

PRIVATE EXPERT OPINION – LEGAL FRAMEWORK AND MEANING

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Abstract: The Slovak law on expertness defines an expert opinion, determining who can venture it and how to bring it before the court. Yet, do the courts consider expert opinions as their own? The presented study explores the incentives to commissioning expert opinions and the legal environment of this institute. The community of experts has found flaws in the legislation governing expert opinions, arguing that experts tend to bias their opinion in favour of the client and break the oath they took on behalf of the law. Although the Slovak legislation sets parameters to avoid abuse or defamation of the expert opinion, the judicial practice will show if the degree of acceptance of this opinion is higher than in countries with non-enacted legislation on these opinions despite their wide use in legal proceedings.

Keywords: expert opinion, expert, public authorities, legislation on expertness.

1 Introduction

In past, the law regulating expertness in the Czech and Slovak Republic was governed by Act No. 36/1967 Sb. stipulating:

- public authorities could delegate too complicated issues to judges, general attorneys, officials, etc.
- an expert in a particular area, knowledgeable of the law on expertness, performed expert activities

The legislation concerning experts imposed fundamental rules for creating, performing and terminating an expert's entitlement. The law distinguished experts and schools of expertness, entrusting experts only with simple tasks, leaving jobs requiring research and development to the schools (Act No. 141/1961 Sb. as amended the Criminal Code).

The legislation concerning expertness vested chairmen of regional courts with appointing experts and the Ministry of Justice with electing academic workers in the Czech Republic. The law set the requirements for entering an expert into the register of sworn experts, considering the expert's nomination unclaimed. The specialist had to meet specific conditions, including Czech or Slovak citizenship, competence to perform legal acts, integrity, his name could not be crossed out from the register of sworn experts for longer than three years, sound knowledge and experience, personality traits suitable for being an expert and his approval of the appointment. The law also governed that the specialist had to take an oath before entering the register. The legislation also stipulated the performance of expertness activities, obliging the expert to be responsible, impeccable and free of bias.

The law further governed the expert's fee, suspending and terminating his right to perform expertness activities, stipulated separately in the legislation. Sec. 24 and 25 (this time solely in the Czech Republic) were incorporated into the law to lay down the ad hoc appointment of experts. In the penultimate part, the legislation governed administrative infractions committed by experts (individuals) and schools of expertness (legal entities), followed by general, interim and final provisions. The activities of experts and schools of expertness were regulated by the relevant legislation, i.e. a regulation complementing the Act on Experts and Interpreters.

In Slovakia, the Act from 1967 was replaced by Act No. 382/2004 Sb. the Act on Experts, Interpreters and Translators as amended on 26th May 2004. Since its effect, the Act has been amended (directly or indirectly) more than ten times.

The Act preserved the obligation of expert subjects to support the decision-making of public authorities. However, the Act changes the concept of an expert in expertness activities and an informed layman into a professional expert in the relevant law, i.e. a specialist in expertness activities and the law.

The law governs requirements for performing expertness activities, rights and obligations of experts, requirements for expertness schools to operate, competence of the Ministry of Justice in its activities and rights and obligations of the client.

The legislation governs expertness activities in legal proceedings and before another public authority or for individuals or legal entities if required by a specific regulation. An expert is an individual or legal subject registered as a forensic expert or unregistered if appointed under Sec. 15 of the Act on Experts. When performing expertness activities, experts must abide by generally binding legislation.

In specific parts, the legislation governs requirements for activities of experts and relative schools, registering individuals or legal entities as forensic experts, specialists at expertness schools, performing expertness activities, expert's fees, termination of the entitlement, administrative infractions and penalties. The law regulates the performance of expertness activities irrespective of the expert opinion being commissioned by a public authority or a private client. In such a case, the expert shall abide by the generally binding legislation, i.e. the Act on Experts, Interpreters and Translators as amended. Expert opinions are governed by Sec. 209 of the Civil Procedure Code, under No. 160/2015 Sb. (civilný sporový poriadok).

§ 209 Act No. 160/2015 Sb. splits into three paragraphs:

(1) A private expert opinion is submitted by a party without the court requesting it.

Although governed only by the Civil Procedure Code, the private expert opinion is also admissible in criminal and administrative proceedings. The Criminal Code (Act No. 301/2005 Sb. – the Criminal Code) and Administrative Procedure Code (Act No. 71/1967 Sb. on administrative proceedings, the Administrative Procedure Code) allow litigants to submit an expert opinion not required by the instituted public authority.

(2) If the complaint contains a private expert opinion including all prerequisites and a determination that the expert is aware of the consequences of filing a perjured report, the expert opinion has the same validity as a report produced by a specialist appointed by the court.

The legislation puts the private expert opinions on the same level as an opinion commissioned by a public authority if containing an expert determination. Yet, there have been many cases when the court, besides the conclusions of the expert opinion, takes into consideration whether the expert opinion was made at the court's request or privately. This situation may lead to a biased judgement against the privately made report. Although the court may ignore the private expert opinion or question its relevance in many cases, the defence can sometimes blame itself for misunderstanding the 'expert' question or choosing poor tactics when defending the client.

(3) If a private expert opinion is being made during the proceedings, the expert may inspect the files or get the necessary information for producing the report otherwise.

The availability of the information and protection of the expert is governed by separate legislation, entitling the specialist to obtain all the data needed for compiling an expert report and get the data and evidence from the client who does not belong to judicial or public authorities and has not submitted the evidence yet.

The article explores the possibilities of commissioning private expert opinions and related legislation within the Slovak body of laws.

2 Materials and Methods

When considering a position of forensic experts in Slovakia, we must study, besides relevant Slovak literature, expert opinions from developed countries, including articles indexed in the Web of Science or Scopus.

We use content analysis for data collection, inspecting laws governing private expert opinions, i.e. 382/2004 Sb. as amended, its statutory instruments and relevant legislation (Criminal and Civil Procedure Code and the Rules of Administrative Procedure). We also explore the global trends in the expert's responsibility presented in scholarly journals, using formal logic methods of data processing: analysis, synthesis, generalization, deduction, abduction, comparison, observation, etc.

3 Results

3.1 Legislation on commissioning and using private expert opinions

Act No. 382/2004 Sb. governs the creation, performance, termination, administrative infractions and penalties of expertness activities, stipulated in Sec. 17 of the Act:

- Clause 1. Expert opinions may be submitted in writing, or orally in the proceedings before the court or other public authorities to be recorded.
- Clause 2. The pages of the expert opinion in a documentary form shall be numbered, bound and tied by a string. The loose ends of the string shall include a sticker, equipped by the expert's seal appendant to the document. Appendices to the document do not have to be numbered.
- Clause 3. If the expert opinion is submitted in an electronic form, each copy shall include a certified electronic signature or seal and a stamp containing the date of the execution.
- Clause 4. A written copy of the expert opinion contains a front page, introduction, opinion, conclusion, and appendices to ensure the reviewability in court and the expert determination.
- Clause 5. Clause 5 defines all mandatory parts of the expert opinion.
- Clause 6. The expert determination is integral to an expert opinion, including the expert's ID, specialization, the serial number of the act under which the expert opinion is qualified and the declaration of the expert that he/she is aware of the consequences upon delivering a false expertise
- Clause 7. Upon the request of the client, the expert confirms, completes in writing or explains details of the expert opinion.
- Clause 8. The expert completes the expertise without undue delay, claimless to a fee if its completion leads to removing methodological and formal errors herein.
- Clause 9. The completion of the expert opinion must not change the original purpose of the document.
- Clause 10. The expert shall keep a duplicate of the submitted expert opinion in writing, signed with his/her handwritten signature or certified electronic signature or certified seal provided with a certified stamp containing the date of the execution for a duration of 10 years.

The parameters of the expert opinion are governed by Regulation No. 228/2018 Sb., introduced by the Ministry of Justice under Act No. 382/2004 Sb. Sec. 19 of Regulation governs the structure, front page and content of the expert opinion:

- Clause 1 outlines the front page of the expert opinion (suggested in Appendix No. 5 of Regulation) and refers to the structure of the expertise (Appendix No. 6), including patterns for expert reports in civil engineering, realty valuation, psychology and counselling psychology.
- Clause 2 lays down the rules for making copies of the expertise.

Expert and private expert opinions are governed by the following legislation:

- Act No. 160/2015 Sb., Civil Procedure Code:
 - § 187 Means of evidence involve expert evidence proceedings and opinion
 - Fourth title:
 - § 206.
 - § 207 expert evidence proceedings allow the court to establish expert evidence as a means of evidence
 - § 208 the performance of expert evidence involves a written execution of the report so that the court may hear the expert.
 - § 209: private expert opinion involves a report delivered by a party without the court's order
- Act No. 301/2005 Sb., Criminal Code:
 - § 36 Defence lawyer may not be an attorney engaged by the court as an expert to the litigation.
 - § 53 The authorized representative of the participating person and the aggrieved party may not be a person engaged by the court as an expert to the litigation.
 - Third title:
 - § 142 expert activities: in criminal proceedings, the presiding judge engages an expert in delivering an expert opinion.
 - § 143: involves engaging an expert, school of expertness and establishes the procedure of appointing an ad hoc expert
 - § 144: deals with a potential conflict of interests an expert may be exposed to
 - § 145: producing an expert opinion and hearing the expert involves setting out the fundamental rules and implementation of the expert opinion and hearing of the expert
 - § 146 errors in the expert opinion: this section establishes the procedure in the event of a questionable expert opinion
 - § 147 expert opinion provided by a school of expertness: this section defines a situation when a school of expertness is engaged in producing an expert opinion.
- Act No. 71/1967 Sb., Administrative Procedures (Civil Procedure Code):
 - § 34 Evidence: the expert opinion is considered evidence.
 - § 36: If an expertise on essential facts is required, the administrative authority appoints an expert
 - § 39 An affirmation made before an administrative authority shall not replace an expert opinion
- Related legislation

3.2 Expert opinion commissioned by a private client

An expert is a person with profound knowledge, experience, education, professional practice or skills in a field beyond the purview of a reasonable person. Unlike witnesses allowed to testify only to things they saw, experts are entitled to give testimony in litigation based on their specialization (The Role of Expert Witnesses in Civil Litigation – Baker Law Group, 2023).

A growing complexity of legal disputes in construction engineering led to an increased demand for expert witnesses in various aspects of judicial proceedings. Experts appointed by the parties have become common when considering cases from many fields, including technical, scientific, legal, valuation and quantity analysis. Expert witnesses must express an objective expert opinion on issues essential for settling the case and which are beyond the knowledge and expertise of the court. Experts are appointed either by one or more parties or a court. Increasing demand for expert evidence in civil proceedings and business arbitrations compels authorities to focus more on the duties of a forensic expert, including sanctions arising from their non-performance (Expert Witness Duties in Construction Disputes, 2023).

An expert opinion may be commissioned by a public authority, individual or legal entity, resting on a concise definition of the issues the expert will be dealing with. Experts are not entitled to respond to legal issues of the case. The Register of Forensic Experts administered by the Ministry of Justice of the Czech Republic (The Register of Experts, Interpreters and Translators) can be instrumental in finding a relevant specialist, or we can address a registered institute or school of expertness. When no expert is registered for the field, or the expertise of the specialist is exceptionally costly or delicate to make, public authorities may appoint a person not included in the register of forensic experts to deliver an expert report (Expert Opinions and All You Need to Know | Articles, 2023). Although clients requesting an expert opinion are predominantly individuals, expert activities have been governed by the same legislation since 1967, when the state was the only applicant for expert reports (The New Legislation Leaves Expert Witnesses Uninterested, Authorities Cry for Forensic Psychologists and Sexologists | Business, 2019). Expert opinions are nowadays chiefly requested by individuals or the private sector trying to settle property, matrimonial or inheritance disputes, tremendously boosting the demand for expert services. The rapid economic growth or changes in the business environment encourage people to buy or sell real estate, make investments, merge companies or reassess the business value, only stressing the notable lack of field specialists.

If a public authority commissions an expert opinion, the appointed expert must not refuse it, subject to the following circumstances: a) serious health issues; b) serious family issues; c) unexpected employee's duties; d) other adverse circumstances; or e) if the legislation decides otherwise. If a private (individual or legal) entity commissions an expertise, the appointed expert may refuse to perform the task for any reason. The public authority of a state other than the Czech Republic is deemed a private person, releasing the specialist from the duty to comply (Vladimír Sharp, 2022). The right to refuse to produce an expert opinion when commissioned by the private sector encourages free enterprise, allowing forensic experts, who are also entrepreneurs, to decide for whom and under which conditions they are willing to work. Private subjects must count on the possibility of an expert's refusal, although well-paid and given enough time to deliver a quality report.

Expert opinions may be required in the civil, administrative and criminal proceedings. In civil judicial proceedings, the court may only hear the expert, or request an affirmation or opinion. An expert opinion in writing may be reviewed by another specialist or a specialized institute. The judge may impose a duty upon anybody to consult an expert, submit necessary documents and explain the matter. In the administrative proceedings, although all expert reports are predominantly in writing, an expert could also be heard. The same applies to criminal proceedings, where the specialist dictates his conclusions in a report. Experts are entitled to inspect the files, be present at the hearing, ask questions and suggest producing further evidence (Expert Opinions – Znalci.com, 2023).

An expert opinion made by a court or party-appointed specialist party is responsible for its credibility and truthfulness. According to the legislation, expert reports must include a clause informing that the expert is aware of the consequences of not delivering a veracious document, impairing the integrity of the proceedings. An expert opinion commissioned in Italian criminal proceedings should provide further evidence on the case requiring technical, scientific or artistic knowledge. This procedure involves analysing and expressing opinions, leading to the settlement of the case (Regulations Governing Expert Evidence Commissioned by a Court or Party in the Italian Criminal Process, 2023). According to (Court-Appointed Experts | Office of Justice Programs, 2023), Rule 706 of the Federal Rules governs that federal courts appoint experts, empowering judicial authorities to impose measures for decision-making. The judicial order to designate an expert is issued before judicial proceedings commence. The court has unfettered discretion over selecting an expert, including a party-

agreed specialist or court, profession or academy-appointed expert. The court and expert communicate in writing or at a conference where all parties may be present. The expert must inform the parties about his findings through a written report, statement or testimony at the public court hearing. The expert may be called on to testify and undergo cross-examination. The expert is entitled to indemnification via means stipulated in the legislation or agreed upon by the parties together with other expenses. The duties of a court-appointed impartial expert may include investigating facts, examining physical evidence, collecting information, performing preparatory tests, inspecting the institution, evaluating documentary evidence and participating in the settlement.

A court may appoint a forensic expert to consider the facts relevant to the expert's competence, including cases of civil procedure and criminal law where the designation is compulsory (as governed by the judiciary). Experts may be appointed for preliminary or pre-trial proceedings, making no significant difference for civil, criminal or administrative proceedings. The litigants may designate a specialist whenever they want. An expert opinion made by a forensic expert (a specialist registered in the Register of Forensic Experts) appointed by a litigant is equal to an opinion given by a court-appointed specialist if it contains an expert's clause stating that the expert is aware of the consequences when giving false testimony (§ 127a the Civil Procedure Code; § 110a the Criminal Code). Although the litigants do not have to follow any specific procedure when appointing an expert, the opinion must inform that the expert is entitled to the expert's fee, independent of the result of the expertise. The specialist must not be the same person for both litigants (European E-Justice Portal – Find an Expert, 2023). Although appointing and employing forensic experts observes general rules, relevant factors and procedures may influence public and private authorities when receiving and discussing expert reports. While legislation may also significantly affect public authorities, private subjects enjoy more flexibility in appointing and cooperating with forensic experts.

The Anglo-American legislation allows the courts to rely heavily on forensic experts as witness specialists when settling disputes. Experts, required to be unbiased and independent, do not directly work for the court, but attorneys-at-law, who want to win the litigation for their clients (Fairley & Huber, 2021); i.e. it is lawyers (private subjects) who commission expert opinions in the Anglo-American legal system.

The Anglo-American and Czech legislation follow the same ethical standards obliging forensic specialists to non-disclosure, irrespective of the situation. Experts are obliged not to disclose any facts learnt when and after performing the expertise. Only the client may release the specialist from the duty of non-disclosure (Duties – Experts, 2023), preventing the leak of sensitive information and enhancing the credibility of expert opinions.

Expert reports commissioned by private subjects and public authorities differ in several ways, e.g. entitlement to an expert's fee. In the event of the private sector, the expert is entitled to the expert's fee under an agreement with the client; otherwise, the expert's fee is subject to the relevant legislation of Regulation on the Expert's Fee. A public authority always abides by Regulation (Vladimír Sharp, 2022).

The Czech legislation regulates expert's fees and expenses related to expert opinions, governing that forensic specialists may be rewarded under a contract with the client or Act on Forensic Experts and Regulation No. 504/2020 Sb., on the Expert's Fee. If a court or public authority, including administrative bodies, commissions an expert opinion, the appointed expert is entitled to a fee according to the legislation. Besides the expert's fee, the specialist is also entitled to compensation for cash expenses and a loss of time, including travelling expenses. Court-appointed experts are entitled to advance money to compensate for their costs. The costs of civil proceedings involve expenses related to the performance of expert opinions. While the successful litigant is entitled to the

reimbursement of costs, partial achievement means that the court either fairly redistributes the reimbursement of costs or declares that neither litigant is entitled to any compensation. The costs of criminal proceedings, including execution proceedings, are paid by the state. If the defendant was found guilty upon final and conclusive judgement, he/she is liable to reimburse the costs to the state, including the cases when the expert opinion was paid by a lump-sum payment. The costs exceeding the limit are paid by the state. The costs of the expert opinion not required by the state, subject to exception, are not covered by the state (European E-Justice Portal – Find an Expert, 2023).

The Czech legislation governs the reward system and costs related to expert opinions in a specific way. If a public authority, e.g. a court or an administrative body, commissions expertise, the forensic expert is not entitled to a contractual fee but is rewarded according to the legislation. On the other hand, court-appointed specialists are entitled to advance payments for their expenses, allowing them to cover costs related to producing the opinion as soon as the proceedings commence. The civil proceedings involve the costs of the report in the costs of proceedings, including the compensation for the successful litigants. In criminal proceedings, the state covers the costs, which shall be reimbursed by the defendant if found guilty. Forensic experts commissioned by public authorities are not entitled to contractual fees, which may discourage them from cooperating with government bodies and attract them to more lucrative contractual earnings.

All clients shall abide by Regulation No. 502/2020 Sb. § 40, governing the duties of the clients. The customer shall ask pertinent, not trivial (a query readily answered by anybody) or legal questions, which should be directed to a law firm. Clients shall inform the expert of the purpose of his opinion and communicate the facts relevant to the credibility and trustworthiness of the report (Reading Expert Opinions, 2023). Experts shall work independently and not under the influence of other persons, threatening the credibility of the report. When performing expertise, experts shall not be subordinate to another person. On the other hand, specialists must remain unbiased towards the client, any other litigant or party, attorney, public authority or the case (Vladimír Sharp, 2022). These restrictions ensure the credibility and trustworthiness of expert opinions, preventing public authorities or private subjects from abusing the process.

Police, as a public authority, gave information about using expert opinions when investigating crimes, including bodily harm. The information about criminal activities spans from 1st January 2022 to 5th December 2022. Forensic experts were engaged in 22.2% of the notifiable cases of bodily harm under § 146 of the Criminal Code. MUDr., as a forensic specialist, was appointed in 20.8% of the notifiable cases. Police asked coroners about the cause of the bodily injury in 100% of the cases. No case involved an opinion on self-defence as a cause of the injury (0%). Asking about a serious bodily injury occurred in 37.4% of the cases where grievous bodily harm was possible but had not happened. Given the experts' varied specializations, no concise methodology for commissioning expert opinions exists (Commissioning Expert Opinions – Police of the Czech Republic, 2023). The Czech police authorities have not set official rules for commissioning expert opinions.

Civil proceedings entrust forensic experts with many essential tasks, including streamlining complex information. Specialists must decode complicated data and present them intelligibly to the judge and jury, involving the clarification of technical terms and processes, e.g. when considering medical malpractice. Experts also voice opinions. Unlike non-expert witnesses, who testify only to the seen facts, specialists express their professional opinion on the submitted evidence. For example, an accident reconstruction expert may confirm or challenge the allegation in the case. Forensic specialists also set professional standards to prevent professional malpractice. Experts also clarify whether the defendant followed the generally established procedures in the field. In civil proceedings, where monetary

compensation is required, economic and financial experts are essential for calculating the damage caused by violating the contract or injuring a person (The Role of Expert Witnesses in Civil Litigation – Baker Law Group, 2023); the litigants rely heavily on expert witnesses, helping them defend in the case. Medical litigations involve medical examiners and coroners voicing opinions on the cause of the injury, the likelihood of long-term detrimental effects or the adequacy of provided medical care. The process of determination involves the medical report as an independent expert opinion or review of medical documentation and transferring the information between the parties (Eskay-Auerbach, 2019). Civil and criminal proceedings discriminate between attending physicians and independent reviewers in terms of the Bar and patient's duties. The attending doctor tends to defend the patient's interests, inclined to depart from an unbiased opinion, which requires strict objectivity. The misunderstanding of possible partiality may lead to misinterpretation, unduly influencing the decision of the court. *Westerhoff v. Gee Estate* case from Canada (Waldman et al. 2020) shows how providers of medical services misrepresented crucial information.

In conclusion, appointing and rewarding forensic experts depends on whether the public or private sector is the client. The former has often limited funds, commissioning expert opinion only if necessary. Public authorities abide by the relevant internal regulations on appointing and rewarding forensic experts, usually varying from those of private subjects. Private bodies are not financially limited when commissioning expert opinions, using the services of forensic specialists even when not necessary. This rule does not apply universally.

4 Discussion and Conclusions

The article aimed to assess the possibilities of commissioning expert opinions and relevant legislation in Slovakia, fulfilling our research aim.

Unlike, among others, the Czech Republic, the Slovak legislation on expertness activities permits the private sector to appoint an expert. Upon considering the client's inducement to commission expertise, public authorities must deem the private expert opinion as if commissioned by a public body.

The incentives to call upon an expert involve the following scenarios. Firstly, the court does not accept the view of one party, asking technical questions in a way the litigant does not like. In such a case, the participants or their attorneys-at-law appoint an expert who will professionally consider the case in favour of the client, shed new light on the matter and twist the course of the proceedings.

Private subjects often appeal to experts to help explain a complex problem during the proceedings. Considering the issue trivial, the court may reject the litigant's request to call upon a specialist, compelling the party to appoint an expert privately to clarify the matter. Secondly, a litigant may plead intentional or unintentional bias or prejudice by a court or public authority. In such a case, new expertise sheds new light on the issue and materially corrects the report commissioned by the court or public authority. The expert is not entitled to consider the formal correctness. The legislation does not govern who can commission an audit opinion. Many cases in the administrative procedure have seen an expert appointed by a party only to delay the proceedings until the lapse of time; i.e. the public authority, which must consider the submitted report, acts under time pressure and cannot resolve before the legally prescribed deadline.

Upon producing the expert opinion, the party submits the document to the court or another public authority for consideration.

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Primary Paper Section: A

Secondary Paper Section: AG