

Introduction

Evidence from a court expert is a common and frequent element of many criminal, civil and administrative proceedings in Poland. However, there are numerous problems with access to reliable opinions from highly qualified experts, which constitutes a significant obstacle to implementing the right to a fair trial. Additionally, the long waiting time to obtain an expert opinion threatens the right to have the case heard without undue delay.

At the same time, it should be noted that the interest of specialists in various fields in serving as court experts is not high. Meanwhile, the low number of experts, especially in some areas of specialization (e.g., medical specializations), results in long waiting times for an opinion to be issued in a specific case and sometimes even difficulty in obtaining any expert to prepare an opinion. This may result from unsatisfactory financial conditions and the threat of criminal liability for possible errors in the opinion. Furthermore, no legislation in Poland would systematically regulate the status and functioning of court experts (although legislative work is currently being carried out in this direction). There is also no systematic mechanism for controlling the quality of expert opinions or precise mechanisms for verifying their qualifications for obtaining this status. Currently, the assessment of the quality, reliability, and completeness of reports is carried out in a dispersed manner - it is dealt with by the court (or other procedural body) in the proceedings for which the opinion was prepared. The assessment of qualifications to act as an expert takes place upon entry on one of the lists of experts. Such lists are kept by the Presidents of District Courts (currently 47 of them). However, it should be noted that they are not equipped with the tools and administrative apparatus to assess whether a candidate for an expert adequately guarantees professionalism.

A specific problem is that the lists of court experts have not been centralized. There is no system for exchanging data between individual lists, which allows one person to be entered into many lists simultaneously. Within these lists, there is also no unified nomenclature for expert specializations, which causes terminological chaos and sometimes also enables the functioning of experts in areas that can hardly be considered as belonging to any field of science (as evidenced by the presence on the list of court experts of the District Court in Warsaw, an expert specializing in "eyelash styling").

Considering the above, we present several recommendations to counteract the problem associated with obtaining expert evidence in Poland. These recommendations were formulated mainly based on an exchange of experience with experts from the Norwegian side during meetings of the bilateral Polish-Norwegian working group on court experts. These recommendations do not contain proposals for a comprehensive review of the legal and factual situation of court experts in Poland. Instead, they constitute an analysis of the possibilities and feasibility of implementing specific experiences, solutions, and good practices operating in this area in Norway. Taking into account the main problems associated with obtaining expert opinions in Poland, we have divided these recommendations into two categories: actions to improve the quality of expert opinions and actions to improve the availability of expert opinions, including the time necessary to obtain them, improving the availability of the experts themselves, and the quality of cooperation between experts and procedural authorities.

A. Actions to improve the quality of expert opinions

1. Creation of general guidelines for expert opinions

Currently, in Poland, apart from general indications resulting from the provisions of codes regulating individual procedures, no document would define an expert's desired patterns of behavior and the content of the opinion he prepared at a general level. We are talking about such patterns as, for example, the obligation to declare in the opinion the research method used by the expert, presenting the results of the conducted research, and separating the research report from the conclusions and opinions of the expert himself. This makes it difficult for procedural authorities to control the quality of opinions. In Norway, there is a "guideline" containing several general recommendations regarding the methodology of preparing opinions and the content of the opinions themselves, suitable for use in any area of expert specialization. It is also worth creating this type of document in Poland. Still, its content should be co-created by the community of court experts, representatives of the world of science, and representatives of legal practice. This document should not take the form of legislative interference but should have the character of "soft law" recommendations and a set of guidelines - this is sufficient to ensure its great importance in applying the law.

2. Providing training opportunities for experts and candidates for experts

Apart from individual cases involving specific associations of experts in a given specialty or universities (e.g., in the form of postgraduate studies), there is no training offered for experts in the field of evidence law and the procedure for preparing and presenting an expert opinion, including its presentation in court. The only group of specialists a priori prepared to become expert witnesses are forensic pathologists (in Poland named forensic medicine doctors) who, through five years of specialized training, learn not only forensic medicine but also how to become an expert witness. Meanwhile, even perfect substantive preparation of an expert in a given area of specialization does not guarantee that he will have knowledge of evidence law and the rules of procedure. In Norway, there are training programs for experts and candidate experts. These programs are diverse in nature. Considering the Polish specificity, the training program conducted by the Norwegian *Den Rettsmedisinske Kommisjon* - a public agency operating in four areas related to forensic experts (forensic psychiatry, forensic toxicology, forensic genetics, clinical medicine, and forensic pathology) deserves special attention. This agency conducts training on the methodology of expert work, the methodology of preparing an opinion, and the method of presenting it in court, even combined with a simulation of preparing an opinion and a simulation of a trial. It would be reasonable to create this training offer for experts and candidates for expert witnesses in Poland. The training should cover the methodology of the court expert's work, the preparation and content of opinions, appearing before the court, the role of the expert, cooperation between the expert and the procedural authority, and the limits of the expert's competencies (e.g., prohibition on expressing opinions on the law). Lecturers, in turn, should be practitioners in giving opinions and applying law. Training could take place in both classroom and e-learning formats.

3. Creation of a central list of individual experts and scientific institutions with a unified nomenclature for the areas of specialization of court experts

One central list of court experts should be postulated to eliminate terminological chaos and negative practices related to the possibility of being entered on more than one list of experts. This list should also include scientific and specialist institutions that, under current legal status, are not included in any type of register. It is worth pointing out that Norway does not have a central or even regional list of court experts. Such lists are maintained only for selected areas of specialization (e.g., child psychology). However, Polish specificity argues for the validity of keeping a list of court experts.

B. Actions to improve the availability of expert opinions, including the time necessary to obtain them, improve the availability of experts themselves, and the quality of cooperation between experts and procedural authorities

1. Abolition of criminal liability for unintentionally issuing a false opinion

One of the factors that discourages specialists from taking on the function of a court expert and which may cause the so-called 'chilling effect' is the threat of criminal liability for an erroneous opinion. While it cannot be postulated that an expert should be excluded from any liability for carelessness in conducting research and preparing an opinion, the use of criminal law instruments for this purpose must be considered highly disproportionate. Hence, we postulate that only intentionally issuing a false opinion should be subject to criminal liability. Therefore, it is justified to waive criminal liability for unintentionally issuing an incorrect opinion (Article 233 § 4a of the Penal Code). The Norwegian legal system does not provide for criminal liability for errors when giving opinions.

2. Increasing the fees of court experts

The fees of court experts remain low in Poland, especially given the relatively high inflation in previous years and the gradual increase in the minimum wage (which indirectly affects earnings in various sectors of the economy). Therefore, increasing the remuneration rates for experts is necessary to encourage highly qualified specialists to serve as court experts.

3. Improving the quality and speed of communication with the expert by creating an electronic communication platform

Counteracting the problem of the time required to obtain an opinion can be at least partially mitigated by improving the quality and speed of communication with the expert. This should be achieved by creating an electronic system enabling remote communication of court experts and procedural authorities, possibly also supporting staff in courts, prosecutor's offices, police units, etc., to perform technical activities accompanying the issuance of opinions (e.g., settlement of opinions, obtain additional documents or materials for opinions). First, the system would be used to transmit decisions on seeking opinions, to transmit digitized files and materials for research, if it would be sufficient to do so in electronic form, and finally, to transmit a ready opinion.

4. Increasing and strengthening the role of private experts

In the Polish procedure, the status of an expert is granted only to a person appointed to prepare an opinion by a procedural body (e.g., court, prosecutor). An expert engaged by a party to the

proceedings is treated as the author of a private document, which is admissible as one of the pieces of evidence in the proceedings, but does not have the status of an expert opinion. In criminal proceedings, the procedural authority is obliged to seek an expert's opinion even if the party presents a reliable and objectively unquestionable private document containing the statements of the expert it has engaged. On the other hand, such private documents are sometimes perceived as "made to order" and not very objective. This is facilitated by the lack of regulation or definition of the status of a private expert in any way. Furthermore, an expert engaged by a party to the proceedings generally does not have access to the case files and the full evidence and, therefore, does not have complete research material. As a consequence, the role of a private expert in Polish proceedings is relatively small. Meanwhile, increasing and strengthening the role of private experts could counteract long waiting times to obtain an opinion. In Norway, the presence of a private expert is a conventional element of court proceedings. However, such an expert must maintain the exact requirements of objectivity, professionalism, and reliability as an expert appointed by the court. He is bound by the same standards (described in the "guide" referred to in point A.1.) as an expert appointed by the court. In turn, the party intending to obtain the opinion of a private expert first signals this intention to the procedural authority by presenting the expert and the scope of issues that he would explain. After obtaining the approval of the procedural authority, there are no obstacles to the private expert gaining access to the complete case materials necessary to issue an opinion, of course, to the extent controlled by the procedural authority. It would be reasonable to introduce similar solutions in Poland, including, above all, defining the role of private experts (as experts obliged to maintain objectivity, even though they act on behalf of a party to the proceedings), involving the procedural body in the procedure of obtaining such an opinion, and at the same time guaranteeing the private expert the opportunity to become acquainted with the materials of the proceedings to the extent necessary to issue an opinion (to the extent controlled by the procedural body). The costs of obtaining a private expert's report should be borne by the party interested in obtaining such an opinion, and would be included in the party's reasonable expenses, which would result in their settlement at the end of the procedure on the same basis as other such expenses. The potential danger of less accessibility of this type of evidence for parties with lower financial capacity would be mitigated by the possibility to request an expert opinion under the existing rules. It is worth noting that the recommendation to increase the role of private experts does not aim to eliminate the role of court experts to the full extent, but rather to create additional possibilities of obtaining evidence upon the initiative of the parties, which would strengthen at the same time the adversarial nature of the proceedings. Moreover, a certain range of opinions should be made mandatory by court appointed experts. For example, this concerns the opinion on the mental health of the suspect (accused), carried out in criminal proceedings by two expert psychiatrists.

Other legal arrangements for experts

Regardless of the recommendations, we also present information on the systemic evaluation of opinions of court experts in selected specialties that takes place in Norway. We believe implementing this legal solution in Poland would be impossible. However, in some aspects, this system may constitute an inspiration for the currently planned reform of court experts in Poland, especially to the extent that it

provides for verification of the reliability of the scientific method used by the expert, carried out by representatives of the scientific community (regardless of the assessment carried out by the procedural authority in a specific case).

In Norway, each expert opinion in the area of competence of *Den Rettsmedisinske Kommissjon* (see point A.2), i.e., in the field of forensic psychiatry, forensic toxicology, forensic genetics, clinical medicine, and forensic pathology, is obligatorily submitted to this agency for evaluation. This evaluation consists of checking the formal side of the opinion, verifying compliance with the general guidelines for experts (see point A.1.), assessing the scientific method used, assessing compliance with the standards of scientific evidence, checking whether the expert does not exceed his competences; assessing the logic of the argument (whether the presented conclusions result from the reported research).

A slightly similar procedure is implemented in Norway by *Barnesakkyndig Kommissjon* (Expert Committee for Children) regarding the opinions of expert psychologists and psychiatrists in family and care matters, primarily in child care. Such opinions must be submitted to the Commission, which shall check the formal side of the opinion, verify compliance with general guidelines for experts, assess the scientific method used, assess meeting the standards of scientific evidence, check whether the expert does not exceed his competences; assessment of the logic of the argument (whether the presented conclusions result from the reported research); verification of the scope of the opinion in relation to the decision; assessing whether the opinion is prepared in clear and understandable language; assessment of whether the expert maintained the standards of professional ethics.

In both cases, the opinion is evaluated by representatives of the scientific community from the area of specialization corresponding to the opinion being evaluated. Each time, two experts from a given agenda participate in the evaluation. Both agencies mentioned above basically work only on the content of the expert's opinion and the decision to seek his opinion, and do not review the files or materials of the proceedings. Both agencies present the conclusions of their evaluation to the procedural body regarding the case in which a given opinion was sought. Evaluation conclusions are freely assessed, just like any other evidence.

Considering the significant number of expert opinions obtained in the proceedings in Poland, designing a similar mechanism covering all opinions, even with selected expert specializations, seems impossible and unjustified. However, the opinion audit itself may be an inspiration for implementing certain legal solutions in Poland, especially in the reform of the court expert system currently being developed. The fact that other representatives of the scientific community evaluate opinions is particularly noteworthy. Therefore, they have a much greater opportunity (compared to the procedural body) to verify the quality and reliability of the scientific method chosen by the expert or the correctness of the interpretation of the data he obtained as a result of the research conducted. The possible implementation of such legal solutions in the Polish legal system would require the selection, preceded by consultations, of the areas of specialisation in which expert opinions would be subject to evaluation. Furthermore, it would be necessary to determine the mechanisms for the selection of opinions to be evaluated, as it seems impossible to subject all opinions (even from selected areas of specialisation) to this procedure. This could be done by random selection of a specific sample of opinions for evaluation, or it could be based on a reasoned request from a party to the proceedings or an instruction from the procedural authority. It is worth pointing out that also the described legal solution adopted in Norway is currently under discussion aimed at limiting the scope of the evaluations carried out.

Further steps

Concluding the presentation of the recommendations and other legal solutions, we indicate further desirable courses of action to improve the quality and availability of expert evidence in Poland. It seems necessary to undertake consultations with the scientific community in order to consider the implementation of the recommendations made in this report. To the extent that this involves a change in the law, it is reasonable to present the recommendations to the Working Group for the Preparation of the Project of the Act on (Court) Experts, appointed by the Minister of Justice by order of 17 April 2024. Above all, however, it is necessary to continue the cooperation and exchange of experiences with the Norwegian Party, especially with regard to the creation of a comprehensive course and training offer for experts and expert candidates, strengthening their competence and the quality of their opinions. As indicated in the report, there is already a methodology in place on the Norwegian Party in this regard, and a comprehensive training programme for expert witnesses, including modern teaching methods involving simulation of opinion preparation and mock trial, is being implemented there. Thus, using the experience of the Norwegian side opens up the possibility for effective and rapid implementation of the recommendations presented in this report, especially in terms of the training offer for experts.