

STATUS OF EXPERTS IN CRIMINAL PROCEEDINGS IN THE REPUBLIC OF SERBIA *

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Abstract. *The growing use of forensic science in criminalistics resulted, in practice, in the need that the parties in criminal procedure, particularly the defendant and the injured party (acting as a prosecutor), increasingly hire experts as consultants. With the introduction of the concept of prosecutorial and police investigations in criminal procedure in the Republic of Serbia, it is evident that assistance based on the knowledge from different fields and disciplines of science, technology, arts or crafts is essential to the public prosecutor. There is also no doubt that the subsidiary prosecutor, defense counsel and the defendant increasingly needed such assistance. The amendments to the Criminal Procedure Code introduced the concept of an expert advisor. Modeled after similar solutions in comparative law, the expert advisor has wider options when it comes to helping the parties in the proceedings. Participation of expert advisors can realistically contribute to the quality of professional expertise in court proceedings, in order not to miss important details relevant to the proceedings as a whole. In this paper, the authors deal with the status of experts in criminal proceedings in the Republic of Serbia. The form and content of their expert assistance deserves further analytical analysis and critical examination.*

Key words: *criminal procedure, an expert, expert advisor, specialist, forensics.*

1. INTRODUCTORY REMARKS

In the process of establishing the material truth, courts are increasingly relying on the findings and opinions of experts. Expertise as a forensic procedural action represents, both in our country and worldwide, an achievement of modern justice. A court expert is a qualified

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person who is required to meet certain formal and substantive conditions. A court expert is an associate of the court where his expert findings and opinion greatly assist the court to determine the truth, that is, to establish specific facts, after which the court judge opens or concludes the main hearing. The course and the outcome of judicial or extra-judicial proceedings largely depend on the quality and comprehensiveness of the findings and opinion of the expert.

In criminal proceedings, a court expert is a legally competent person of appropriate profession who provides professional assistance to the main participants of the criminal procedure in resolving criminalistic, technical and other professional issues, or in the process of undertaking criminal procedure actions. As a rule, professional assistance is usually provided to the investigating judge or a designated police officer when taking procedural actions in the course of criminal procedure. With the introduction of the concept of prosecutorial-police investigation, it is evident that the assistance based on knowledge from different fields and disciplines of science, technology, arts or crafts is also available to the public prosecutor. There is no doubt that the subsidiary prosecutor, defense counsel and the defendant also need such assistance.

The issues relating to the use of a special expert knowledge in criminal proceedings have become topical due to the long-awaited adoption of the Act on Court Experts¹ which is expected to break up with the practice of marginalization of court experts as a profession in Serbia. In any case, parties in criminal procedure have the need to use modern scientific achievements in technical and other exact sciences, which are applied, for example, in criminal investigation techniques (Maksimović, 2000).

2. EXPERT PERSON – SPECIALIST

The Criminal Procedure Code (2014)² of the Republic of Serbia explicitly accept a narrower meaning of the term “*expert witness*” by specifying that an expert witness is not the only one who can use special (non-legal) expertise in the procedure, nor is he the only one who may apply such knowledge in the process. In fact, according to the Criminal Procedure Code, the possession of expert knowledge is also characteristic for the “*expert person*”, which is equally true for experts in criminal proceedings who provide advisory and consultative help (*expert advisors*) and for experts who provide professional technical assistance in performing criminal procedure actions (*professional assistants*).

Our legislator recognizes the actual differences between an expert witness and “an expert person”, who are relatively independent procedural subjects and the holders of different secondary procedural functions; therefore, they use different forms of non-legal expert knowledge in criminal proceedings. The procedural activity of an expert witness has always focused on obtaining new evidence, and the result of his activities is embodied in *the expert testimony* which is used as evidence in court. In addition, an expert witness activity takes place within the scope of a subject-specific expert examination in criminal proceedings. The result of the procedural activity of “an expert person” (a specialist providing expert assistance in the narrow sense) is embodied in a *statement* that does not have the power of evidentiary instrument in court and does not constitute a subject-specific content, as it is already included in the procedural activity of the party who is being

¹ Act on Court Experts of the Republic of Serbia, Official Gazette RS, No. 44/2010.

² The Criminal Procedure Code, Official Gazette RS, No. 55/2014.

assisted. Moreover, the activity of "an expert person" does not ensue within the subject-specific expert examination proceedings but in the process of undertaking any criminal procedure action. Finally, it should be noted that the abovementioned activity is related to undertaking criminal procedure actions only when it comes to providing professional and technical assistance, while the advisory activity of specialists is not limited in this respect.

In our criminal procedure, "an expert person" has a much wider scope of procedural activities in relation to specialists in other countries, for example, in the Russian and Ukrainian criminal proceedings. In the criminal procedure legislation of these countries, a specialist (an expert in the narrow sense) is defined as a person who possesses the scientific, technical or other specialized knowledge and experience; at the request of the investigative body, the specialist assists in undertaking investigative and judicial criminal procedure actions (Veličkin, Turčin, 1996:93-100). A specialist is defined as a criminal court expert who provides assistance only for purpose of undertaking criminal procedure actions, which corresponds to the so-called *expert assistant*. In contrast, in Serbian criminal procedure, "an *expert person* (specialist)" provides subject-specific assistance to a criminal court in the course of criminal proceedings and, to some extent, it may help the parties as well in resolving certain technical and other disputable expert issues, acting as the so-called *expert advisor*.

In the criminal procedure doctrine of the former USSR countries, the procedural activity of this specialist entirely covers the so-called informative and consultative activity, which is usually considered as a special form of using subject-specific expertise in criminal proceedings (Orlov, 1988:15). In this regard, we may raise the question of justifiability of the Serbian legislator's decision to provide such a wide range of procedural activities of the "expert person".

Results from practice indicate that this question is not easy to answer, even though it may seem at first glance that our legislator has chosen the right solution. The research of specialists' activities in the Russian judicial practice shows that the most commonly used *forms of expert assistance* in criminal court proceedings are as follows: *consultations* on specific technical issues; *resolving dilemmas* about the possibility of providing expertise in a particular case; *providing explanation* about certain events and phenomena; *clarifying technical terminology*; *pointing to relevant facts* that are of importance for the investigation (Mihailov, 2002:127-130).

In practice, the content of activities performed by a specialist exceeds the scope of his procedural activities as defined by Russian criminal procedure doctrine and legislation. The scope of procedural activities of specialists in the legal practice of the Russian Federation corresponds to the term "*expert person*" in our legislation. Consequently, it can be concluded that the possibilities of using the knowledge of "an expert person" as envisaged in the Serbian criminal procedure legislation are much wider and more diverse.

In terms of application of expert assistance, judicial practice in Serbia shows that such a possibility has not been fully exploited yet. Moreover, bearing in mind that this conclusion primarily relates to the so-called *expert advisors*, it could be concluded that in terms of the scope of procedural activities of "an expert person" the Serbian judicial practice is more inclined to the solutions from the Russian legislation, which is closer to our practice (Žarković, Lajić, 2004:65-84). Thus, for example, the practice of the former District Court in Belgrade shows that expert assistance is usually provided exclusively to a criminal court by forensic officers and police experts for traffic in the course of undertaking criminal procedure actions, usually including detection, marking, fixing and packaging evidence, creating photo albums, sketching and camera recording, etc. (Milošević, 2003:209-226).

3. EXPERT ADVISOR

It is known that the parties in the criminal procedure contribute to determining the legally relevant facts in criminal proceedings by proposing to the court to establish certain evidence, attending the presentation of evidence when they may ask questions, seeking clarification and information, proposing new evidence and providing critical assessment of the presented evidence, etc. This equally applies to the facts which are determined on the basis of lay knowledge and general experience and to the facts that are determined by applying a special expert knowledge (expertise) in criminal proceedings.

In this regard, we may raise the question of the competence of the parties to critically assess and file objections about the facts contained in the statement of an expert witness and make some comments on that statement, when it is clear that the public prosecutor, the accused and defense counsel do not have enough expertise in a given nonlegal area. This also applies to the injured party and the private prosecutor. Expert assistance to parties is fully justified from the standpoint of the goals of criminal procedure because, owing to the experts' contribution to establishing the facts, parties may objectively contribute to shedding more light on criminal matters and a successful solution.

Italy, for example, is one of the countries which have more experience in the implementation of this solution. *Technical adviser* as a special qualified person that has existed in the Italian criminal procedure since 1955, and similar solution was envisaged in the Italian Criminal Procedure Code of 1998, in Article 225 (appointment of a *technical consultant*), Article 230 (activities of a technical consultant), and Article 233 (technical consultancy other than court expertise).³

The Italian legislator, as well as the Serbian legislator, has accepted the so-called narrower conception of *an expert person*, by linking the activity of this specialists to investigation and professional expertise of an expert witness in particular. It should be noted that "*a technical consultant*" as an expert assistant of the parties (the accused, the victim and the private prosecutor) may appear in the main trial hearing, but it is usually in summary proceedings when the discussion is not preceded by an investigation.

If a technical consultant attends the process of expert examination, he can make suggestions and place remarks that shall be entered into the court record. If he is engaged after the completion of the expert examination, he can obtain a copy of the expert witness testimony at the expense of the party that has hired him, on the basis of which he can draw up written remarks that will be read at the main hearing. When attending the main trial hearing, a technical consultant will be examined as an expert witness.

Drawing on the identical arguments and comparative models, a similar solution was envisaged in the official Draft of the Criminal Procedure Code (CPC) of the Republic of Macedonia in 2008 (Krstevska, 2009:143). According to the Draft CPC (Art. 253), a *technical advisor* may be appointed by the public prosecutor, the defendant and the defense counsel from the list of registered expert witnesses, in order to assist them in collecting data, assessing or contesting the expertise. The number of technical advisers may not exceed two experts. If the defendant is a poor person, then he/she is entitled to have a court-appointed technical advisor, whose services are paid from the state budget. The draft further envisages that a person who is not eligible to act as an expert witness may not be appointed as a technical advisor. During the expert discussions on the text of the Draft CPC, this provision was

³ Codice di procedura penale, "Gazzetta ufficiale della Repubblica Italiana" No. 250/1998.

supplemented by introducing another paragraph, under which the rights and obligations of expert witnesses shall equally apply to technical advisers. Advisers are defined as experts from the Register of expert witnesses, who may be appointed by the parties in the course of criminal proceedings when they need expert assistance in a particular area.

Finally, according to the Draft CPC (Art. 254), technical advisers may take the following actions: 1) they may attend the process of assigning tasks to the expert witnesses and, thereupon, place requests and file objections with the court concerning the expertise which has been entered in the court record; 2) acting at the request of the parties, they may participate in the process of expert examination (perceived in a broad sense), whereby they may suggest specific expert investigation, and make objections that will be entered in the expert's report; and 3) if they are appointed after the completion of expert examination, they can examine the expert's report and seek authorization from the court to examine the person, object or venue that was subject to expertise.⁴

The 2014 Criminal Procedure Code (CPC) of the Republic of Serbia⁵ provides the possibility for the parties, in particular for the defendant and the injured party (acting as a subsidiary prosecutor) to privately hire the appropriate experts as an informal *professional consultant* (i.e. expert advisor), in case there is a need to critically evaluate the results of an expert witness examination. In practice, these situations are relatively common, such as the consultation with experts outside the investigative actions, which can be determined on the basis of court records and statistics (Soković, 2008:41).

Article 126 of the Serbian Criminal Procedure Code (CPC)⁶ provides that the expert advisor (*professional consultant*) has the right to attend the expert witness examination (which may also be attended by the defendant and his counsel), to inspect files during the expert examination and to propose to the expert witness to undertake certain actions, to make comments on the findings and the opinion of the expert witness, to pose questions to the expert witness in trial proceedings and to be examined on the subject matter of the expert examination.

In addition to the right to select expert witnesses and propose the subject matter of expert examination, the parties are also entitled to select the expert advisor whenever the authority conducting proceedings orders an expert witness examination (Article 125). The parties are entitled to this right regardless of whether the expert witness has been appointed *ex officio* or at the request of the opposing party.

The public prosecutor is in charge of the preliminary proceedings until an indictment is raised; thus, he can have an expert advisor only after the indictment has been raised. Expert advisor must have the same qualifications as an expert witness. The expert advisor freely selected by the party does not have to be taken from the list of registered expert witnesses.

According to Article 125 (para. 3), only the defendant and the injured party (acting as a prosecutor) can submit a request for the appointment of an expert advisor whose professional assistance will be paid from the state budget, providing that the defendant is charged with a criminal offence punishable by a term of imprisonment exceeding 3 years, in cases where it is required for reasons of procedural fairness and in other justifiable cases (Art. 77, para 1), as well as in cases where the defendant and the injured party (as a subsidiary prosecutor) cannot afford to pay the costs of appointing an expert advisor and where the appointment

⁴ The provisions on technical advisers were eventually omitted from the text of the 2010 Macedonian Criminal Procedure Code (Zakon za krivičnata postapka, "Služben vesnik na Republika Makedonija" br. 150/2010).

⁵ Article 125, the Criminal Procedure Code, Official Gazette RS, No. 55/2014.

⁶ Article 126, the Criminal Procedure Code, Official Gazette RS, No. 55/2014.

of the advisor is in the interest of the procedure. The decision on the appointment of an expert advisor is rendered by the judge in preliminary proceedings, or the presiding judge in the main trial, or a single judge in summary proceedings, whereas the expert advisor is officially appointed by the president of the court conducting the proceedings (from the list of permanent court expert witnesses registered with that court). An expert advisor may only attend an expert witness examination which the defendant and his counsel are entitled to attend (Article 126, para.1).

The difference between *an expert witness* and *an expert advisor* (professional consultant) is that the expert advisor does not submit findings and opinion in the course of the proceedings, but only points out to the flaws in the findings and opinion of the court-appointed expert witness. Expert advisor expresses his opinion on the subject matter of expertise and has the opportunity to present his findings and his opinion but, even then, his *statement* does not have the procedural form of findings and opinion provided by an expert witness. Yet, this statement has probative force and the judge may take his opinion into account in the course of sentencing. The expert advisor is required to take an oath which is similar to the oath taken by the expert witness. However, whereas an expert witness gives an official testimony, an expert advisor can only give a statement. In his oath, he promises to fully and accurately present his findings and opinion, which ultimately means that he is not obliged to give evidence against the party that hired him. He is obliged to provide assistance to the party in a professional, conscientious and timely manner (Article 126, para.) rather than working to its detriment. His activities may not be detrimental to the proceedings, but he is not obliged to cooperate with the authorities in charge of running the proceedings.

4. EXPERT WITNESS

The current Criminal Procedure Code (2014) of the Republic of Serbia recognizes only two types of experts in criminal proceedings: *an expert witness* and "*an expert person*". The possibility of making use of other forms of non-legal professional knowledge related to evidence and fact-finding primarily refers to exceptional cases where such knowledge and experience may contribute to clarifying the subject-specific issue; in criminal proceedings, it commonly implies the services of *an expert witness*. Our legislature does not make a distinction between *an expert witness* and the so-called *lay witness*, and the situation is similar in the domestic criminal procedure theory.

Unlike an ordinary (lay) witness, *an expert witness* has special professional knowledge which enables him to examine the facts or circumstances which are essential for rendering a professional opinion (expertise) on the subject matter under consideration. An *expert witness* differs from the *court-appointed expert witness* in that he perceives the facts at the time of the criminal event, not at the time of criminal proceedings; moreover, an *expert witness* account is provided in the form of a statement similar to that given by a lay witness. Therefore, a expert witness is the witness who, by applying special professional knowledge, accidentally observed some facts and circumstances within his area of expertise *in the past*, and who is summoned to give a statement about them *at present*; given his/her direct involvement, this person is an irreplaceable expert witness (in the true sense of the word).

In theory, an example of an expert witness (in the true sense of the word) is the *doctor on duty* who examined the injured person, given that he is the only medical professional

who could competently testify about the condition and type of injuries sustained by the injured person. In the German criminal procedure theory, another example of an expert witnesses is the *police officer* who has special non-legal knowledge, provided that he is asked only those subject-specific questions which he may respond to as an expert in a specific area. In addition, the police officer can always be heard on a specific issue in the professional capacity as an expert witnesses, even though he is not officially registered as an expert witness in that criminal matter. Certainly, he will testify regarding the facts which he encountered while performing his official duties (Ilić, 1997:214).

Notably, the legal status of *an ordinating specialist* (lat. *Ordinarius*) who treated a deceased person should be given special consideration in practice. According to the explicit provisions of the Serbian legislation and other EU legislations (e.g. Polish), such a doctor may not be appointed as an expert witness in that criminal matter. The doctor can, if necessary, be invited to attend the examination and autopsy of the corpse of the deceased person whom he has been treating as his patient. Relying on the above criteria, the doctor who treated the deceased is considered to be *an expert witness* in the true sense (Wetterich, 1970:59). In a situation when the doctor is invited to attend the autopsy of the deceased person who used to be his patient in an earlier period, he has the same rights and duties as any other lay witness who is examined outside the main hearing. The testimony of this doctor must be kept in a special case file and, in particular, outside the file containing the findings of the expert autopsist.

In principle, this witness does not have the right to formally put objections to the expert autopsist regarding ways of detecting and fixing (preserving) certain facts and related issues, given the fact that, at the moment when autopsy is performed, the doctor does not act in the capacity of a specialists but rather in the capacity of a witness. We agree, however, with the standpoint that this doctor may be required to make a statement about the facts directly observed during the autopsy itself, and that, if necessary, this doctor can be subsequently examined (Kramarić, 1997:36). In particular, he will be examined (in trial proceedings) if the expert testimony on autopsy has not been accepted by the court.

It is important to emphasize that this doctor applies the same special professional knowledge and observes the facts at the time of autopsy (*at present*) on the same basis as they were observed when he treated the deceased (*in the past*). In any case, this witness is an irreplaceable *expert witness* in the true sense, to an equal extent as "expert person" or a court-appointed expert witness when questioned in the capacity of an expert witness.

5. CONCLUSION

In modern conditions, the need for using special technical knowledge of forensic science and other non-legal field cannot be denied to the public prosecutor, the defendant and his defense counsel, and the injured party (acting as a prosecutor). They are all entitled to the professional assistance of court experts, "expert persons", specialists, expert advisors, expert witnesses. Acting in the legally prescribed manner, all these entities use their special knowledge and experience in any field of science, technology, arts and crafts contribute to clarifying disputable facts and resolving certain technical and other disputable issues, all of which is ultimately aimed at accomplishing the objectives of criminal proceedings. Considering the fact that the court judgment greatly depends of the findings and opinions of experts, it is necessary to avoid further marginalization of the profession of court experts. A

more comprehensive regulation of their legal status may be modelled after legal solutions applied in other countries, including a system of licensing registered court experts.

The Serbian Criminal Procedure Code (2014) introduces the concept of an *expert advisor (professional consultant)* who is entitled to review documents and case files during the court-appointed expert examination, and to propose to the *court-appointed expert* to undertake certain actions. The participation of an expert advisor can realistically contribute to the overall quality and effectiveness of expert examination, by ensuring that the court-appointed expert has not omitted some details that may be important in the course of criminal proceedings. New legal solutions on this matter will contribute to overcoming the fact that the use of experts/specialists (since 1977 up to date) has been largely reduced to hiring forensic technicians (who are police officers). At the same time, the professional assistance of experts of other profiles, not only to the parties but also to the criminal court, was an exception rather than the rule. The final answer to the question of expediency in providing expert assistance to parties in criminal procedure, and to all other related issues, may only be provided in practice by applying integrated solutions.

In any case, further promotion of all forms of non-legal expertise in our criminal procedure would significantly contribute to standardizing the legal framework on mandatory provision of expert assistance and introducing the concept of *expert witnesses* modeled after relevant solutions in comparative law.

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STATUS EKSPERATA U KRIVIČNOM POSTUPKU U REPUBLICI SRBIJI

Sve izraženija primena forenzičkih disciplina u kriminalistici rezultirala je potrebom da krivično-procesne stranke, a naročito okrivljeni i oštećeni kao tužilac, u praksi sve češće angažuju stručna lica kao konsultante. Sa uvođenjem tužilačko-policijskog koncepta istrage u krivičnu proceduru u Republici Srbiji, evidentno je da se pomoć bazirana na poznavanju različitih struka i disciplina nauke, tehnike, umetnosti ili zanata ne može poreći ni javnom tužiocu. Nesporno je, takođe, da je takva pomoć sve potrebija i oštećenom kao tužiocu, braniocu i okrivljenom. Izmenama Zakonika o krivičnom postupku (2014) uvodi se stručni savetnik koji po ugledu na slična rešenja u uporednom pravu ima šire mogućnosti kada je u pitanju pomoć stranci. Učešće stručnog savetnika realno može doprineti da veštačenje bude temeljnije obavljeno, tj. da ne promaknu važni detalji od značaja za postupak u celini. U ovom radu autori se bave statusom stručnih lica u krivičnom postupku čija forma i sadržina pružanja stručne pomoći zaslužuju dodatno analitičko sagledavanje i kritičko preispitivanje.

Ključne reči: *krivični postupak, veštak, stručni savetnik, specijalista, forenzika.*