hearing be open to the public.¹⁹ This power is without prejudice to the court's power to adjourn the hearing of any summons or other application from chambers into court and subsequently from court to chambers.²⁰

[6-8] A party filing a summons or notice for hearing in chambers must specify in the summons or notice whether the hearing is to be open to the public or not open to the public. Where any chambers hearing is not to be open to the public, such hearing must be listed as 'In chambers (not open to the public)'.²¹

[6-9] The 2005 version of Practice Direction 25.1 also covered the mode of hearing for proceedings of the Family Court. Since 2015, these provisions can be found under paragraphs 4 to 12 of Practice Direction 15.15 – 'Matrimonial and Family Proceedings – Miscellaneous'.

[6-10] The second Practice Direction – Practice Direction 25.2, provides that, although the press may report all proceedings conducted in chambers to which the public are admitted, no report may be made of any proceedings

¹⁷ Practice Direction No 25.1 'Chambers Hearings in Civil Proceedings in the High Court, District Court and the Lands Tribunal', [2].
¹⁸ *Ibid*, [3]. Included in the First Schedule are proceedings under the Patent Ordinance (Cap 514) (appeals under the Ordinance concerning a patent application which has not been published).
¹⁹ *Ibid*, [4]. In brief, included in the Second Schedule are matters relating to disability; ex parte applications for injunctions, prohibition orders and the appointment of a receiver; matters relating to companies winding-up and bankruptcy; matters relating to intellectual property, matters relating to arbitration; applications by companies to be represented by their directors in legal proceedings; trust matters and applications to obtain evidence for a foreign court.
²⁰ Pursuant to RHC Order 32 rule 18, also see Practice Direction No 25.1 'Chambers Hearings in Civil Proceedings in the High Court, District Court and the Lands Tribunal', [8].
²¹ Practice Direction No 25.1 'Chambers Hearings in Civil Proceedings in the High Court, District Court and the Lands Tribunal', [9]-[10].

(including the judgment) held in chambers which are not open to the public without the authority of the master or the judge before whom the proceedings were conducted. If the master or the judge considers that proceedings should be open for reporting or the judgment should be released for publication, the master or judge should afford the parties an opportunity to make representations on the matter before so declaring.²²

3. ADMINISTRATIVE DIVISION OF CHAMBERS APPLICATIONS

[6-11] For purposes of administrative efficiency and so as to deal with the considerable amount of business which comes before the master, chambers applications have been divided into two distinct classes.

3.1 Ex parte applications

3.1.1 Ex parte applications without a hearing

[6-12] Most ex parte applications are dealt with without a hearing. The master simply entertains a 'paper' application. These applications are usually dealt with by the Practice Master²³ who makes the decision on the merits of the documents submitted. The skill of advocates, therefore, lies in their presentation of the correct papers.

[6-13] This procedure is appropriate for most ex parte applications and will, for example, embrace applications for substituted names, for leave to serve out of the jurisdiction,²⁵ for orders by which proceedings cannot be entered automatically,²⁶ for charging orders nisi²⁷ and for orders for possession of land.²⁹

22 Practice Direction No 25.2 'Reports on Hearings held in Chambers Not Open to the Public', [2].

23 All the masters assume the role of Practice Master by rotation. The Practice Master deals largely with urgent and ex parte applications.

24 RHC Order 65 rule 4.

25 *ibid.*, Order 11 rule 1.

26 RHC Order 42 rules 5 and 5A provide for the automatic entry of judgments and orders covering many different matters such as payment of liquidated sum or for possession of land and orders for dismissal of proceedings, stay of enforcement of a judgment, setting aside judgment or order must be drawn up in the terms agreed, expressed in writing and endorsed by the solicitors acting for each of the parties. In the absence of the approval of a master before being entered or sealed and in the absence of the approval of a master before being entered or sealed and in the absence of the approval of a master before being entered or sealed, this list require the consent of a master before they can be entered. An application to amend by consent would be an example.

land or shares,²⁷ for garnishee orders nisi²⁸ and for the issue of writs of possession of land.²⁹

[6-14] The relevant documents, which normally consist only of an affidavit together with a draft order, should be lodged with the Registry. The affidavit must be marked at the top in ink 'ex parte application'.³⁰ A judicial clerk will peruse the papers to ensure that they are in order and submit them to the masters for their order. If the master is agreeable to grant the order sought, he or she will write on the top-sheet 'Order in terms' where the master has amended an order, 'Order as Amended' and the master will sign the order. If masters are not willing to grant the order on the papers provided, they may make a requisition requiring the solicitor for the applicant to answer questions or to provide further documents in support of the application. The order will then either be made or refused.

[6-15] The order is returned the next day to solicitors or their clerks by leaving it in an out-tray on the counter at the registry.

3.1.2 Ex parte applications where the master will require the attendance of the party or the party's solicitor

[6-16] As a matter of practice, the masters will require the attendance of the party or the party's solicitors before they will entertain certain ex parte applications. This would apply, for example, to urgent applications where the party making the application has no time to file the required affidavit and seek an order from the master.³¹ There might be an application for a charging order nisi when the judgment debtor is about to dispose of the property to be charged³² or an application for stay of execution pending the hearing of an application to set aside a default judgment.³³ This procedure is also appropriate for the hearing of applications for prohibition orders³⁴ and the interim attachment of property.³⁵ In all these cases, the party must either attend in person or by a solicitor. Personal attendance (by the applicant in person) will also be required where an application is made by a body corporate for leave to be represented by one of its directors in commencing³⁶ or defending³⁷ an action.

27 RHC Order 50 rule 1.

28 *ibid.*, Order 49 rule 2.

29 *ibid.*, Order 113.

30 Practice Direction No 10.1 'Affidavit Evidence', [14].

31 Urgent applications are usually heard by the Practice Master. RHC Order 50 rule 1.

32 *ibid.*, Order 13 rule 8.

33 Under section 21B, High Court Ordinance (Cap 4) and RHC Order 44A.

34 RHC Order 44A.

35 *ibid.*, Order 5 rule 6(3)(a).

36 *ibid.*, Order 12 rule 1(2A).