

# Top ten tips for getting the most from SEN expert witnesses

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The outcome of an SEN appeal turns on the quality of the expert evidence. Yet, despite its importance, solicitors practising before the First Tier Tribunal rarely get the most out of their expert witnesses. I provide ten top tips below on getting the most from experts.

## **1. Expert selection – get it right**

A simply but important point – make sure you are recommending experts that you know and trust. If you come across a new expert ask to see a redacted, example report to make sure that they know what they are doing before your instruction – no one wants to be the guinea pig.

## **2. Initial instructions – get experts involved early**

They're busy professionals with, likely, a busier or less flexible diary than you. If you are not sending letter of instructions to the experts yourself, then guide your client on instructing the expert and what the expert needs to know in order to get on top of the brief quickly.

## **3. Provisions of papers – instructing experts in a silo is pointless**

It sounds obvious but make sure you provide your expert with all the papers they need to do a proper job. Previous reports, annual review documentation, evidence of academic progress, evidence that is unhelpful to your client's case: all of this is crucial for an expert to see to avoid any pitfalls that can be exploited in cross examination (think: would your opinion change had you seen x document?). Ultimately, if the expert has not been properly briefed or been given complete information, this will impact on the quality of the end report. If amendments are required it will also increase your client's costs.

## **4. Diaries – think forward**

When you instruct an expert in a SEN appeal you know what you want: an assessment, a report, commentary on the other side's evidence, input into the working document, attendance at the final hearing. You also have a reasonable idea of when the expert's input will be required. Therefore, instruct them to book time out their diary to provide these services from the outset.

## **5. Assessments – make sure the child/ young person is seen in school**

SEN appeals are about the educational provision the relevant child requires. Recently I have seen more and more examples of experts who have not been instructed to visit the schools in contention, nor to observe the child in school or speak to school staff. These are crucial visits for the expert to make and can provide very helpful direct evidence of the school's view on matters.

## **6. Draft reports – check them**

It goes without saying that draft reports should be thoroughly reviewed. A proper review is not just a proofreading exercise, although proof reading is an important aspect of a review. Check that the experts have stated the documents that they have reviewed – if something appears missing, check if they have reviewed it and, if not, give it to them to review. Check recommendations for specificity and quantification – without this writing the working document won't be possible. Check internal consistency – for instance, if a speech and language therapist has opined a child has receptive language difficulties, check that the receptive language index score is below 100 i.e. below average and check that the subtests relied upon to reach that score (typically, in the case of receptive language: word classes, following directions, understanding spoken paragraphs, semantic relationships) are also below average. Test any discrepancy with your expert.

## **7. The local authority evidence – give it to the expert and ask for feedback**

When the local authority evidence arrives or, perhaps more helpfully, the final hearing bundle, send it to your relevant expert and ask them to conduct an analysis of it. More and more often in conference I am being told that there is nothing wrong with a local authority report and that it's simply the recommendations are wrong. This is not detailed enough. The reason for the differences between the reports needs to be unpicked so that it can be tested in cross examination. The person responsible for doing the unpicking is your expert. This information should be provided in conference (see below) or, as in other areas of practice, a brief note prepared by the expert identifying the issues and, importantly, providing page/paragraph references to the final hearing bundle where the inconsistencies arise so that they can be put to the local authority expert.

## **8. Conferences – hold at least two and make them worthwhile**

Ideally there would be two conferences in the lifespan of an appeal, one upon receipt of draft reports, the other upon receipt of the hearing bundle. The purpose of these conferences is not for the expert witness to repeat the contents of their report to the lawyers and the client - it has been read in advance – something which should be made clear to the expert in advance of the conference.

Conference one is the expert's opportunity to listen: listen to what the issues in the appeal are; listen to what the client is trying to achieve; listen to what the gaps in the draft report are. Afterwards, the report should be amended to reflect the issues discussed.

Conference two is a different beast entirely – it is the experts time to shine. It should take place a week or so before the final hearing and, at the very least, before counsel has fully prepared. Lawyers and experts should have reviewed the hearing bundle or, at the very least, the expert evidence and any key evidence upon which it is based. The conference should serve two purposes – firstly, a roundtable meeting to discuss the final issues for hearing. Secondly (and most importantly) the experts should be assisting counsel prepare for the final hearing.

## **9. Working documents – ensure the experts review and comment on it**

Working documents are crucially important – they form the list of issues before the FTT and also reflect what each party wants the EHC Plan arising from the appeal to look like. Your experts must be involved in preparing the working document – they know how it needs to be drafted and should be asked to check any amendments you make. Double check that your experts have actually checked it – regularly in hearings experts decide the working document is not drafted properly – this should happen in advance.

## **10. The hearing**

Make sure you explain to your experts, if they have not been to a final hearing before, what the expectation upon them is, what they will be questioned on (carefully: do not coach) and the basic procedure.

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