Rules of the High Court (Amendment) Rules 2008

The Rules of the High Court (Cap. 4A)

Order 38 – EVIDENCE

Remarks

I. GENERAL RULES

1. General rule: witnesses to be examined orally (O. 38, r. 1)

Subject to the provisions of these rules and of the Evidence Ordinance (Cap. 8) and any other written law relating to evidence, any fact required to be proved at the trial of any action begun by writ by the evidence of witnesses shall be proved by the examination of the witnesses orally and in open court.

2. Evidence by affidavit (O. 38, r. 2)

(1) The Court may, at or before the trial of an action begun by writ, order that the affidavit of any witness may be read at the trial if in the circumstances of the case it thinks it reasonable so to order.

(2) An order under paragraph (1) may be made on such terms as to the filing and giving of copies of the affidavits and as to the production of the deponents for cross-examination as the Court thinks fit but, subject to any such terms and to any subsequent order of the Court, the deponents shall not be subject to cross-examination and need not attend the trial for the purpose.

(3) In any cause or matter begun by originating summons, originating motion or petition, and on any application made by summons or motion, evidence may be given by affidavit unless in the case of any such cause, matter or application any provision of these rules otherwise provides or the Court otherwise directs, but the Court may, on the application of any party, order the attendance for cross-examination of the person making any such affidavit, and where, after such an order has been made, the person in question does not attend, his affidavit shall not be used as evidence without the leave of the Court.

2A. Exchange of witness statements (O. 38, r. 2A)

(1) The powers of the Court under this rule shall be exercised for the purpose of disposing fairly and expeditiously of the cause or matter before it, and saving costs, having regard to all the circumstances of the case, including (but not limited to) –

(a) the extent to which the facts are in dispute or have been admitted;
(b) the extent to which the issues of fact are defined by the pleadings;
(c) the extent to which information has been or is likely to be provided by further and better particulars, answers to interrogatories or otherwise.

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(2) ~~At the hearing of a summons for directions~~ **At the determination of a case management summons** in an action commenced by writ the Court shall direct every party to serve on the other parties, within such period ~~of the hearing~~ as the Court may specify and on such terms as the Court may specify, written statements of the oral evidence which the party intends to adduce on any issues of fact to be decided at the trial.
The Court may give a direction to any party under this paragraph at any other stage of such an action and at any stage of any other cause or matter.
Order 3, rule 5(3) shall not apply to any period specified by the Court under this paragraph.

Rule 157 Consequential to Order 25

(3) Directions under paragraph (2) or (17) may make different provision with regard to different issues of fact or different witnesses.

(4) Statements served under this rule shall –

(a) be dated and, except for good reason (which should be specified by letter accompanying the statement), be signed by the intended witness and ~~shall include a statement by him that the contents are true to the best of his knowledge and belief~~ **must be verified by a statement of truth in accordance with Order 41A**;

(b) sufficiently identify any documents referred to therein; and

(c) where they are to be served by more than one party, be exchanged simultaneously.

Rule 103 Logical Extension

(5) Where a party is unable to obtain a written statement from an intended witness in accordance with paragraph (4)(a), the Court may direct the party wishing to adduce that witness's evidence to provide the other party with the name of the witness and (unless the Court otherwise orders) a statement of the nature of the evidence intended to be adduced.

(6) Subject to paragraph (9), where the party serving a statement under this rule does not call the witness to whose evidence it relates, no other party may put the statement in evidence at the trial.

(7) Subject to paragraph (9), where the party serving the statement does call such a witness at the trial –

(a) except where the trial is with a jury, the Court may, on such terms as it thinks fit, direct that the statement served, or part of it, shall stand as the evidence in chief of the witness or part of such evidence;

~~(b) the party may not without the consent of the other parties or the leave of the Court adduce evidence from that witness the substance of which is not included in the statement served, except~~

~~(i) the Court's directions under paragraph (2) or (17) specify that statements should be exchanged in relation to only some issues of fact, in relation to any other issues;~~

~~(ii) in relation to new matters which have arisen since the statement was served on the other party;~~

Rule 192 Rec 100

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(b) the witness may with the leave of the Court –
(i) amplify his witness statement; and
(ii) give evidence in relation to new matters which have arisen since the witness statement was served on the other party;

(c) whether or not the statement or any part of it is referred to during the evidence in chief of the witness, any party may put the statement or any part of it in cross-examination of that witness.

(7A) The Court may grant leave under paragraph (7)(b) only if it considers that there is good reason not to confine the evidence of the witness to the contents of his witness statement.

(8) Nothing in this rule shall make admissible evidence which is otherwise inadmissible.

(9) Where any statement served is one to which the Evidence Ordinance (Cap. 8) applies, paragraphs (6) and (7) shall take effect subject to the provisions of that Ordinance and Parts III and IV of this Order.

The service of a witness statement under this rule shall not, unless expressly so stated by the party serving the same, be treated as a notice under that Ordinance; and where a statement or any part thereof would be admissible in evidence by virtue only of that Ordinance, the appropriate notice under Part III or IV of this Order shall be served with the statement notwithstanding any provision of those Parts as to the time for serving such a notice. ~~Where such a notice is served, a counter-notice shall be deemed to have been served under rule 26(1).~~ Rule 266

(10) Where a party fails to comply with a direction for the exchange of witness statements he shall not be entitled to adduce evidence to which the direction related without the leave of the Court.

(11) Where a party serves a witness statement under this rule, no other person may make use of that statement for any purpose other than the purpose of the proceedings in which it was served –

(a) unless and to the extent that the party serving it gives his consent in writing or the Court gives leave; or
(b) unless and to the extent that it has been put in evidence (whether pursuant to a direction under paragraph (7)(a) or otherwise).

(12) Subject to paragraph (13), the judge shall, if any person so requests during the course of the trial, direct the Clerk of Court to certify as open to inspection any witness statement which was ordered to stand as evidence in chief under paragraph (7)(a).

A request under this paragraph may be made orally or in writing.

(13) The judge may refuse to give a direction under paragraph (12) in relation to a witness statement, or may exclude from such a direction any words or passages in a statement, if he considers that inspection should not be available –

(a) in the interests of justice or national security;
(b) because of the nature of any expert medical evidence in the statement; or
(c) for any other sufficient reason.

(14) Where the Clerk of Court is directed under paragraph (12) to certify a witness statement as open to inspection he shall –

(a) prepare a certificate which shall be attached to a copy ("the certified copy") of that witness statement; and
(b) make the certified copy available for inspection.

(15) Subject to any conditions which the Court may by special or general direction impose, any person may inspect and (subject to payment of the prescribed fee) take a copy of the certified copy of a witness statement from the time when the certificate is given until the end of 7 days after the conclusion of the trial.

(16) In this rule –

(a) any reference in paragraphs (12) to (15) to a witness statement shall, in relation to a witness statement of which only part has been ordered to stand as evidence in chief under paragraph (7)(a), be construed as a reference to that part;
(b) any reference to inspecting or copying the certified copy of a witness statement shall be construed as including a reference to inspecting or copying a copy of that certified copy.

(17) The Court shall have power to vary or override any of the provisions of this rule (except paragraphs (1), (8) and (12) to (16)) and to give such alternative directions as it thinks fit.

(L.N. 223 of 1995)

3. Evidence of particular facts (O. 38, r. 3)

(1) Without prejudice to rule 2, the Court may, at or before the trial of any action, order that evidence of any particular fact shall be given at the trial in such manner as may be specified by the order.

(2) The power conferred by paragraph (1) extends in particular to ordering that evidence of any particular fact may be given at the trial –

(a) by statement on oath of information or belief, or
(b) by the production of documents or entries in books, or
(c) by copies of documents or entries in books, or
(d) in the case of a fact which is or was a matter of common knowledge either generally or in a particular district, by the production of a specified newspaper which contains a statement of that fact.

4. Limitation of expert evidence (O. 38, r. 4)

The Court may, at or before the trial of any action, order that the number of

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medical or other expert witnesses who may be called at the trial shall be limited as specified by the order.

4A. Evidence by single joint expert (O. 38, r. 4A)

Rule 193
Rec 107

(1) In any action in which any question for an expert witness arises, the Court may, at or before the trial of the action, order 2 or more parties to the action to appoint a single joint expert witness to give evidence on that question.

(2) Where the parties cannot agree on who should be the joint expert witness, the Court may –

- **(a) select the expert witness from a list prepared or identified by the parties; or**
- **(b) direct that the expert witness be selected in such manner as the Court may direct.**

(3) Where an order is made under paragraph (1), the Court may give such directions as it thinks fit with respect to the terms and conditions of the appointment of the joint expert witness, including but not limited to the scope of instructions to be given to the expert witness and the payment of the expert witness's fees and expenses.

(4) Notwithstanding that a party to the action disagrees with the appointment of a single joint expert witness to give evidence, the Court may, subject to paragraph (6), make an order under paragraph (1) if it is satisfied that it is in the interests of justice to do so after taking into account all the circumstances of the case.

(5) The circumstances that the Court may take into account include but are not limited to –

- **(a) whether the issues requiring expert evidence can readily be identified in advance;**
- **(b) the nature of those issues and the likely degree of controversy attaching to the expert evidence in question;**
- **(c) the value of the claim and the importance of the issue on which expert evidence is sought, as compared with the cost of employing separate expert witnesses to give evidence;**
- **(d) whether any party has already incurred expenses for instructing an expert who may be asked to give evidence as an expert witness in the case; and**
- **(e) whether any significant difficulties are likely to arise in relation to –**
  - **(i) the choosing of the joint expert witness;**
  - **(ii) the drawing up of his instructions; or**
  - **(iii) the provision to him of the information and other facilities needed to perform his duties.**

(6) Where a party to the action disagrees with the appointment of a single joint expert witness to give evidence, the Court shall not make an order under

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paragraph (1) unless the party has been given a reasonable opportunity to appear before the Court and to show cause why the order should not be made.

(7) Where the Court is satisfied that an order made under paragraph (1) is inappropriate, it may set aside the order and allow the parties concerned to appoint their own expert witnesses to give evidence.

5. Limitation of plans, etc., in evidence (O. 38, r. 5)

Unless, at or before the trial, the Court for special reasons otherwise orders, no plan, photograph or model shall be receivable in evidence at the trial of an action unless at least 10 days before the commencement of the trial the parties, other than the party producing it, have been given an opportunity to inspect it and to agree to the admission thereof without further proof.

6. Revocation or variation of orders under rules 2 to 5 (O. 38, r. 6)

Any order under rules 2 to 5 (including an order made on appeal) may, on sufficient cause being shown, be revoked or varied by a subsequent order of the Court made at or before the trial.

7. Evidence of finding on foreign law (O. 38, r. 7)

(1) A party to any cause or matter who intends to adduce in evidence a finding or decision on a question of foreign law by virtue of section 59 of the Evidence Ordinance (Cap. 8) shall –

(a) in the case of an action to which Order 25, rule 1, applies within ~~14 days~~ **28 days** after the pleadings in the action are deemed to be closed, and

(b) in the case of any other cause or matter, within 21 days after the date on which an appointment for the first hearing of the cause or matter is obtained,

or in either case, within such other period as the Court may specify, serve notice of his intention on every other party to the proceedings.

Rule 158 Consequential Amendment

(2) The notice shall specify the question on which the finding or decision was given or made and specify the document in which it is reported or recorded in citable form.

(3) In any cause or matter in which evidence may be given by affidavit, an affidavit specifying the matters contained in paragraph (2) shall constitute notice under paragraph (1) if served within the period mentioned in that paragraph.

8. Application to trials of issues, references, etc. (O. 38, r. 8)

The foregoing rules of this Order shall apply to trials of issues or questions of

fact or law, references, inquiries and assessments of damages as they apply to the trial of actions.

9. Depositions: when receivable in evidence at trial (O. 38, r. 9)

(1) No deposition taken in any cause or matter shall be received in evidence at the trial of the cause or matter unless –

(a) the deposition was taken in pursuance of an order under Order 39, rule 1, and

(b) either the party against whom the evidence is offered consents or it is proved to the satisfaction of the Court that the deponent is dead, or beyond the jurisdiction of the Court or unable from sickness or other infirmity to attend the trial.

(2) A party intending to use any deposition in evidence at the trial of a cause or matter must, a reasonable time before the trial, give notice of his intention to do so to the other party.

(3) A deposition purporting to be signed by the person before whom it was taken shall be receivable in evidence without proof of the signature being the signature of that person.

10. High Court documents admissible or receivable in evidence (O. 38, r. 10)

(1) Office copies of writs, records, pleadings and documents filed in the High Court shall be admissible in evidence in any cause or matter and between all parties to the same extent as the original would be admissible.

(2) Without prejudice to the provisions of any enactment, every document purporting to be sealed with the seal of any office or department of the High Court shall be received in evidence without further proof, and any document purporting to be so sealed and to be a copy of a document filed in, or issued out of, that office or department shall be deemed to be an office copy of that document without further proof unless the contrary is shown.
(25 of 1998 s. 2)

11. Evidence of consent of new trustee to act (O. 38, r. 11)

A document purporting to contain the written consent of a person to act as trustee and to bear his signature verified by some other person shall be evidence of such consent.

12. Evidence at trial may be used in subsequent proceedings (O. 38, r. 12)

Any evidence taken at the trial of any cause or matter may be used in any subsequent proceedings in that cause or matter.

13. Order to produce document at proceeding other than trial (O. 38, r. 13)

(1) At any stage in a cause or matter the Court may order any person to attend any proceeding in the cause or matter and produce any document, to be specified or described in the order, the production of which appears to the Court to be necessary for the purpose of that proceeding.

(2) No person shall be compelled by an order under paragraph (1) to produce any document at a proceeding in a cause or matter which he could not be compelled to produce at the trial of that cause or matter.

II. WRITS OF SUBPOENA

14. Form and issue of writ of subpoena (O. 38, r. 14)

(1) A writ of subpoena must be in Form No. 28 or 29 in Appendix A, whichever is appropriate.

(2) Issue of a writ of subpoena takes place upon its being sealed by an officer of the Court.

(3) Where a writ of subpoena is to be issued in a cause or matter in the Court, the appropriate office for the issue of the writ is the Registry.

(HK)(5) Before a writ of subpoena is issued a praecipe for the issue of the writ must be filed in the Registry together with a note from a judge or master authorizing the issue of such writ and the sum of $500 shall be deposited in the Registry, in addition to any fee payable in respect of such issue, as a deposit in respect of the witness' reasonable expenses; and the praecipe must contain the name and address of the party issuing the writ, if he is acting in person, or the name or firm and business address of that party's solicitor and also (if the solicitor is the agent of another) the name or firm and business address of his principal.

(HK)(6) In any proceedings, whether in chambers or in court, the Court may order the reimbursement by one or more of the parties to a witness who has been served with a writ of subpoena in respect of any expenses reasonably and properly incurred by that witness.

(HK)(7) Any expenses so ordered by the Court to be paid shall be assessed by the Court making the order or, if no such assessment is made by the Court, shall be taxed (if not agreed) and paid by the party ordered to make such payment.

(HK)(8) A witness whose expenses have been ordered to be paid may, if the party ordered to make such payment is the party who made the deposit on issue of the writ of subpoena, recover such expenses, after assessment, agreement or taxation, from

the said deposit and look to the party liable to make such payment for the balance, if any.

(HK)(9) The deposit (or such part of it as shall remain after payment to the witness under rule 14(8)) shall be refunded to the party that paid the deposit if –

(a) that party was not ordered to pay the costs of the witness; or

(b) that party was ordered to pay the costs of the witness and has effected payment of such costs after assessment, agreement or taxation.

15. More than one name may be included in one writ of subpoena (O. 38, r. 15)

The names of two or more persons may be included in one writ of subpoena ad testificandum.

16. Amendment of writ of subpoena (O. 38, r. 16)

Where there is a mistake in any person's name or address in a writ of subpoena, then, if the writ has not been served, the party by whom the writ was issued may have the writ re-sealed in correct form by filing a second praecipe under rule 14(5) endorsed with the words "Amended and re-sealed".

17. Service of writ of subpoena (O. 38, r. 17)

A writ of subpoena must be served personally and, subject to rule 19, the service shall not be valid unless effected within 12 weeks after the date of issue of the writ and not less than four days, or such other period as the Court may fix, before the day on which attendance before the Court is required.

18. Duration of writ of subpoena (O. 38, r. 18)

Subject to rule 19, a writ of subpoena continues to have effect until the conclusion of the trial at which the attendance of the witness is required.

19. Writ of subpoena in aid of inferior court or tribunal (O. 38, r. 19)

(1) The office of the Court out of which a writ of subpoena ad testificandum or a writ of subpoena duces tecum in aid of an inferior court or tribunal may be issued is the Registry, and no order of the Court for the issue of such a writ is necessary.

(2) A writ of subpoena in aid of an inferior court or tribunal continues to have effect until the disposal of the proceedings before that court or tribunal at which the attendance of the witness is required.

(3) A writ of subpoena issued in aid of an inferior court or tribunal must be served personally.

(4) Unless a writ of subpoena issued in aid of an inferior court or tribunal is duly served on the person to whom it is directed not less than 4 days, or such other period as the Court may fix, before the day on which the attendance of that person before the court or tribunal is required by the writ, that person shall not be liable to any penalty or process for failing to obey the writ.

(5) An application to set aside a writ of subpoena issued in aid of an inferior court or tribunal may be heard by a master.

III. HEARSAY EVIDENCE

20. Application and interpretation (O. 38, r. 20)

(1) In this Part of this Order "the Ordinance"（條例）means the Evidence Ordinance (Cap. 8) and any expressions used in this Part and in Part IV of the Ordinance have the same meanings in this Part as they have in the said Part IV.

(2) This Part of this Order shall apply in relation to the trial or hearing of an issue or question arising in a cause or matter, and to a reference, inquiry and assessment of damages, as it applies in relation to the trial or hearing of a cause or matter.

(3) In this Part –
"hearsay evidence"（傳聞證據）means evidence consisting of hearsay within the meaning of section 46 of the Ordinance.

(2 of 1999 s. 6)

21. Power to call witness for cross-examination on hearsay evidence and to call additional evidence to attack or support hearsay evidence (O. 38, r. 21)

(1) Where a party tenders as hearsay evidence a statement made by a person but does not propose to call the person who made the statement to give evidence, the Court may, on application-

(a) allow another party to call and cross-examine the person who made the statement on its contents;

(b) allow any party to call –

(i) additional evidence to attack or support the reliability of the statement;

(ii) additional evidence to attack or support that first-mentioned additional evidence.

(2) Where the Court allows another party to call and cross-examine the person who made the statement, it may give such directions as it thinks fit to secure the

attendance of that person and as to the procedure to be followed.

(2 of 1999 s. 6)

22. Powers exercisable in chambers (O. 38, r. 22)

The jurisdiction of the Court under rules 20 and 21 may be exercised in chambers.

(2 of 1999 s. 6)

23-34. (Repealed 2 of 1999 s. 6)

IV. EXPERT EVIDENCE

35. Interpretation (O. 38, r. 35)

Rule 194
Rec 102 & 103

(1) ~~In this Part of this Order a reference to a summons for directions includes a reference to any summons or application to which, under any of these rules, Order 25, rules 2 to 7, apply, and expressions~~ **Expressions** used in this Part of this Order which are used in the Evidence Ordinance (Cap. 8) have the same meanings in this Part of this Order as in that Ordinance.

Rule 159
Consequential to Order 25

(2) A reference to an expert witness in this Part or Appendix D is a reference to an expert who has been instructed to give or prepare evidence for the purpose of proceedings in the Court.

Rule 194
Rec 102 & 103

35A. Expert witness's overriding duty to Court (O. 38, r. 35A)

Rule 195
Rec 102 & 103

(1) It is the duty of an expert witness to help the Court on the matters within his expertise.

(2) The duty under paragraph (1) overrides any obligation to the person from whom the expert witness has received instructions or by whom he is paid.

36. Restrictions on adducing expert evidence (O. 38, r. 36)

(1) Except with the leave of the Court or where all parties agree, no expert evidence may be adduced at the trial or hearing of any cause or matter unless the party seeking to adduce the evidence –

(a) has applied to the Court to determine whether a direction should be given under rule 37 or 41 (whichever is appropriate) and has complied with any direction given on the application~~, or~~**.**

~~(b) has complied with automatic directions taking effect under Order 25, rule 8(1)(b), or~~

~~(c) has complied with the automatic directions, or any other directions ordered~~

Rule 267
Logical Extension

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~~by the master under Order 37, rule 1(1A). (L.N. 363 of 1990)~~

(2) Nothing in paragraph (1) shall apply to evidence which is permitted to be given by affidavit or shall affect the enforcement under any other provision of these rules (except of Order 45, rule 5) of a direction given under this Part of this Order.
(L.N. 363 of 1990)

37. Direction that expert report be disclosed (O. 38, r. 37)

(1) Subject to paragraph (2), where in any cause or matter an application is made under rule 36(1) in respect of oral expert evidence, then, unless the Court considers that there are special reasons for not doing so, it shall direct that the substance of the evidence be disclosed in the form of a written report or reports to such other parties and within such period as the Court may specify. (L.N. 404 of 1991)

(2) Nothing in paragraph (1) shall require a party to disclose a further medical report if he proposes to rely at the trial only on the report provided pursuant to Order 18, rule 12(1A) or (1B) but, where a party claiming damages for personal injuries discloses a further report, that report shall be accompanied by a statement of the special damages claimed and, in this paragraph, "a statement of the special damages claimed"（關於所申索的專項損害賠償的陳述書）has the same meaning as in Order 18, rule 12(1C). (L.N. 404 of 1991)

37A. Expert report to be verified by statement of truth (O. 38, r. 37A)

Rule 104
Rec 103

An expert report disclosed under these rules must be verified by a statement of truth in accordance with Order 41A.

37B. Duty to provide expert witness with copy of code of conduct (O. 38, r. 37B)

Rule 196
Rec 103 & 104

(1) A party who instructs an expert witness shall as soon as practicable provide the expert witness with a copy of the code of conduct set out in Appendix D.

(2) Where the Court has under rule 4A(1) ordered that 2 or more parties shall appoint a single joint expert witness, paragraph (1) applies to each of the parties.

(3) If the instruction is in writing, it must be accompanied by a copy of the code of conduct set out in Appendix D.

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37C. Expert witness's declaration of duty to Court (O. 38, r. 37C)

Rule 196
Rec 103

(1) An expert report disclosed under these rules is not admissible in evidence unless the report contains a declaration by the expert witness that –

(a) he has read the code of conduct set out in Appendix D and agrees to be bound by it;

(b) he understands his duty to the Court; and

(c) he has complied with and will continue to comply with that duty.

(2) Oral expert evidence is not admissible unless the expert witness has declared, whether orally or in writing or otherwise, that –

(a) he has read the code of conduct set out in Appendix D and agrees to be bound by it;

(b) he understands his duty to the Court; and

(c) he has complied with and will continue to comply with that duty.

(3) Paragraph (1) does not apply to a report that was disclosed under rule 37 before the commencement of this rule.

38. Meeting of experts (O. 38, r. 38)

In any cause or matter the Court may, if it thinks fit, direct that there be a meeting "without prejudice" of such experts within such periods before or after the disclosure of their reports as the Court may specify, for the purpose of identifying those parts of their evidence which are in issue. Where such a meeting takes place the experts may prepare a joint statement indicating those parts of their evidence on which they are, and those on which they are not, in agreement.

39. Disclosure of part of expert evidence (O. 38, r. 39)

Where the Court considers that any circumstances rendering it undesirable to give a direction under rule 37 relate to part only of the evidence sought to be adduced, the Court may, if it thinks fit, direct disclosure of the remainder.

41. Expert evidence contained in statement (O. 38, r. 41)

Where an application is made under rule 36 in respect of expert evidence contained in a statement and the applicant alleges that the maker of the statement cannot or should not be called as a witness, the Court may direct that the provisions of ~~rules 20 to 23 inclusive and 25 to 33~~ **rules 20 to 22** inclusive shall apply with such modifications as the Court thinks fit.

Rule 197
Consequential
Amendment

Remarks

42. Putting in evidence expert report disclosed by another party (O. 38, r. 42)

A party to any cause or matter may put in evidence any expert report disclosed to him by any other party in accordance with this Part of this Order.

43. Time for putting expert report in evidence (O. 38, r. 43)

Where a party to any cause or matter calls as a witness the maker of ~~a report which has been disclosed in accordance with a direction given under rule 37~~ **an expert report which has been disclosed under these rules**, the report may be put in evidence at the commencement of the examination in chief of its maker or at such other time as the Court may direct.

Rule 198 Consequential Amendment

44. Revocation and variation of directions (O. 38, r. 44)

Any direction given under this Part of this Order may on sufficient cause being shown be revoked or varied by a subsequent direction given at or before the trial of the cause or matter.

(Enacted 1988)