which are listed in the second schedule to the Practice Direction, will usually not be open to the public.[12] 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. 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.[13] 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 and, 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)'.

The second Practice Direction[14] 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 (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.

3. Administrative Division of Chamber Applications

For purposes of administrative efficiency and so as to deal with the considerable amount of business which comes before the masters as speedily as possible, chambers applications have been divided into three distinct classes.

12 In brief, included in the Second Schedule are matters relating to children; applications in matrimonial proceedings; 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.

13 Pursuant to RHC Order 32 rule 18.

14 High Court Practice Direction No 25.2 'Reports on Hearings held in Chambers Not Open to the Public'.

(a) Ex parte applications

(i) Ex parte Applications Without a Hearing

Most ex parte applications are dealt with without a hearing and the master simply entertains a 'paper' application. These applications are usually dealt with by the Practice Master[15] who makes the decision on the merits of the documents submitted. The skill of advocates, therefore, rests in their presentation of the correct papers.

This procedure is appropriate for most ex parte applications and will, for example, embrace applications for substituted service,[16] for leave to serve out of the jurisdiction,[17] for orders by consent which cannot be entered automatically,[18] for charging orders nisi in respect of land or shares,[19] for garnishee orders nisi[20] and for the issue of writs of execution for the recovery of possession of land.[21]

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'.[22] 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' or, 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.

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.

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

16 RHC Order 65 rule 4.

17 RHC Order 11 rule 1.

18 RHC Order 42 rules 5 and 5A provide for the automatic entry of certain consent judgments and orders covering many different matters such as judgments for a liquidated sum or for possession of land and orders for dismissal of proceedings, stay of proceedings, stay of enforcement of a judgment, setting aside judgment in default, transfer of proceedings and payment out of money paid into court. In these cases the judgment or order must be drawn up in the terms agreed, expressed as being 'By Consent' and endorsed by the solicitors acting for each of the parties. They do not require the approval of a master before being entered or sealed and will be enforced by the courts as any other judgment or order. Judgments and orders falling outside this list require the consent of a master before they can be entered and enforced. An application to amend by consent would be an example.

19 RHC Order 50 rule 1.

20 RHC Order 49 rule 2.

21 RHC Order 113.

22 See High Court Practice Direction No 10.1 'Affidavit Evidence'.

(ii) Ex parte Applications Where the Master Will Require the Attendance of the Party or the Party's Solicitor

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 await an order from the master.[23] There might be an application for a charging order nisi when the judgment debtor is about to dispose of the property to be charged[24] or an application for stay of execution pending the hearing of an application to set aside a default judgment.[25] This procedure is also appropriate for the hearing of applications for prohibition orders[26] and the interim attachment of property.[27] 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 commencing[28] or defending[29] an action.

(b) Three-minute applications

Three-minute applications constitute an important part of the court's case management role. Minor inter partes applications will be dealt with by way of three-minute applications and even weighty chambers applications will commence with a three-minute application which the master will hear and adjourn for argument at a subsequent fixed time hearing.[30] Here, the master sits in a special court designated for the purpose. The list is designed so that applications are heard in 30 minute batches and, within each batch, consent applications are called on first, followed by those requiring argument. The advocates[31] make their applications standing, and the procedure is invariably very quick.

23 Urgent applications are usually heard by the Practice Master.
24 RHC Order 50 rule 1.
25 RHC Order 13 rule 8.
26 Under section 21B, *High Court Ordinance* (Cap 4) and RHC Order 44A.
27 RHC Order 44A.
28 RHC Order 5 rule 6(3)(a).
29 RHC Order 12 rule 1(2A).
30 The time to be allocated for the further fixed time hearing will be determined by the master at the three-minute hearing and a subsequent hearing date allocated by the Registry.
31 Trainee solicitors, legal executives, holders of an Associate Degree in Legal Studies or the Higher Diploma in Legal Studies and members of the English Institute of Legal Executives have a right of audience on an uncontested application or on an application listed for a three-minute hearing according to High Court Practice Direction No 14.1 'Rights of Audience Before a Master'.

The relevant papers, normally a summons supported by affidavit,[32] must have been submitted to the Registry in advance, but the master will not usually have perused the papers in advance, save in unusual cases. Matters commonly dealt with and concluded on three-minute applications include time summonses;[33] applications to make a charging order absolute;[34] for leave to amend which is contested,[35] although if the contest is significant the application will be adjourned for a fixed-time hearing; the hearing of the summons for directions where all items are agreed;[36] security for costs;[37] to make a garnishee order absolute;[38] for an order for further and better particulars where the respondent has failed to answer the letter of request;[39] to consolidate by consent;[40] by a solicitor to withdraw[41] and for leave to file the defence out of time.[42]

As the application is inter partes, advocates for both parties may be present, although in many instances, such as an application for a charging order to be made absolute, the respondent will appear in person. Where this occurs, the master will take pains to explain the effect of the order to the respondent. In the case of a charging order over a flat being made absolute, for example, the master will explain to the respondent that the latter can continue to live in the flat, the effect of the order being that the respondent's interest in the premises is charged in favour of the judgment creditor who may apply subsequently to have it sold. The master will check carefully in an appropriate case to ensure that there has been proper service of documents. For example, on an application for a charging order absolute on shares, the master will check that the order nisi has been properly served both on the respondent and on the company whose shares are to be charged.

The hearing takes on rather an inquisitorial form and masters, anxious to expedite the business, will exercise tight control over the proceedings. If there is no contest, they may well grant the application sought without the need for either party to address them. As we have seen above, if the application is contested, there may be a brief argument but, if it is likely to be lengthy, the masters will adjourn it for a fixed-time hearing later. As can be seen, it is vital that the advocates appreciate precisely what is

32 See High Court Practice Direction No 14.2 'Proceedings before Masters'. In some cases, such as the summons for directions, a supporting affidavit will not be required.
33 Applications for extension of time under RHC Order 3 rule 5. For time summonses, no affidavit is required.
34 RHC Order 50 rule 3.
35 RHC Order 20 rule 5.
36 RHC Order 25 rule 1.
37 RHC Order 23.
38 RHC Order 49 rule 4.
39 RHC Order 18 rule 12(3).
40 RHC Order 4 rule 9.
41 RHC Order 67 rule 6.
42 RHC Order 3 rule 5.

being sought, so that they can make any necessary points speedily and succinctly.

The master may well make a lump sum assessment as to the costs of the hearing; if the successful applicant is represented by a solicitor, the lump sum costs will usually be HK$800; if by a trainee solicitor, the lump sum costs will usually be HK$500.

(c) Fixed-time applications ('special chambers hearings')

Fixed-time applications, often referred to as 'special chambers hearings' consist of the more weighty inter partes applications, where there is likely to be lengthy argument. It is important that solicitors, when applying for a fixed-time hearing, make an accurate assessment of the time required, so as to avoid wasting the court's time.[43]

Matters dealt with on fixed-time applications include applications for summary judgment, applications to set aside judgment in default of notice of intention to defend or default of defence, contested applications for further and better particulars and interrogatories, applications to strike out pleadings and taxations of costs.

For fixed-time applications, the relevant papers must be lodged in the registry in advance (see below) and a judicial clerk will fix the date and time for the hearing. The papers must be sent to the master some days before the hearing and the master will have perused them in advance. According to a Practice Direction,[44] all matters to be listed for more than 30 minutes which do not fall within the ambit of a special list (see below) are to be brought first on the Chambers List or to the Practice Master for an estimate to be fixed for the length of the hearing and for any other necessary directions. The Registry will then list the matter in accordance with the directions and estimate given by the master.

Some applications are heard on special days in special lists. These are applications by mortgagees for orders of sale[45] (the mortgage list), actions arising out of hire purchase agreements[46] (the hire purchase list) and moneylender actions[47] (the moneylenders list). There are also special lists for company winding-up, bankruptcy and probate matters.

43 The masters usually work under a great deal of pressure to get through their lists and an accurate assessment of the time needed for an application is highly desirable. Last-minute adjournments should also be avoided and applications for the adjournment of a three-minute or fixed time application should be made well in advance by letter signed by both parties to the proceedings and, in a case where a summons has been adjourned several times by letter, the master might require the parties to attend to justify further adjournments.

44 High Court Practice Direction No 14.2 'Proceedings Before Masters'.

45 RHC Order 88.

46 RHC Order 84A.

47 RHC Order 83A.

4. Procedure and Advocacy Technique in Making Chamber Applications

It is now appropriate to consider some of the more important procedural aspects involved in making chambers applications and proper advocacy techniques.

(a) Procedural rules governing the making of fixed time chamber applications

Because the former Supreme Court Practice Direction, which had regulated inter partes applications and appeals to a judge in chambers, had regrettably been frequently ignored by practitioners, it has been replaced by a much more detailed and far-reaching Practice Direction.[48] The purpose of the present Practice Direction is to ensure that all relevant papers are before the judge or master and both parties in good order well before the hearing so that the court and the parties may be well prepared for the hearing. This should have the effect of expediting the hearing and saving time and costs.

The Practice Direction, which does not affect the operation of the Construction and Arbitration List, ex parte and interim applications for injunctions, the Personal Injuries List or the Constitutional and Administrative Law List, deals with two[49] separate situations: (i) contested interlocutory summonses listed before a judge or master for 30 minutes or more; and (ii) contested interlocutory summonses listed for less than 30 minutes for argument before a judge or master.[50] We will deal with both of these situations in turn.

(i) Contested interlocutory summonses listed before a judge or master for 30 minutes or more

For contested interlocutory summonses listed before a judge or master for 30 minutes or more, the parties must prepare and submit before the judge or master the following materials: first, jointly prepared hearing

48 High Court Practice Direction No 5.4 'Preparation of Interlocutory Summonses and Appeals to Judge in Chambers for Hearing', which came into force in October 2005.

49 The Practice Direction also regulates contested interlocutory summonses listed for directions before a master, but these are not dealt with here.

50 In this part of the chapter, we deal only with interlocutory applications to masters; appeals to a judge in chambers are dealt with later in the chapter at pp 177–178.

(c) Examination-in-chief upon a witness statement

As we have seen above, not only will the court invariably order the exchange of witness statements but it may direct that the statement stand as the evidence-in-chief of the witness. The court should not, however, so direct where the witness' credibility is in issue or the evidence the witness will give is controversial — *Mercer v Chief Constable of the Lancashire Constabulary* [1991] 2 All ER 504, [1991] 1 WLR 367 (CA).

If the court does so direct and the witness statement has been properly prepared, examination-in-chief should proceed very simply and quickly. Counsel will show the statement to the witness and ask the witness to look at it. Counsel will ask the witness whether the signature on the statement is that of the witness. If it is, counsel will ask the witness in an appropriate case whether the statement was translated to the witness by the witness' solicitor before it was signed. If the witness agrees, counsel will ask whether the contents of the statement are true. If the witness agrees, the examination may be concluded.

Occasionally, counsel will wish to ask the witness to clarify matters in the statement or to expand upon it. Counsel must bear in mind the limitation, however, that the witness may not be asked about matters the substance of which is not included in the witness statement without the consent of the other party or the leave of the court, except in relation to events that have occurred since the statement was recorded.[3] Indeed, Keith J has sent a clear warning to advocates in *Ng Kam Chun Stephen, trading as Chun Mou Estate Agency Co v Chan Wai Hing Janet* (above) that he would only grant leave when a good explanation was put forward as to why the additional matters had not been dealt with in the witness' statement. This strict approach has been supported subsequently by Deputy Judge Kwok in *Wearwell International v Cosmopolitan Merchandise (International) Ltd* (1994) HCA No A4364 of 1989.

Counsel for the other party may then be invited by the judge to cross-examine the witness.

(d) Examination-in-chief of a witness whose witness statement has been exchanged but not ordered to stand as evidence-in-chief

Where witness statements have been exchanged but the court has not directed that the witness statement will stand as the evidence-in-chief of the witness, the party calling the witness similarly may not, without the consent of the other party or the leave of the court, lead evidence from the witness the substance of which was not included in the statement served,

3 RHC Order 38 rule 2A(7)(b).

except in respect of new matters which have arisen in the course of the trial.[4]

3. Preparation for Examination-in-Chief

(a) The need for attention to detail

It is a common but mistaken belief that examination-in-chief requires no special skill or preparation. In simple cases, experienced advocates can no doubt give an adequate performance without exhaustive preparation, provided they have in front of them properly prepared proofs of their witnesses' evidence. Where, however, the facts and issues are complex, counsel must prepare with meticulous attention to detail to ensure that no important facts are omitted. Reliance on the proof, unless drafted by you, is less effective than producing lists of the answers expected to be given by your witness.

The foundation for effective examination-in-chief lies in a thorough knowledge of the case and an appreciation of the objective for which each witness is called. An examination of this nature requires a sound and detailed knowledge of the testimony which each of the witness can give on the material issues as well as familiarity with any other facts which might tend to discredit them, such as previous inconsistent statements or criminal convictions. It is important to appreciate the weaknesses of one's witnesses as well as their strengths.

You will have taken a careful proof of your witness' evidence and these proofs will form the basis for your preparation of the expected answers to be elicited from the witness during your examination-in-chief.

(b) Dealing with previous convictions and establishing good character

When preparing for examination-in-chief, it is important to investigate any collateral circumstances that might tend to weaken your witnesses' testimony or discredit them. In a criminal trial, for example, the character and previous convictions, if any, of your clients require special consideration. If your client does have previous convictions or an unsavoury past, you must remember that details can only be brought out by the prosecution under the limited provisions of our rules of evidence.[5] In particular, if you adduce evidence of your client's good character, this will permit the prosecution to adduce any evidence it has of your client's bad character and convictions.

4 Ibid

5 These are dealt with at length in Chapter 12 at pp 292–299.

Provided this risk is borne in mind, there will be many occasions when your client's good character *should* be brought out. Good character is relevant in two different ways. First, it is always relevant to the defendant's credibility — *R v Berrada* (1989) 91 Cr App R 131 (CA).[6] Secondly, the defendants' good character might tend to show that they are not the sort of persons who are likely to have behaved in the manner alleged or, to put it a different way, because the accused persons have led their lives to their present age without blemish, they are the less likely to commit a crime now — *R v Cohen* (1990) 91 Cr App R 125 (CA). Where the good character of the accused is brought out in a jury trial, the judge must make reference to it in the summing up to the jury.[7] District Court judges or magistrates need not, however, expressly direct themselves as to the good character of defendants unless the central issue of the case is the integrity and credibility of the accused persons.[8] The judge or magistrate should, however, always take the good character of the defendant into account when reaching the verdict. Where there are two defendants, one of whom puts forward that defendant's good character but the other does not, the Court of Appeal, in *R v Vye* [1993] 1 WLR 471 (CA), has ruled that the judge should direct the jury as to the good character of the defendant who puts it forward. As regards the absence of good character of the co-defendant, the judge has two options. The judge may choose to tell the jury that they must try the case on the evidence and must not speculate as to the character of the co-defendant in the absence of any evidence[9] or may choose to say nothing at all about the co-defendant.

6 In this case, the Court of Appeal ruled that the defendant's good character should be put to the jury by the judge in his summing up where the defendant's credibility was in issue. See also *R v Marr* (1990) 90 Cr App R 154.

7 *R v Cohen* (1990) 91 Cr App R 125 (CA). In *R v Vye* [1993] 1 WLR 471 (CA), the Court of Appeal made it clear that the obligation upon the judge to give a direction as to the relevance of defendants' good character to their credibility applies only where they have testified or made pre-trial statements. By contrast, a direction as to the relevance of their good character to the likelihood of their having committed the offence charged must be given whether or not the defendants have testified. These decisions have been applied in Hong Kong in *R v Yeung Lung-fai* [1991] 2 HKC 102 (CA) and *R v Chan Chuen-kam* [1993] 1 HKC 241 (CA). The courts have, however, accepted that failure to give a direction on the first limb may be cured by an adequate direction on the second limb — *R v Tangkao Sae Tang* (1994) Cr App No 56 of 1994 and *R v Lee Kam Yuen* (1994) Cr App No 734 of 1993.

8 *R v Chan Wu-nam* (1993) Cr App No 274 of 1992, *R v Yue Pei-Li* (1993) Crim App No 347 of 1992, *R v Lai Hon Man* (1993) Cr App No 421 of 1992, *R v Lai Kam-hing* (1993) Mag App No 488 of 1993, *R v Wong Yun Tsan* (1994) Cr App No 436 of 1993, *R v Lau Kai Sing* (1993) Mag App No 746 of 1993 and *R v Lin Kae-tzong* (1994) Cr App No 11 of 1994.

9 This course of action was taken by the trial judge and gained the approval of the Court of Appeal in *R v Chan Kwok Keung* [1994] 1 HKC 116 (CA). The court declined to follow the advice of Lord Chief Justice Lane in *R v Gibson* (1991) 93 Cr App R 9, where he had advised that the judge should make no comment at all.

(c) Special circumstances affecting the presentation of the evidence

Before trial, you should also consider whether there are any special circumstances likely to be involved in the manner of the witness' giving evidence. Child witnesses require careful attention and advice from a child psychiatrist, parent or teacher as to the most suitable manner of examination might prove beneficial. For example, in *R v DJX* (1990) 91 Cr App R 36 (CA), the court permitted child witnesses in an abuse case to testify behind a screen to overcome their reluctance; the children were obscured from the accused but could be seen by the judge and counsel. Subsequently in 1995, amendments were made to the *Criminal Procedure Ordinance* to allow a court to permit a vulnerable witness to give testimony via video-link, video recording or deposition.[10] Expert witnesses might require a projector screen on which to show slides and PowerPoint presentations or a whiteboard on which to demonstrate their findings; in some cases, a computer or projector might be needed. Arrangements should be made well before the hearing date, and permission to set up the equipment obtained from the judge through the court clerk.

4. The Technique of Conducting Examination-in-Chief

In preparing for examination-in-chief, you should make a list of the various topics upon which you intend to examine your witness. Our own belief is that it is easier to become a successful advocate if you train yourself to see a case pictorially. Mastery of detail is the key to success. Counsel must know and understand the facts in the environment in which they took place. A visit to the locus in quo can be very helpful here. Counsel may then be able to run a film through their mind so that they can mentally see it and refer to it in their examination of the witnesses. We shall return to this technique when dealing with cross-examination.

As a general rule, examination-in-chief should proceed in chronological order following the order of the proof of evidence. This is helpful to witnesses as they may well have refreshed their memory from their proofs beforehand. Although important questions may properly be formulated in advance, they should never be read out to the witness and

10 *Criminal Procedure Ordinance*, Part IIIA — 'Special Procedures for Vulnerable Witnesses'. See Part III for the classes of children and people who may be considered vulnerable witness, and Practice Direction 9.5 'Evidence by Way of Live Television Link or Video Recorded Testimony'.

witnesses should be examined from memory with your lists of expected answers and proof located in a convenient place. Whilst asking questions, eye contact should be maintained. Some counsel like to tick off on the proofs or the list matters that have been dealt with satisfactorily and this system ensures on the list that no significant details are omitted from the examination. If witnesses stray from the order of the list, it might be useful to bring them back to that order as soon as possible without confusing them. Questions should be put clearly and confidently, as any lack of assurance on the part of counsel will undoubtedly communicate itself to the witnesses and may well cause them to become diffident and omit an important point. It is also good practice to preserve continuity in questioning so that the examination proceeds steadily but not too quickly. Put your questions by way of short sentences so phrased that, without leading, a responsive answer is forthcoming. Use simple words that everyone, especially your witness, understands. When you have received a satisfactory response, don't repeat the question in a slightly different form or you may receive a different answer, your witness believing that you were not satisfied with the first response.

Techniques happily differ. Some very skilful advocates play a low-profile role in their examination-in-chief, letting the witnesses tell their story in their own words, every so often interjecting 'and what happened next?'. This is undoubtedly a sound technique when dealing with witnesses who know what they are doing and understand why they are in the witness box. A diffident or garrulous witness will need to be guided, however, and counsel is well advised to adopt a more positive role here, guiding at times and stopping the witness at others. A witness who finds it difficult to distinguish what is relevant from what is irrelevant also needs tighter control. The type of witness should have been ascertained at the time of the taking of the proof and counsel should expect to receive some prior warning from instructing solicitor in an appropriate case. Where the witness is diffident, garrulous or tends towards irrelevancy, a good technique is to ask short, specific questions making it clear to the witness by the form of questions what response is wanted.

5. Leading Questions

It is an important rule of evidence that testimony generally may not be elicited in examination-in-chief by way of leading questions.

(a) What are leading questions?

Leading questions are questions that suggest the desired response on a fact in issue or which can be answered 'yes' or 'no' or which pre-support the existence of a fact in issued which has not yet been established and

are objectionable on the grounds that the answers, being suggested by counsel, fail to elicit the actual knowledge or opinion of the witnesses but permits the witnesses merely to assent to suggestions put to them. Logically, answers coming spontaneously from witnesses without suggestion as to the desired response are more compelling and carry more evidential weight. They are also objectionable in that the evidence is coming from counsel who has not been affirmed or sworn and is not competent to testify. Such questions also attract objections from your opponent.

(b) When are leading questions permitted? When should they be used?

There are several instances where leading questions are permitted and, on occasions, positively desirable. They are:

(i) Questions on non-contentious Introductory Matters Such as the Name, Address, Qualifications, and Occupation of the Witness.

It is good practice to lead your witness through the formal part of the testimony and this exception is frequently used also in the case of expert witnesses where their qualifications and experience may be elicited from them by means of leading questions if counsel so wishes. It may, however, be tactically preferable for expert witnesses to state their qualifications in their own words.

(ii) Questions Relating to Matters not in Dispute.[11]

Evidence may be led on matters admitted in the pleadings or at the pre-trial meeting in criminal cases. Again this practice is desirable by way of speeding up proceedings.

(iii) Questions Relating to Any Matter with the Consent of Opposing Counsel, Unless the Trial Judge, Exercising Inherent Powers to Regulate Court Procedure, Objects.

There will be many instances where formal testimony or evidence on peripheral matters which are not likely to be contested can be elicited much faster by way of leading questions. Counsel should ask opposing counsel in advance whether counsel has any objection to such questions and, if none is expressed, say before leading: 'My Lord, my learned

11 *R v Robinson* (1897) 61 JP 520.

reputation in trade mark infringement actions and passing off.[43] Other situations in which statute refers to the admission of expert evidence include evidence pertaining to observations made by the Hong Kong Observatory,[44] speedometers and radar and weighing devices.[45]

3. Appointment of An Expert by the Court

The court has power to appoint an expert in both criminal and civil cases. As regards criminal cases, the Court of Appeal held in *R v Lam Wai Hang* [1997] 3 HKC 386 that the court had power to call an expert as a witness in exceptional circumstances. In this case, the trial judge had properly called a doctor as an expert witness to examine and report upon a person who had alleged that he had been assaulted when being interviewed in police custody.

In respect of the court's civil jurisdiction, RHC Order 40 makes provision for the appointment of an expert by the court. For example, in *Mak Lam Pui Yuk v Mak Wo Ping* (1987) MP No 516 of 1987,[46] a surveyor was appointed by the court as an independent expert to value a matrimonial home.[47]

4. Selecting Your Expert and Establishing the Qualifications of the Expert in Court

(a) Counsel's task in establishing the witness as an expert

It is for the judge to decide as a matter of law whether the witness should be classified as an expert and whether evidence of opinion is, accordingly, admissible. In the words of Trainor J in *R v Chan Kim-hung* [1977] HKLR 479:

> A witness may express an opinion on an issue before the court if that issue requires special skill or knowledge to resolve it and the witness possesses special skill or knowledge of the issue. The opinion is not automatically accepted by the court ... to ensure this, one of the first things the witness has to do is to satisfy the court that he has special skill or knowledge ... it is not enough for the witness to declare himself an expert, that is for the trial judge to decide.[48]

43 *General Electric Trade Mark Case* [1973] RPC 297 and *Lego System Aktieselkab v Le Lemelstrich Ltd* [1983] FSR 155.
44 Section 23, *Evidence Ordinance*.
45 Section 28, *Evidence Ordinance*.
46 In this case, it was held that it was not improper for one of the parties to send material unsolicited to the independent expert to assist him in his task.
47 The court, however, refused to appoint a court expert in *Nguyen Ho v Director of Immigration* [1991] 1 HKLR 576.

It is, therefore, important to bear in mind, when selecting your expert, that it will be your task to establish the witness as an expert before the court. Having decided that expert evidence is really needed in support of your case, you must give careful thought to the selection of your witness. Very often, a case is won or lost by the astute selection of the right expert. As advocates gain in experience, they will know with more certainty whom to approach; in their early days, it will be sensible to seek the advice of a senior colleague.

(b) Matters to look for when selecting your expert

When considering your choice of expert, you should bear in mind two main points. First, you will have to persuade the court that the witness is, in fact, worthy of being classified as an expert. The expert's qualifications, expertise in the particular field and previous experience in testifying as an expert witness will all impress the court. Secondly, not only must the witness be acceptable to the court as an expert, but the witness's testimony as an expert must be such as to carry weight with the judge and, where appropriate, jury. The expert's court presence, therefore, must also be taken into account.

Finally, the expert witness should ideally be an independent person who has not been involved in the investigation of the incident for either of the parties involved. The courts have made it clear, however, that they may admit the evidence of an expert witness who is in the employment of one of the parties (or the evidence of a police officer as an expert called by the prosecution)[49], although the absence of independence might affect the weight to be attached to the evidence. The proper course to be adopted by the court was helpfully summarised by Lam J in *Tang Ping Choi v Secretary for Transport* [2004] 2 HKLRD 284 (CA), in which the judge said that, in the exercise of the court's discretion, the following principles should be applied: (i) admissibility and weight were two different questions to be considered at different stages; (ii) in the context of expert evidence, it was a

48 The same point was made by the Court of Appeal in *R v Yim Chor-man* [1975] HKLR 546 (CA).
49 See *R v Chung Chen-hsin* [1996] 1 HKCLR 120, [1996] 2 HKC 156 (police firearms expert called by prosecution to testify as to whether or not alleged weapon was a firearm within the meaning of the *Firearms and Ammunition Ordinance* (Cap 238); held that there was no requirement that the expert be independent from the prosecuting authority and the possible lack of independence went to the weight to be attached to the evidence, per Stuart-Moore J).

relevant consideration in determining whether permission to admit such evidence (as well as the weight to be accorded to it) should be given, whether experts were fully aware of their duty as experts; (3) the fact that a witness was an employee of a litigant would not automatically bar the witness from giving expert evidence for that litigant; (4) however, once the issue of admissibility had been brought up, whether in respect of an employee or otherwise, the court could examine the extent to which such a witness was aware of the witness' duty as an expert witness; (5) an important aspect of the duty of an expert witness was to inform the court of all relevant matters, whether such matters were favourable to the witness' conclusion or otherwise; (6) if the court was of the view that experts had not properly understood their duty towards the court when preparing the report, it was a question of case management whether the report should be excluded or some other solution should be adopted to remedy the situation; and (7) the proper solution would depend upon the circumstances of each case. It was impossible to identify all relevant factors and possible solutions. In a case in which an expert was giving evidence on an important issue which was highly controversial and that witness was the only expert who would give evidence on that aspect, the court would attach great significance to the expert's understanding of the expert's duty to the court[50].

In brief, useful pointers to look for when selecting your expert witness are:

(i) the witness' formal qualifications;
(ii) the witness' age;
(iii) the period of time the witness has spent acquiring the particular experience;
(iv) the work the witness has done in the area of specialisation — publications etc;

50 See also *Hong Kong Air Cargo Terminals Ltd v Commissioner of Rating and Valuation* [2004] 2 HKLRD 702 (plaintiff secured witness statement from two expert witnesses who were employees of the plaintiff on the issue of competition; defendant applied to exclude certain parts from their witness statements on the grounds that the witnesses were not independent of the party who had called them to testify; as to whether evidence should in such circumstances be excluded, Lord Phillips MR had said in *R (Factortame) Ltd v Secretary of State for Transport* [2003] QB 381 (CA): 'Where an expert has an interest of one kind or another in the outcome of the case, this fact should be made known to the court as soon as possible. The question of whether the proposed expert should be permitted to give evidence should then be determined in the course of case management. In considering that question, the judge will have to weigh the alternative choices open if the expert's evidence is excluded'; there was, therefore, no absolute rule that an interested person could not give expert evidence).

(v) the witness' familiarity with the work of other experts in the area of specialisation;
(vi) whether the witness has done any teaching in the area;
(vii) whether the witness is a member of a professional body or trade association;
(viii) whether any public honours have been bestowed upon the witness or any public recognition has been given;
(ix) whether the witness has appeared in court previously as an expert in this field and the frequency of such appearances;
(x) the witness' knowledge of the facts and whether the witness' knowledge has been gained first hand or is merely secondary;
(xi) whether the witness is the sort of person whose demeanour in court will carry weight; and
(xii) the degree of independence of the witness from the parties.

5. Counsel's Conference With the Expert

After selection of the appropriate expert, it is proper for counsel, either immediately or at a later date nearer the trial, to hold a conference with the expert. The purpose of this conference will be for counsel to brief themselves on the relevant technical aspects of the case and discuss any report that the witness will be able to give. In most cases, this report will be of considerable importance in the trial and it is, therefore, essential that the report be prepared carefully and accurately. Indeed, an early disclosure of a compelling report may well facilitate an early settlement.

6. The Form and Content of the Expert's Report

The form and content of the expert's report will, of course, depend upon the nature of the case and the purpose for which the expert is being called to testify. It may, however, be helpful to set out briefly what conventionally goes into an expert's report and its manner of presentation.

(a) The report should begin with the name, address, qualifications and experience of the expert.
(b) There should then be a statement as to the issues to which the report relates. This statement must identify the problem under investigation.
(c) The expert witnesses should then specify the investigations which have been carried out. Expert witnesses should visit the *locus in quo* or inspect the evidence personally, as it is most important that

8. Disclosure of Expert Evidence

As an important procedural matter, the solicitor should bear in mind the rules affecting the adducing of expert evidence at trial, the exchange of experts' reports and the lodging of agreed reports with the court.

(a) Civil litigation

In respect of civil litigation, the relevant rule regulating the adducing of expert evidence is RHC Order 38 rule 36 which provides that, save with the leave of the court, expert evidence may not be adduced at trial unless the party seeking to adduce it has applied to the court for directions and has complied with those directions.[56] RHC Order 38 rules 37 and 38 set out guidelines for the issuing of directions. Rule 37 provides that, where an application for directions under rule 36 is made in any action other than a personal injuries action, then, unless the court considers that there are special reasons for not so doing, it shall direct that the substance of the evidence be disclosed in the form of a written report.[57]

In the case of personal injury actions to which automatic directions under Order 25 rule 8 apply, any party who wishes to rely upon expert evidence at the trial must, within 6 weeks of the time when pleadings are deemed to be closed, disclose the substance of his report to the other parties in the form of a written report, which must be agreed if possible. Similarly, there are automatic directions in the case of an assessment of damages to be made by a master.[58] In personal injury actions, a plaintiff

56 It was made clear in *Herman Iskander v Bonardy Leo* [1988] 1 HKLR 583 that, where expert evidence was not disclosed in accordance with directions given, the leave of the court was required for its admission.

57 The court pointed out in *Winchester Cigarette Machinery Ltd v Payne* [1993] The Times 10 October, that the court has inherent jurisdiction to refuse an application for directions as to the adducing of expert evidence brought under RHC Order 38 rule 36 where the lateness of the application would prejudice the other party. In this case, application was made for directions three weeks before the trial date and the Court of Appeal ruled that it was proper for the judge to dismiss the summons where a party made his application at the last minute so that there were no longer any directions that could practically be given and which would enable justice to be done. All that the applicants could do would be to apply subsequently to the trial judge for leave which was a matter for the judge's discretion. It has been held in *Ko Chi Keung v Lee Ping Yan Andrew* [2001] 1 HKLRD 829, [2001] 2 HKC 63 that a judge or a master has jurisdiction to rule on the admissibility of expert evidence at the interlocutory stage of the proceedings. Where it is clear and obvious that the expert evidence sought to be admitted is irrelevant or inadmissible, such a ruling should be made before the trial: *Annabell Kin Yee Lee v Lee Wing Kim* (2001) HCA No 9522 of 1997.

58 RHC Order 37 rule 1A(b).

must also serve with his statement of claim a medical report and statement of all special damages claimed.[59]

The purpose of exchange of reports was clearly explained by Sheen J in *The Capitaine Le Goff* [1981] 1 Lloyd's Rep 322, at p 324:

> The object of exchanging the evidence of expert witnesses is twofold; namely (i) to endeavour to narrow the issues at the trial; and (ii) to prevent surprise at the trial so as to enable counsel to be properly instructed by his client's own experts so that he is prepared for the cross-examination of the opposing experts upon matters remaining in issue.

The court may order that reports be exchanged mutually or sequentially — *Kirkup v British Rail Engineering Ltd* [1983] 1 WLR 190.

Further RHC Order 38 rule 38 provides that the court may, if it thinks fit, direct that there be a meeting 'without prejudice' of the experts instructed by both parties for the purpose of identifying those parts of their evidence which are in issue. Where this meeting takes place, the experts may prepare a joint statement indicating those parts of their evidence on which they are, or are not, in agreement.

(b) Criminal litigation

In the case of criminal trials for indictable offences, section 80B(1) of the *Magistrates Ordinance* requires that, not less than seven clear days before the return date, the prosecution must serve on the defence copies of all documentary exhibits, which will include experts' reports. Following the committal of any person for trial in the Court of First Instance or when an order is made transferring a case for trial in the District Court, the expert's report and the material upon which the report is based must be furnished to the other party.[60]

As we have already seen,[61] there is a duty on the prosecution to notify the defence and the court of any forensic evidence available to the prosecution supporting the defence case. For example, if the prosecution are relying upon a confession and there is in the possession of the prosecution a medical report to the effect that the defendant has sustained injuries consistent with beatings whilst in police custody, this should be made known to the defence and the court. Convictions were quashed in *R v Maguire* [1992] QB 396, [1992] 2 All ER 433 on the grounds that a prosecution witness had failed to disclose the results of certain forensic tests, although the prosecution were unaware of the results of the expert's investigations. The court said that a forensic scientist advising the

59 RHC Order 18 rule 12(1A).

60 Section 65D, *Criminal Procedure Ordinance*.

61 or a more detailed discussion of the prosecution's duty of disclosure, see Chapter 3 pp 77–86 and the Department of Justice's Statement of Prosecution Policy and Practice, paragraph 18.

prosecution was obliged to disclose material of which he was aware which might have some bearing upon the outcome of the case.[62]

The duty that rests upon the prosecution to assist the defence by disclosure of materials was considered at length by the Court of Appeal in *R v Ward* [1993] 1 WLR 619 (CA), a case in which the defendant's conviction had been quashed by reason of failure to make full disclosure by the prosecution's forensic experts whom the court branded as 'partisan' in favour of helping the police. The court pointed out that it was the duty of Government forensic experts to assist in criminal investigations in a neutral and impartial manner. A common law duty of disclosure rested upon the prosecution and this extended both to the results of tests which supported the prosecution's case and those which had the opposite result. In view of the undoubted inequality as between the prosecution and defence in access to forensic scientists, it was of paramount importance that the prosecution fulfilled its duty of disclosure. Further, there was a clear obligation upon expert witnesses, whose assistance was sought by the prosecution, to bring the results of their experiments and tests to the attention of their instructing solicitor so that they might be disclosed to the defence.

The prosecution should also supply samples of exhibits to permit their testing by an expert appointed by the defence — *R v Tai Muk Kwai t/a Nan Lien Pharmaceutical Co* [1980] HKC 655.

9. Opinion and Hearsay in Expert Evidence

Expert witnesses should ideally investigate and ascertain the facts for themselves before expressing an opinion upon them. Three different situations merit consideration:

(a) Opinion on facts observed by the experts themselves

Expert witnesses should ideally express their opinion on data observed by themselves. They should, for example, carry out the post-mortem examination personally or visit the building to be valued. In this case, their opinion is directly admissible and carries the greatest weight.

(b) Opinion on facts admitted or not in dispute

In a case where the facts are admitted or not in dispute, expert witnesses are permitted to express their opinion, whether or not they have ascertained those facts from their own observations — *M'Naghten's Case*

62 See also the decision of the Hong Kong Court of Final Appeal in *HKSAR v Lee Ming-tee* (2003) 6 HKCFAR 336, [2004] 1 HKLRD 513.

(1843) 10 Cl & F 200. Their opinion may carry less weight, however, if they have not ascertained the facts for themselves.

(c) Opinion on facts in dispute based on evidence of others

Where expert witnesses have not ascertained the facts for themselves and the existence of those facts are in dispute, it is not permissible to ask them to express an opinion directly on the basis of the evidence of others.[63] The opinion of the witnesses formed on such a basis necessarily involves a subjective selection by the witnesses of the evidence that they accept and the evidence they reject, and the making of a decision by the witnesses as to the facts that they believe to have been proved by the evidence, thereby usurping the function of the court. What the witnesses may be asked to do, however, is to express an opinion on hypothetical facts.[64] Counsel examining the witnesses may properly invite the expert to assume certain facts, which they hope to persuade the court have been established by the evidence, and then ask the witnesses to express their opinion on the basis of the assumed facts contained in the hypothetical question. For example, where Dr A, who carried out the post-mortem and has testified as to the findings which are not admitted, and you wish to elicit from Dr B his opinion as to when death occurred based upon the findings of Dr A, you might frame the question as such: 'Dr B, assuming the facts set out in the report of Dr A to be true, what, in your opinion, would you estimate to be the time of death of the deceased?' It is then up to you to persuade the court that the facts as set out in Dr A's report are true. The same technique must be used in your closing address when inviting the court to accept the opinion of Dr B.

10. The Role and Duty of the Expert Witness in Testifying Before the Court

Expert witnesses have a difficult role to perform when called upon to testify in court. With the development of the adversarial system of

63 It was held by the Divisional Court in *R v Wood* [1990] Crim LR 264 that the opinion of an expert, who was a consultant psychiatrist, as to whether the accused had been suffering from automatism at the time of the commission of the offence, was inadmissible on the grounds that the expert's medical opinion was based upon hearsay. Similarly in *R v Ngai Man* [1990] 1 HKC 344, the evidence of an expert was ruled in part to be inadmissible as based upon hearsay as to the impact damage sustained by vehicles in an accident.

64 This practice was approved in *Paric v John Holland (Construction) Pty Ltd* (1985) 59 ALJR 844.