

The majority of disputes now settle well before trial. Therefore solicitors often have little experience of the steps that need to be taken in the few months before trial, including in relation to expert evidence.

Permission from the court is essential for an expert witness to give oral evidence at trial. This will not usually be given until after the pre-trial checklist has been filed, except in large or complex cases where there has been a case management conference after the experts' reports have been disclosed.

The pre-trial checklist requires solicitors:

- to list the names and fields of expertise of their experts, and indicate for each one whether they are a joint expert, and whether their report is agreed;
- to state whether there has been a discussion between experts and whether they have signed a joint statement; and
- to give dates to avoid if experts are to be required to give oral evidence, and the trial date is not yet fixed.

If you are seeking permission for the experts to give oral evidence, you may also need to be able to demonstrate that:

- expert evidence is likely to significantly affect the outcome of the trial;
- oral evidence from the experts is likely to assist the trial judge;
- there is a risk of injustice if the expert evidence is not tested at trial; and
- the cost of the experts' attendance is proportionate.

### Securing experts' availability for trial

This requires good teamwork and planning. Experts have an obligation to attend court if called upon to do so. They should be kept advised of the directions and timetable from allocation stage onwards, particularly of the trial window, or likely period in which the trial will take place. They should be invited to provide the solicitor with their specific availability, at the latest before the pre-trial checklist is completed or a fixed trial date is applied for. It is prudent not only to obtain information on when the experts *are* available, but also on the reasons *why* they are not available for particular days within the actual or likely trial window.

Unavailability of an expert witness will also rarely be justification for an application to adjourn an already fixed trial date, particularly if the expert witness has been instructed relatively late in the case without



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# Expert preparation

## Mark Solon explains how to prepare experts for trial

first checking his availability for trial.

If there is some doubt about the expert's availability to give essential oral evidence at trial, issue a witness summons under CPR 34.2, particularly if the expert has another trial or commitment in his diary for the same day or period.

If your expert witness can be available for sufficient time to give evidence on the trial date, but not if he has to travel to the trial court to do so, consider whether he might give evidence by video link.

When you have permission for an expert witness to give oral evidence at trial on a date they can attend, the following steps are still necessary:

- Ensure that the expert has reserved the date(s) exclusively in his diary—if there is any doubt, serve a witness summons.
- For trials that are listed for several days, if at all possible plan when the expert needs to attend by discussion with your advocate, the other party and, if there is a pre-trial review, with the court (at diary/listing manager level at least). It is very expensive and unlikely to lead to a good performance by an expert if he attends for several days when it is unnecessary.
- Ensure that the client and funder have approved the fees for the experts' attendance at court, and that you have agreed cancellation fees with the expert should the case settle.
- Check that the expert has been kept completely up-to-date with all developments in the case relevant to

their evidence—have you sent them any late disclosure documents and the other experts' reports?

- Check whether the expert has given oral evidence at a trial before and, if not, whether he might benefit from some familiarisation training in courtroom skills, or from a visit to observe a trial at the court in question. However, do not arrange or endorse specific "coaching" on the actual case, or use similar scenarios.

At a minimum, you or the advocate should remind inexperienced experts that when they give evidence they should:

- address the judge (not the counsel examining them);
- answer the questions they are asked but no more;
- keep to the facts and matters within their expertise;
- avoid being drawn into hypothetical discussions;
- avoid arguing with the advocate or the judge; and
- not attempt to win the case.

The trial bundle must include all disclosed experts' reports, relevant to matters that remain in dispute on which the parties seek to rely. In a complex case a separate bundle of the expert evidence might be necessary.

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