

Characteristics of expert's report as evidence

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Abstract. In recent years, there has been an increasing need for private expert's report for judicial evidence. In practise, it appears that a well-developed expert's report is an important bases for the court's decision-making. It is no secret that the quality of the expert's reports presented varies. Therefore, when expert drawing up his expert's report, either directly for the court or for the parties, the expert should avoid mistakes and pay attention to the quality of the expert's report, which should have certain characteristics that we address in this paper.

1 Introduction

In recent years, there has been an increasing need for private expertise for judicial evidence. In practice, it appears that a well-prepared expert report is an important basis for the court's decision-making. It is no secret that the quality of the expert opinions presented varies. Therefore, when drawing up his expert's report, whether drawn up directly for the court or for the parties, the expert should avoid errors [1] and pay attention to the quality of the expert's report [2], which should have certain characteristics that we address in this paper.

2 State of the problem at home and abroad

2.1 Expert as a perpetrator of a crime

The expert may be the perpetrator of the offense by giving **false expert opinion**. The facts of this offense are contained in § 347 of the Criminal Code.

If an expert before a court, prosecutor or police in criminal proceedings, before a court in civil or execution proceedings, or before a public authority, or before an arbitration tribunal, declares an untrue circumstance that is essential to the decision or such circumstance conceals, or causes minor damage to another, by misrepresenting circumstances that are material to the person to whom the expert report relates, or material to the decision underlying the expert report, or to conceal such circumstance, will be punished by imprisonment for one to five years.

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The expert will be punished by imprisonment for three to eight years if he commits the offense in a more serious manner or on a specific motive.

The expert shall be liable to a term of imprisonment of four to ten years if he commits the act in question and causes considerable damage or any other, extremely serious consequence.

The features of this offense will not be fulfilled not only when the expert in court, the prosecutor or the investigator in the criminal proceedings declares the facts which are essential for the decision, but even if they conceal such circumstances. The expert may commit this criminal offense both by action and omission of his obligation arising from his position in criminal proceedings.

The offender may only be an expert in connection with the performance of his duties. The perpetration of the offense is deliberate, and the perpetrator's intention must also apply to the fact that it is a circumstance which is essential to the decision. This factual nature of the offense protects the interest in the correct establishment of the facts as a basis for the legal decisions of courts, prosecutors, investigators or police authorities. [3]

2.2 Mistakes in expert's acts

Article 146 of the Code of Criminal Procedure deals with the errors of a written expert act in criminal proceedings: "If doubts arise as to the accuracy of the expert report or if the expert report is unclear or incomplete, the expert must be asked to explain or complete the report. If this would not remove the doubts or uncertainties of the expert opinion or the completeness of the expert opinion, another expert shall be added."

Errors in expert activities can be divided into [4]:

- formally,
- methodological and content.

The most common **formal errors** in the submitted written expert opinion occur due to failure to comply with the formal requirements laid down in Act No. 382/2004 Coll. and in Decree no. 228/2018 Coll. These are:

- the individual pages of the expert report are not numbered or tied and stapled; the free ends of the line are not obscured by a sticker or not stamped with an official stamp,
- lacks any of the particulars of the title page,
- the composition is not observed (valid only in written expert opinion),
- missing expert's signature,
- missing official stamp or non-blue stamp,
- the date or place of the expert's work is not stated,
- there is no expert clause,
- the wording of the expert clause is not within the meaning of the legal standard,
- the expert clause is not signed by the expert or the person responsible for the expert activity (legal entities),
- the number of the expert act does not correspond to the number recorded in the expert's journal.

An expert act shall be considered to be **methodologically incorrect** if:

- is based on incomplete or technically unacceptable documents and the expert did not draw attention to this fact and did not ask the contracting authority to supplement the documents,
- the expert did not take into account all the facts that were relevant to the opinion, but selected only some and with others, e.g. he did not deal with contradictions,
- the expert unambiguously solved the expert tasks, although the range of input values or the level of scientific development of the given field does not allow such unambiguous solutions,
- the expert is unauthorized in dealing with legal issues or pre-settles legal issues unequivocally and fails to draw attention to the possibility of another alternative,
- the opinion is ambiguous or unclear, the exact opinion of the expert on the issue is not obvious,
- the report is incomplete - the expert did not provide answers to all questions in the expert's report; the answers to the questions are incomplete,
- the expert based on illegally obtained documents,
- when drawing up the report, the expert is based on knowledge that no longer corresponds to the given scientific level of knowledge at the time of submitting the report;
- in carrying out the task, the expert is based on an incorrect or invalid regulation for the date of the assessment;
- the expert did not approach the examined issue systemically and did not consider the properties of all elements and their interaction,
- the expert has prepared an report/supplement in the field/sector in which he is not registered, the expert has also prepared answers to those questions (tasks) that belong to a field/sector in which he is not registered,
- the expert in the expert act solved and provided data which he did not have in the task of expert.

2.3 Assessment of expert report as evidence

The objective of rating an expert report as evidence is to assess it in terms of factual, formal and content correctness [5].

Rate of ***factual accuracy*** of an expert report represents a rating of its quality, resp. truthfulness. The problem in this area may be, in particular, that the expert report is prepared by the expert in the matter, but is assessed by a layman (court or judge). That is why the expert should prepare his report not only in the statutory, but also in sufficiently comprehensible form, so that the review is written in a way that allows other stakeholders to understand its content.

The ***formal correctness*** of the expert report is also rated, i.e. whether it is at all an expert opinion from a formal point of view (whether the composition and particulars of the expert opinion are respected, whether it is signed, stamped, or missing an expert clause, etc.). [6] Subsequently, the ***procedural requirements*** of the report are also rated, whether it is even possible to authorize the expert report as evidence. Indeed, if the evidence for obtaining the expert's report were obtained in an unlawful manner, if the expert's person were biased, if the expert evaluated the legal aspect of the matter, etc., it would not be possible to use that expert's report as evidence.

In addition to factual and formal correctness, the assessment is also rated in terms of **content correctness**, which mainly concerns the verification of input documents (especially whether these documents are sufficient to answer questions, whether they are true and logically acceptable) and the rating of the expert's work (rating whether the expert chose the right method, whether he used it correctly and so on).

In practice, there may be situations where the court's rating of an expert report raises doubts about the correctness of the expert opinion. Such a situation is dealt with in Section 146 of the Code of Criminal Procedure [7]: "If doubts arise as to the accuracy of the expert opinion or if the expert report is unclear or incomplete, the expert must be asked to explain or complete the expert opinion. If this would not remove the doubts or uncertainties of the expert opinion or the completeness of the expert opinion, another expert must be added." In the past, the equivalent provision corresponding to civil litigation was contained in § 127 of Act No. 99/1963 Coll. The Code of Civil Procedure, as amended, under which "an expert opinion may also be reviewed by another expert, scientific institute or other institution". However, since this legislation, the recodification of civil procedural law, by the adoption of Act no. 160/2015 Coll. Civil Procedure Code and Act No. 161/2015 Coll. The Civil Extrapolation Code has been dropped. In § 207 para. 3 of Act no. 160/2015 Coll. the Civil Procedure Code, as amended, provides for an indirect arrangement which allows such a procedure under strictly defined conditions. These conditions are (1) the fact that there is a clear discrepancy between the conclusions of the experts so far, and (2) the person conducting the audit report will be an expert institute. In these cases, so-called the **review (control) expert opinion**, while the expert appointed for the preparation of such opinion is obliged to cope with the previous opinion.

For example, in German civil proceedings, the court may invite the parties to nominate an expert. If the parties agree on the expert, this decision shall be binding on the court. At the same time, the court will determine the extent to which the expert can maintain contact with the parties involved. The expert must be impartial and independent in the drawing up of the expert report, with the result that, according to the decision of German judicial practice, the expert report submitted by a party in civil proceedings has less weight. It is permitted in Germany that if the judge has the expertise necessary to consider the case, he may judge it himself. However, the parties must be informed of that procedure. In the field of expert evidence in the German legislation, we can register the difficult position of the expert in the preparation of a written expert opinion, because the German legislation does not contain any provisions on the formal and content requirements of the written expert opinion.

3 Research results – characteristics of expert's report as evidence

It is often the case that an expert report is the basis for a final court decision. Consequently, the person of the expert, as well as the expert opinion, must fulfill all the attributes placed on them in order for the expert evidence to be considered reliable, true, high-quality and objective. The aim is that the court can base its decision on such evidence and has no doubt about it. The court decision thus issued also guarantees a fair trial.

Thus, in addition to the statutory requirements [8], an expert opinion should also meet the following requirements [9]:

- a) complexity,
- b) internal consistency,
- c) independence and impartiality,
- d) completeness,

- e) repeatability,
- f) the soundness and reasonableness of the methods used in drawing up the report,
- g) mutual control of the methods and procedures used in the expert report,
- h) the reliability and decisiveness of the data used in drawing up the expert report.

Ad a)

The **complexity** of the expert opinion must be perceived on two levels, namely the factual and temporal level. On the merits, an expert's report is complex if it takes into account all the legitimate interests, rights and obligations of all parties concerned independently, impartially, justifiably and justifiably. Complexity in the temporal plane is determined by taking into account the past, present and future state of the examined phenomenon. Consequently, an expert's report is considered to be complex if the expert has taken into account, independently and impartially, all the relevant facts which he should have had and could have taken into account in its preparation.

Ad b)

The expert opinion is **internally consistent**, unless the general assumptions, principles, methods used, etc. mutually contradict each other. Thus, the expert must use procedures and methods that are consistent with the general assumptions of their use and on which those methods and procedures are based, as well as with the assumptions explicitly set out in the expert opinion, when drawing up the expert opinion. If this principle were not respected, it would not be possible to determine the correct result.

Ad c)

The requirement of **independence and impartiality** is met if the expert is in no way interested and dependent on the outcome of the expert report or on the course and outcome of the court proceedings in which the expert report is to be used. Nor should the expert intentionally influence the outcome of the assessment to the benefit of any interested party by choosing certain methods, data or procedures used in the preparation of the opinion. [10]

Ad d)

The aim of the requirement for **completeness** of the expert opinion is, in particular, to ascertain the methods used, the assumptions used, the whole procedure by which the expert reached at the result given in the expert report, the information and data used. Compliance with this principle is a condition for compliance with the repeatability principle.

Ad e)

The **repeatability** of the expert report is associated in particular with the possibility of reviewing the examination carried out, calculations and procedures used by the beneficiary. The structure and form of the review should be clear, not misleading the recipient, etc. The expert opinion must be repeatable also from the perspective of another expert. This means that even an impartial expert must be able to repeat the procedure used by the expert in making the report and to produce similar results, using an average effort and based on information on procedures, methods and data sources.

Ad f)

The **soundness and reasonableness** of the methods used in the preparation of the opinion means that all the procedures and methods used in the preparation of the expert report were by the expert in his independent and impartial consideration of all the relevant facts and information he had and could have known in the opinion - that there was a good reason to use them. On the contrary, the concept of justification must be distinguished. It is

justified to use certain methods and procedures in an expert opinion if the expert explicitly states directly in his expert opinion the reasons which led him to use them.

Ad g)

Compliance with the requirement of **mutual control of methods and procedures** is necessary, in particular, where at least two different procedures or methods have been used to obtain a set of output data, and those methods or procedures produce identical or insignificantly different results for identical or similar input data. Experts often use this principle, for example, in determining the rate of capitalization, growth rates, etc.

Ad h)

Data coming from **reliable** sources of information that are independent of both the expert and the stakeholders may be considered reliable, with each source used indicating its source. Failure to comply with this requirement shall also be considered if the expert prefers data from non-trusted sources over data from trusted sources.

Another view of the evaluation of expert opinions is given by J. Musil [11], who divided the criteria of evaluation of expert opinions into three groups:

1. Legal correctness of evidence

When rating the legal site, respectively the legal admissibility of an expert opinion as evidence shall be assessed whether:

- the expert report has been prepared by a person having the status of an expert, an expert organization or an expert institute and whether these entities have been properly involved in the process,
- all legal regulations were complied with in the preparation of the expert opinion,
- the expert has not exceeded the limits of his professional competence, in particular by: addressing legal issues, evaluating evidence, using expertise and methods belonging to a specialization other than that in which he is qualified; .
- the report has the content and formal requirements given by the legislation.

2. Evidence relevance of the expert opinion

In the opinion of J. Musil [11], in assessing the relevance of the expert opinion, it is assessed whether it is possible to deduce from the content any evidence on the subject of the evidence and what it is, or whether the expertise contributes to establishing the facts of the case. Legal relevance of expertise - consistency between the subject of the evidence and the subject of the expert's opinion must be considered by the law enforcement authority as soon as it decides to recruit the expert and formulates questions for the expert in order to avoid inefficient and uneconomical procedures.

3. Rating of the credibility of the expert report

The credibility of an expert report can be said if the truthfulness of knowledge results from the method and procedure we have come to know. [12] Thus, a testimonial which, by its content, guarantees a true outcome of knowledge is credible.

The criteria for assessing the credibility of an expert report are [11]:

- the ability of the expert to provide credible expert opinions (requirements for the expert in terms of professional qualifications, personality characteristics and objectivity);
- the completeness and error-free nature of the underlying materials, whether they were obtained legally, etc.,

- expert justification of the expert opinion, what is that the expertness of the expert examination and the professional justification of the conclusions of the expert opinion are rated.

Musil also emphasized the clarity of the expert report, which he expressed as follows: "Experts seem to be unaware that their report has a specific function. It is to convey expertise not to scientists but to lawyers and procedural parties. In particular, the defendant must have a real opportunity to be fully involved in the process of taking evidence and in evaluating evidence, which, of course, means that they are understandable to him. Many experts believe that the authority of their judgment will be higher the more Latin words, English abbreviations, mysterious marks and symbols are in it." [11]

4 Conclusion

In many legal areas, expert activity is increasingly important. In some cases, for example, in investigating the mental state of persons, in traffic accidents or in determining the value of real estate, it would not be possible at all to successfully conclude legal proceedings (criminal, civil, etc.) without the assistance of experts. It is often the expert statements and opinions of experts that the state authorities and courts base their decisions in dispute resolution. The aim is that the court can base its decision on such evidence and has no doubt about it. The court decision thus issued also guarantees a fair trial. Therefore, the expert should, with due diligence and precision, draw up his expert opinion, process all the data and information that influence the conclusion of the expert report and consequently the fundamental impact on the court's decision on guilt, innocence or the length of the sentence. Consequently, the expert should avoid giving false or distorted and incomplete expert opinions, thereby committing a criminal offense.

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