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EXPERT AND QUASI-EXPERT IN POLISH CRIMINAL PROCEEDINGS. THE POSSIBILITY OF USING THE SO-CALLED PRIVATE OPINIONS

Summary
A presentation of the institution of an expert and quasi-expert in criminal proceedings and comments on the products of their work, i.e. trial and out-of-trial opinion, also known as a private opinion, with particular attention to the changes introduced by the amendment to the Code of Criminal Procedure of July 1 2015. It also presents the institution of a quasi-expert (private expert), educated outside the criminal trial, and the nature of the private opinion he prepares, including the issue of admissibility of a private opinion and its assessment. The proposed changes mentioned in the literature on the subject, as well as my own proposals for changes aimed at increasing the control over the reliability and correctness of expert opinions and enabling wider use of private opinions in criminal proceedings, were indicated and discussed.
Keywords: court expert, ad hoc expert, expert opinion, private opinion, private expert, quasi-expert, criminal proceedings, evidence proceedings, private evidence

Introduction

Despite the long history of the use of expert opinion evidence in criminal trials, the amendments to the Code of Criminal Procedure Law were introduced by the amendment of July 1, 2015[1], through the mediation of which private opinion evidence has gained in value, have shed new light on the institution of the expert and the evidentiary value of the opinion prepared by him. The amendment put into the hands of a party a tool for actual and effective polemics against the evidence of an expert appointed by the authority, which is often the sole basis for the ruling issued in the case. For the purposes of this paper, it has been assumed that the terms "quasi-expert" and "private expert" will be used interchangeably.

[1] Law of September 27, 2013 on amendments to the Law – Criminal Procedure Code and some other laws, Journal of Laws of 2013, item 1247.

The institution of the expert: the concept of court expert and ad hoc expert

The legislator does not define the term "expert." The Code of Criminal Procedure only regulates issues related to his appointment, duties and the opinion he prepares. In the doctrine, the attempt to define the concept of an expert is essentially based on two aspects: the requirement of special knowledge and the appointment of an expert for a specific purpose[2]. According to the wording of Article 195 of the Code of Criminal Procedure[3] , the legislator distinguishes two separate categories of experts whose opinions may be used by the trial authority. We are talking about expert witnesses (also known as permanent experts) and *ad hoc* experts.

Quasi-expert and private opinion

The Code of Criminal Procedure does not normalize the function of a private expert, also referred to in the doctrine as a quasi-expert[4]. The wording of the provision of Article 195 of the Criminal Procedure Code[5] only indicates who can be appointed by the criminal procedure authorities to act as an expert witness. In practice, however, the function of a private expert (quasi-expert), i.e., a specialist who prepares a private opinion at the request of the accused or another party who is not an authority of the proceedings, has developed separately from the court expert and *ad hoc* expert; it can then be used in criminal proceedings.

Private experts are not in the legislature's interest, and no registers of such specialists are created. There are also no regulations specifying what conditions must be met by a person preparing an opinion at the request of a party to the proceedings. Thus, the fundamental issue distinguishing a private expert from a court expert and *an ad hoc* expert is their procedural position, except that the role of a private expert is not statutorily defined. In the case of a quasi-expert, he acts on behalf of a client and, therefore, is based on a civil law contract. On the other hand, an expert is appointed by the authority on the basis of an order for the admission of expert evidence. In addition, for a service such as the preparation of a private opinion, the quasi-expert is paid by the commissioning party, not by the state budget.

Another difference concerns the powers and duties of a private expert. As a rule, a private expert does not have any duties or powers in connection with the performance of an assignment which would result from the provisions of the Code of Criminal Procedure or other legal acts. A quasi-expert is not a participant in criminal proceedings, nor does he play any role in them that justifies the creation of powers or duties such as those of an expert appointed by an authority.

As a rule, a quasi-expert is not required to familiarize himself with the files of the proceedings in order to give an opinion. Although acting under Article 156 § 1,

[2] J. Dzierżanowska, J. Studzińska (eds.), *Biegli w postępowaniu sądowym cywilnym i karnym. Praktyczne omówienie regulacji z orzecznictwem*, Wolters Kluwer, Warsaw 2019, p. 324.
[3] Law of June 6, 1997 – Code of Criminal Procedure, Journal of Laws of 2018, item 1987 as amended.
[4] S. Waltoś, P. Hofmański, *Proces karny. Zarys systemu*, Wolters Kluwer, Warsaw 2016, p. 397.
[5] Ibid.

sentence 2 of the Code of Criminal Procedure[6], he can request the authority to provide access to the records of the proceedings. However, the issuance of such permission by the president of the court is questionable. A quasi-expert is also not entitled to the right of evidentiary initiative and, unlike an expert, cannot suggest to the authority that additional evidence be taken or point out deficiencies in the material collected. When a private expert's report draws such conclusions, it tends to be a suggestion to the party filing a private opinion in the case and also to file a request for additional evidence.

A private expert may also not participate in the conduct of a procedural action. The court will not summon him for this purpose, and there is also no legal basis for allowing a private expert to participate in procedural activities with a party as his counsel or attorney does.

Since a private expert is not an expert in the procedural sense, he is not entitled to the protection of Article 197 § 2a of the Code of Criminal Procedure.[7] The right to remuneration for the preparation of an opinion, as well as its amount, is based solely on the arrangement between the quasi-expert and the commissioner of the private opinion.

A quasi-expert's opinion does not have to be used in a trial or even submitted into evidence. It is up to the commissioning party to use it further. However, in the case of the opinion of a court-appointed expert, the opinion prepared by him always becomes evidence in the case and is subject to evaluation by the court. On the other hand, the expert bears full responsibility for preparing an opinion in violation of statutory duties.

A private expert is not statutorily obliged to prepare an opinion, so he can decide on his own to accept or reject the assignment, as well as, under the terms of the concluded contract, withdraw from the preparation of the opinion. Moreover, the opinion's scope and subject matter will be shaped by the commissioning party, possibly in consultation with the private expert, but always in a contract between the commissioning party and the expert. Of course, it is not a hindrance to commission a private expert to prepare an opinion corresponding in scope to that prepared by a court expert. A party may formulate the subject matter of the agreement to coincide with the content of the order for the admission of expert evidence issued by the authority. In practice, the opinion of a private expert is most often a polemic against the content of the opinion of a court expert, which also affects the scope of the agreement concluded with the quasi-expert.

Thus, it can be said that a quasi-expert may be a specialist in a particular field, but this is not his procedural function. The law does not specify any prerequisites for a person commissioned to prepare a private opinion. The selection of a specialist is at the sole discretion of the principal, and thus it is incumbent on the principal to determine whether the selected person has the special knowledge to conduct the

[6] Law of June 6, 1997 – Code of Criminal Procedure, Journal of Laws of 2018, item 1987 as amended.
[7] Ibid.

appropriate research and prepare an opinion that is essentially intended to fit the party's line of defence or, in the case of an auxiliary prosecutor, the line of the accusation. The risk of producing a worthless opinion rests entirely with the ordering party, and any objections to the prepared opinion must be resolved by the party using a private expert in separate proceedings on its own.

Court expert as private expert

Neither the provisions of the Code of Criminal Procedure nor the implementing regulations limit the authority of an expert listed by the president of the district court to give an opinion at the request of a private person. As a general rule, an expert witness may only use this title when providing an opinion to authority, so the rest of the time, he is only a specialist in a particular field.

In practice, it is increasingly common for private opinions to be prepared by experts listed as court experts, not just independent experts. This may have to do with the fact that, firstly, it is easier to determine the personal data and range of specialization of an expert on the basis of the list maintained by the president of the district court, which is a publicly available list, and secondly, it is supported by the party's belief that an expert witness not only knows how to prepare an opinion correctly, technically, for court purposes but also presumably, based on many years of experience, will cope better with the evaluation of evidence and prepare an opinion convincing to the party's position.

Another argument in favour of using a listed expert witness for a private opinion is prestige. Many years of experience in the preparation of opinions in specific categories of criminal cases or the frequency of use of the opinion of a particular expert by authority make it possible to assume that the private opinion prepared by him will be of real evidentiary value and that the special knowledge he possesses and the relevant analysis will allow him to refute or support the allegations made in the case.

As indicated earlier, a private expert does not have to accept an assignment to prepare a private opinion. In the case of experts listed as court experts, the refusal to accept an order to prepare a private opinion is most often argued on the grounds that they are listed as experts in the court district in which the private opinion is to be presented. Experts may be concerned that producing private opinions may consequently expose them in the eyes of the authority to charges of lack of objectivity. In the case of expert witnesses giving opinions in medical malpractice cases, for example, a common reason for refusing to provide a private opinion is the airtight environment in which the cases of employees or co-workers may be reviewed.

Private expert as court expert

Until July 1, 2015, the provisions of the Code of Criminal Procedure did not allow the admission of evidence of a private opinion[8]. In the doctrine, an attempt has been made to find a solution that allows the use in the trial of an opinion prepared

[8] Law of June 6, 1997 – Code of Criminal Procedure, Journal of Laws of 2004, No. 93, item 889.

at the request of a party, such as by appointing a private expert to act as an expert witness for the court. Such a solution was advocated by Prof. Dr Tadeusz Tomaszewski, in whose opinion nothing prevented the court from appointing the author of the opinion to act as an expert in the trial if it considers, firstly, that the issue in question is of significant importance and, secondly, that the substantive and formal conditions for the appointment of this expert exist[9]. The authority's authority to summon the author of a private opinion as an expert is derived from Article 193 of the Code of Criminal Procedure or Article 195 of the Code of Criminal Procedure.[10] By the same token, the authority may also provide such an expert with access to the investigation file and have him prepare a written or oral opinion, which will gain the value of a procedural opinion. Such an expert is appointed as an *ad hoc* expert.

In the current state of the law, the appointment of a private expert to serve as a court expert does not seem to face formal difficulties, and the justification for such a decision can be based on the same arguments already cited above. However, other doubts can be noted - such as whether the summoning of the author of a private opinion to participate in the case as an expert should be preceded by an examination of the opinion prepared by him through the prerequisites listed in Articles 201 of the Code of Criminal Procedure. and 196 of the Code of Criminal Procedure.[11] This is because only then does the appointed expert guarantee the impartiality and conscientiousness of the judicial opinion prepared.

Prof. Dr Tadeusz Widla formulated a strongly opposing position with regard to the possibility of appointing the author of a private opinion as an expert witness due to the establishment of a personal relationship between the commissioning party and the specialist, which undermines confidence in the person who prepares such an opinion since the contractor feels obliged to meet the expectations of the commissioning party[12]. This argumentation is not unreasonable in view of the fact that, as a rule, the goal of the principal is to obtain the opinion most favourable to him, and the goal of the quasi-expert is to be paid.

At the same time, it is clear that the appointment of a quasi-expert as *an ad hoc* expert does not give the private opinion issued by him the character of a trial opinion. Therefore, when an expert is appointed, the author of the private opinion should prepare a new opinion. However, it seems that it will then be sufficient to provide the authority with an opinion of the same content, only that following the issuance of the appointment order.

At this point, however, it seems reasonable to raise the question of whether the appointment of the author of a private opinion as an expert, in light of the provision

[9] T. Tomaszewski, *Czy korzystać z opinii prywatnych?*, „Przegląd Sądowy" 1997, no. 2, p. 31.
[10] Law of June 6, 1997 – Code of Criminal Procedure, Journal of Laws of 2018, item 1987 as amended.
[11] Ibid.
[12] T. Widła, *Źródła błędów w opiniach pismoznawczych*, "Palestra" 1982, no. 11–12, pp. 83 et seq.

of Article 196 § 3 of the Code of Criminal Procedure.[13], can be a justification for raising a charge of lack of confidence in the impartiality of such an expert. Of course, appointing the author of a private opinion as an expert will involve taking an oath from him, as well as instructing him on the responsibility for giving a false opinion, but such measures may seem not only insufficient but also disadvantageous to the party commissioning the private opinion. It is conceivable that a judicial opinion prepared after the author of a private opinion has been appointed as *an ad hoc* expert by a competent authority will turn out to contradict a private opinion prepared by the same specialist. Indeed, it may be that once a quasi-expert is appointed to serve as an expert, he or she will gain access to evidence on the basis of which previous conclusions will change. This contradiction is not necessarily due to the deliberate action of the private expert but, for example, the failure (intentional or not) of a party to provide evidence and information that will affect the final form of the private opinion prepared.

Another issue is to question the author of the private opinion. It goes without saying that a private expert cannot be questioned as an expert since he does not have such status, nor does he gain it after being subpoenaed by the court or in connection with the questioning activity. In such a case, one would have to consider whether it would be permissible to question a private expert as a witness. The first doubt about the legitimacy of such an arrangement relates to the fact that the private expert is not a witness to the course of the event that is the subject of the criminal proceedings. A quasi-expert issuing a private opinion becomes familiar with the evidence and information necessary for his opinion but obtained from external sources. Calling a quasi-expert as a witness would also change his status in the pending proceedings to that of a witness, which could contradict the content of Article 196 § 1 of the Code of Criminal Procedure[14], according to which persons called as witnesses in a case may not be experts in the case. Calling the author of a private opinion as a witness would lead to a situation in which the witness would express his opinion as to the assessment of the facts in light of his special knowledge, while at the same time not bringing into the proceedings any information related to the course of the event under investigation, which is, as it were, a perversion of the function of a witness in the proceedings by giving him powers reserved for other participants in the criminal proceedings. However, it seems that such an approach is a manifestation of a very narrow interpretation of the witness regulations and defining a witness only as a person who is supposed to provide the court with knowledge of an event in a way that allows it to establish the facts. However, it happens in many proceedings that the person called as a witness also speaks based on his special knowledge. While such testimony cannot replace an expert's opinion, witness testimony can often influence the scope of the opinion conducted, support its conclusions, or be judged unreliable by the claims of the expert's opinion.

[13] Law of June 6, 1997 – Code of Criminal Procedure, Journal of Laws of 2018, item 1987 as amended.
[14] Ibid.

Adopting such a position can also be seen as limiting the rights of the parties to the proceedings. This is because it excludes the possibility of summoning a quasi-expert to question or confront another witness or expert preparing an opinion on behalf of the authority. A party could then request the summoning of a quasi-expert as an expert, but it seems that justifying such a request may pose more difficulties than justifying a request for witness evidence. Moreover, it would also involve a change in the role of the author of the private opinion, which may prove disadvantageous to the party, which will no longer be able to use his services outside the trial and will thus lose the factual support coming from him. At the same time, the quasi-expert himself will no longer be able to act for a party to the proceedings.

The jurisprudence indicates that, despite the absence of obstacles to the court's order to appoint as an expert the author of a "private opinion" performed at the request of a party and presented to the court, to question him as an expert and to include his written opinion (after it is upheld) in the evidence of the case, such a practice should be rare and come into play only if the court does not entertain any doubts about the reliability and objectivity of the author of such an opinion, his experience and expert skills, as well as the suitability of his special knowledge to give an opinion on a specific issue that requires resolution. In no case, however, should a court ignore a "private opinion" and mechanically, indiscriminately refuse to include it in the case file or instrumentally dismiss it as not needing any evaluation[15].

Exclusions for private expert

In the absence of any legal regulations covering private experts, it would have to be assumed that there are no grounds excluding the right of a quasi-expert to prepare an opinion for the commissioning party, even though in light of Article 196 of the Code of Criminal Procedure,[16] such exclusions existed. However, the evaluation of such an opinion as reliable and objective may be questionable in this regard. Indeed, one cannot agree with the thesis that a private opinion drawn up by a person close to the accused or the accuser could be evaluated differently due to the nature of the bond between these people. The private opinion, as will be discussed in more detail later, is subject to evaluation in accordance with the principle of free evaluation of evidence expressed in Article 7 of the Code of Criminal Procedure[17] . The issue will be different when the authority appoints a private expert to serve as *an ad hoc* expert. In that case, one must agree with the thesis of Prof. Dr Stanislaw Waltos that the court must examine whether there are circumstances excluding the participation of the author of a private expert report from serving as an expert[18] before admitting

[15] Judgment of the Court of Appeals in Wroclaw of 31.8.2017, II AKa 22/17, LEX No. 2402355.

[16] Law of June 6, 1997 – Code of Criminal Procedure, Journal of Laws of 2018, item 1987 as amended.

[17] Ibid.

[18] S. Waltoś, P. Hofmański (eds.), *Proces karny. Zarys systemu*, Wolters Kluwer, Warsaw 2013, p. 414.

such evidence. The absence of such an examination could lead to the preparation of an opinion that is useless in the trial, for, as indicated in the case law, "in the situation provided for in Article 196 § 2 of the Code of Criminal Procedure,[19] the issued opinion does not constitute evidence, which means that it does not form the basis of the judgment (Article 410), and as a document, it is not read (Article 393 § 1), nor can it be considered as read (Article 393 § 2), because it is not the subject of an action that is called in practice counting into evidence."[20].

The so-called private opinion – definition and its admissibility

As with the definition of a private expert (quasi-expert), the legislature does not introduce the concept of a private opinion. Therefore, using the literature findings on the subject, it can be said that it is an opinion of an extra-procedural nature, prepared at the request of an entity other than the authorized procedural body, issued by a person with special knowledge in a particular field[21]. Similarly, Prof. Dr Jaroslaw Zagrodnik points out that this is an expert report prepared by an expert (specialist) or an expert at the request of a participant in the criminal process who is not the body conducting criminal proceedings at a given stage[22]. Therefore, it follows from the above that a private opinion is an expert report containing special knowledge prepared by a specialist at the request of a party to the process, which is not an authority. This definition can be supplemented by stating that a private opinion has the character of a private document within the meaning of Article 393 § 3 of the Code of Criminal Procedure[23], which, once introduced into evidence, is subject to the court's evaluation like other evidence and may form the basis of sentencing. Evidence of such an opinion may also be dismissed based on Article 170 § 2 of the Code of Criminal Procedure.[24] This means that if a party – in practice, other than the public prosecutor – orders an opinion from some specialist, in essence, a written expert opinion, the court may admit it as evidence, provided there are no reasons for dismissing the evidentiary request. The opinion will then be included in the evidence forming the basis of the verdict. The author of such an opinion is not an expert witness at trial within the meaning of the Code. However, nothing prevents him from being appointed by the court to serve as an *ad hoc* expert at the request of a party, even if this function amounts only to questioning him in such a capacity. There will then be a conversion

[19] Law of June 6, 1997 – Code of Criminal Procedure, Journal of Laws of 2018, item 1987 as amended.

[20] Judgment of the Court of Appeals in Rzeszów of 6.9.2012, II AKa 86/12, LEX No. 1223429.

[21] K. Eichstaedt, *Znaczenie opinii prywatnej w postępowaniu karnym*, "Prokuratura i Prawo" 2016, no. 4, pp. 90 (90–98).

[22] J. Zagrodnik, *Problematyka prywatnego gromadzenia dowodów w procesie karnym*, in: M. Nowak, M. Golec (eds.), *Ogólnopolska konferencja naukowa 10–11 maja 2005 roku „Dowody w procesie karnym. Nowe rozwiązania i niewykorzystane możliwości"*, University of Silesia, Faculty of Law and Administration, Katowice 2005, p. 67.

[23] Law of June 6, 1997 – Code of Criminal Procedure, Journal of Laws of 2018, item 1987 as amended.

[24] Ibid.

of the informal and non-institutional acquisition of evidence (means of proof) into a so-called conventional activity, that is, normalized by the provisions of the Code of Criminal Procedure[25]. When we consider the qualification of a private opinion as a private document, it should be recalled that the Code of Criminal Procedure does not define a "private document"[26]. According to Prof. Dr Jerzy Skorupka[27], after whom the private opinion will be referred to as the so-called "private opinion" in the course of the debate on determining the conceptual scope of a private document, three positions have formed. The first adopts a narrow understanding of the document, which restricts the concept to the so-called "procedural document" only to the object written in graphic characters. It is understood that in the procedural sense, a document is a statement by handwriting, typewriting or print of a circumstance relevant to the proceedings. The document is a self-contained source of evidence and is subject to reading. According to the second, broader position, a document is any object or other recorded medium to which a specific right is attached or which, due to the content contained therein, constitutes evidence of a right, legal relationship, or a circumstance of legal significance. Such a definition was introduced into the Criminal Code in Article 115 § 14 of the Criminal Code.[28] In the literature, according to the cited position, it is indicated that the essence of a document is a record of any content as long as it constitutes evidence of those contents referred to in Article 115 § 14 of the Criminal Code.[29] Thus, it is assumed that there is insufficient justification for distinguishing a document only in the procedural sense, the characteristic of which would be a letter or a print[30]. Regarding the manner in which documentary evidence is conducted, it is accepted that the literal meaning of the act of reading is too narrow nowadays. Reading, therefore, is any form of acquaintance by the procedural authority with the contents of the documents, not only by sight but also by hearing[31]. The third position divides documents according to the related content and the manner of its disclosure into: subject to reading when they contain statements of knowledge and subject to inspection when they contain the registration of a crime[32]. According to J. Skorupka, with whom it is necessary to agree, the so-called private opinion is

[25] S. Waltoś, P. Hofmański (eds.), *Proces karny. Zarys systemu*, Wolters Kluwer, Warsaw 2013, p. 414.
[26] Law of June 6, 1997 – Code of Criminal Procedure, Journal of Laws of 2018, item 1987 as amended.
[27] J. Skorupka, *Tzw. opinia prywatna w świetle noweli Kodeksu postępowania karnego z 27.09.2013 r.*, in: Ł. Blaszczak, K. Markiewicz (eds.), *Rola biegłego w postępowaniach sądowych*, Presscom Publishing House, Wrocław 2016, p. 232.
28 Law of June 6, 1997 – Criminal Code, Journal of Laws of 2018, item 1600 as amended.
29 Ibid.
[30] S. Waltoś, P. Hofmański, *Proces karny. Zarys systemu*, Wolters Kluwer, Warsaw 2013, p. 390.
[31] Ibid., p. 390.
[32] T. Nowak, *Dowód z dokumentu w polskim procesie karnym*, Oficyna Wydawnicza "Ławica", Poznań 1995, p. 139.

a document in the light of each of the above positions[33]. The so-called private opinion gained statutory evidentiary value based on the amendment[34] of the Code of Criminal Procedure on July 1, 2015. The 1997 Code *expressis verbis* did not allow the reading at the trial of private documents that were created outside of and for the purposes of criminal proceedings[35]. The so-called private opinion was treated as a private document, however, created as a result of and for the purposes of criminal proceedings. Therefore, it could not be evidence in a criminal trial. However, it could have been very important information for the court to prove[36]. Until July 1, 2015, Article 393 § 3 of the Code of Criminal Procedure[37] read: "Any private documents created outside the criminal proceedings and not for the purposes of the proceedings may be read at the trial, in particular statements, publications, letters and notes." As a result of the amendment, this provision received new wording, according to which: "Any private documents created outside the criminal proceedings, in particular statements, publications, letters and notes, may be read at the trial." The phrase "and not for its purposes" was removed from the wording of the cited provision, thereby allowing a party to submit in criminal proceedings evidence prepared outside the proceedings and for its purposes, and such evidence is undoubtedly the so-called private opinion. In light of the purpose of the so-called July amendment, the change introduced was intended to increase the adversarial nature of the criminal trial. Despite the legislator's quick withdrawal from the amendment, some provisions, including Article 393 § 3 of the Code of Criminal Procedure[38], retained its new wording, cementing the position of the so-called private opinion as evidence not only enhancing the adversarial nature of the proceedings but also strengthening the defendant's right to defence. This change should be considered fully positive. In practice, it is of great importance to the parties to a criminal trial, opening the way for them to factually and substantively dispute the evidence gathered in the case, carried out with the help of a specialist with relevant specialist knowledge and experience. In fact, it should be pointed out that although a party also before the amendment was entitled to a motion to admit evidence of an expert opinion, then a supplementary opinion, and if the party continued to question the prepared opinion, a motion for the opinion of other experts, the positive recognition of such a motion ultimately remained dependent on the court's decision.

[33] J. Skorupka, op. cit., p. 232.
[34] Law of September 27, 2013 on amendments to the Law – Criminal Procedure Code and some other laws, Journal of Laws of 2013, item 1247.
[35] Law of June 6, 1997 – Code of Criminal Procedure, Journal of Laws of 2004, No. 93, item 889.
[36] S. Waltoś, P. Hofmański (eds.), *Proces karny. Zarys systemu*, Wolters Kluwer, Warsaw 2013, p. 413.
[37] Law of June 6, 1997 – Code of Criminal Procedure, Journal of Laws of 2004, No. 93, item 889.
[38] Law of June 6, 1997 – Code of Criminal Procedure, Journal of Laws of 2018, item 1987 as amended.

However, it is not the case that it was only the 2015 amendment[39] that enabled the parties to use in criminal proceedings special knowledge not coming from an expert appointed by the authority. The prohibition outlined in Article 393 § 3 of the Code of Criminal Procedure concerned the use in the proceedings of a private document in the form of a so-called private opinion as having been created outside the criminal proceedings, but for the purposes of the proceedings, not its preparation itself.

In fact, in the practice of criminal proceedings, the so-called private opinion of a specialist could, in the previous state of the law, be introduced into evidence by a party through its right to object to the expert's opinion and in the drawn-up appeal as an appellate objection constructed on the subject of the evaluation of evidence. This allowed, in effect, to bypass the prohibition of Article 393(3) of the Code of Criminal Procedure. The defendant or any other party to the trial who privately commissioned an expert report containing an analysis of the evidence collected in the case or polemicizing with the statements of an expert appointed by the authority could use the knowledge thus obtained as to the conclusions or research methods, e.g., when questioning the expert or in a request for a supplementary or new opinion, another expert or experts. Such an opinion was a good justification for an evidentiary request for the appointment of an expert or for taking action to correct the defects in the expert's opinion[40]. Until the amendment, the so-called "private opinion" thus constituted information on evidence for the trial authorities, being a document that argued for the trial authority's admission of an expert opinion[41] or the admission of a supplementary opinion.

In view of the changes made by the 2015 amendment to Article 393 § 3 of the Code of Criminal Procedure,[42] it is possible to include the so-called private opinion in evidence. Consequently, the literature has pointed out doubts about the procedural significance of the so-called private opinion. Professor Dr Piotr Kardas formulates two solutions to the doubts that have arisen:

– adoption that the evidence of a so-called private opinion has the same status and character as the evidence of an expert opinion prepared at the request of a procedural authority, except that, according to the cited author, this approach is possible due to the lack of formal evaluation of evidence in Polish criminal procedure, and the so-called private opinion is, pursuant to Article 393 § 1 of the Code of Criminal Procedure.[43] a document equivalent to the opinion of an expert appointed by the trial

[39] Law of September 27, 2013 on amendments to the Law – Criminal Procedure Code and some other laws, Journal of Laws of 2013, item 1247.

[40] A. Gaberle, *Dowody w sądowym procesie karnym. Teoria i praktyka*, Wolters Kluwer Polska, Warsaw 2010, p. 245.

[41] Order of the Supreme Court of 4.01.2005, V KK 388/04, LEX No. 141204; judgment of the Supreme Court of 24.01.2008, II KK 290/07, LEX No. 346651.

[42] Law of September 27, 2013 on amendments to the Law – Criminal Procedure Code and some other laws, Journal of Laws of 2013, item 1247.

[43] Law of June 6, 1997 – Code of Criminal Procedure, Journal of Laws of 2018, item 1987 as amended.

authority. The court may make findings on the basis of an extrajudicial opinion and, if it contradicts the expert's opinion, even disregard the expert's report performed by the expert at the request of the trial body;

– according to the second solution, the so-called private opinion remains documentary evidence and has a formally different procedural status – it is not a document prepared at the request of a procedural authority and does not have the status of expert evidence. In this state of affairs, the evidence of a so-called private opinion is evidence of "lesser" weight than the evidence of an expert appointed by order of the trial authority[44].

The first solution has not gained favour with the judicial authorities to the extent that the so-called private opinion would constitute a document equivalent to an expert opinion. If equalizing the importance of the two documents was the goal of the legislator, this would have been reflected in the provisions of the Code of Criminal Procedure in the form of an addition to the provisions of Chapter 22 to normalize the evidence of the so-called private opinion. At this point, it is also worth pointing out that the name "private opinion" has developed outside the criminal process. Thus, simply calling a document an "opinion" does not equate that document with a judicial opinion. Jerzy Skorupka even argues that the private opinion should be called a so--called private opinion since the document is not really an opinion. However, despite the non-recognition of a so-called private opinion as equal to an expert's opinion, it is possible to make findings based on it and even to disregard expert evidence and rely entirely on the content of the so-called private opinion by the court in sentencing.

Evaluation of private opinion evidence

The so-called private opinion is an extra-procedural (private) document that may contain special knowledge relating to the subject matter of the criminal trial. It cannot constitute evidence in this trial because such an expert report was not carried out in the manner prescribed by the provisions of Chapter 22 of the Code of Criminal Procedure; in particular, it was not prepared at the request of the trial authority. However, there is a fairly widespread view that the so-called "private opinion" cannot be completely disregarded, as it contains information about evidence that is not irrelevant to the proper resolution of the case. The indicated document under Article 393 § 3 of the Code of Criminal Procedure.[45] is not a procedural opinion. However, since it is read at the trial, and therefore as an element of the basis for adjudication, it will have to be under Article 410 of the Code of Criminal Procedure[46] considered

[44] P. Kardas, *Podstawy i ograniczenia przeprowadzania i wykorzystywania w procesie karnym tzw. dowodów prywatnych*, "Palestra" 2015, no. 1–2, pp. 21–22; idem, *Pozaprocesowe czynności obrońcy a tzw. dowody prywatne w świetle nowelizacji procedury karnej* "Palestra" 2014, no. 9, pp. 134 et seq.

[45] Law of June 6, 1997 – Code of Criminal Procedure, Journal of Laws of 2018, item 1987 as amended.

[46] Ibid.

by the court, but not as an opinion, but only as a document that can verify it[47]. This means that the court should always express its opinion on the extrajudicial opinion submitted to it in the proceedings by a party, and if, for the reasons indicated in Article 170 § 1 of the Code of Criminal Procedure,[48] does not reject the evidentiary request, it should indicate in the justification of the judgment what it thinks of such a document and how it evaluates it[49]. Once evidence from a so-called private opinion is included in a criminal trial, it is subject to the free evaluation of the trial body, like any other evidence introduced into the trial in accordance with the law[50]. According to Article 410 of the Code of Criminal Procedure,[51] if such an opinion is disclosed at the main hearing, factual findings may be made on its basis.

Thus, as can be seen from the above, the so-called private opinion is subject to evaluation by the court like any evidence that has been requested, admitted and conducted by the court. In the case of a so-called private opinion, the conduct of this evidence will consist of reading it. The court carries out this activity, and the opinion is subject to evaluation using the principle of free evaluation of evidence mentioned in Article 7 of the Code of Criminal Procedure.[52] However, it should be considered whether the court may make auxiliary reference to the premises outlined in Article 201 of the Code of Criminal Procedure in evaluating the so-called private opinion. As emphasized above, the so-called private opinion, as not commissioned by the body of the proceedings, does not have a procedural attribute. Therefore the provisions of the Code of Criminal Procedure regarding the opinion of an expert appointed by the body do not apply to it. Nonetheless, such an opinion in terms of its construction can correspond – and often does – to the conditions described in Article 200 of the Code of Criminal Procedure since the purpose of the so-called private opinion is to undermine a court opinion that has already been drawn up or to submit a party's own opinion containing special knowledge, even when the need does not arise from the provisions of Article 193 of the Code of Criminal Procedure[53], applying to it the methods described in Article 201 of the Code of Criminal Procedure[54] allows the court

[47] M. Kurowski, in: D. Świecki (ed.), B. Augustyniak, K. Eichstaedt, M. Kurowski, *Kodeks postępowania karnego. Komentarz*, vol. 1, Section V, Chapter 22, Wolters Kluwer, Warsaw 2017, p. 670.

[48] Law of June 6, 1997 – Code of Criminal Procedure, Journal of Laws of 2018, item 1987 as amended.

[49] T. Grzegorczyk, *Kodeks postępowania karnego. Komentarz*, vol. 1, Wolters Kluwer, Warsaw 2014, p. 695.

[50] P. Hofmański, *Granice prawa do obrony w świetle zmian Kodeksu postępowania karnego zawartych w ustawie z dnia 27 września 2013 r.*, w: T. Gardocka, P. Hofmanski et al., *Prawo do obrony w postępowaniu penalnym. Wybrane aspekty*, Office of the Ombudsman, Warsaw 2014, p. 15.

[51] Law of June 6, 1997 – Code of Criminal Procedure, Journal of Laws of 2018, item 1987 as amended.

[52] Ibid.

[53] Ibid.

[54] Ibid.

to make a more thorough evaluation of the opinion commissioned in the criminal proceedings and possibly supplement it or appoint a new expert, and in the second case to rely on the so-called private opinion in sentencing. In both cases, there is no doubt that positive legal consequences will not arise from any opinion that, in light of the assessment of the evidence, is: incomplete, unclear, and also contradictory internally or with other evidence. In light of Article 410 of the Code of Criminal Procedure, the correct evaluation of the so-called private opinion is crucial for the party to the proceedings that has requested the admission and conduct of such evidence, as it can become the basis for making factual findings.

It was pointed out above that the purpose of a so-called private opinion may be to challenge an opinion commissioned by an authority or to evaluate the evidence gathered in the case by an independent specialist. Thus, it depends on the activity of a party to the proceedings whether the assertions contained in the expert's opinion are considered sufficient and correct, and thus become the basis for the judgment rendered. However, a party's ability to question and control the opinion of an expert witness, which relates to a highly specialized and complex subject matter, is itself severely limited. While the court hearing the case, using the quantifiers for evaluating the evidence, may, in case of doubt, call an expert to supplement the opinion, clarify the doubts that have arisen, or appoint a new expert, a party to the proceedings does not have such means at its disposal, except to make a convincing request for the admission and taking of evidence of a supplementary expert opinion, and even such a request must be adequately justified, as it should arouse in the court a legitimate need for its positive consideration. The lack of special knowledge makes it significantly impossible to prove that an expert opinion does not meet the conditions described in Article 201 of the Code of Criminal Procedure.[55] Admitting and conducting evidence of a so-called private opinion is linked to the need to evaluate this evidence in accordance with the principle of free evaluation of evidence expressed in Article 7 of the Code of Criminal Procedure.[56] According to this principle, the authority, including the pre-trial authority, is obliged to form its conviction on the basis of all the evidence carried out, evaluated freely, and taking into account the principles of sound reasoning and indications of knowledge and life experience. For the so-called "private opinion", an evaluation through the prism of the premise of indications of knowledge may be relevant. It would have to be considered whether, in the case of a so-called private opinion, the authority has the right to assess the merits of the special knowledge contained in it, given the authority's lack of such knowledge.

Expert opinion from another proceeding

An interesting issue in criminal proceedings is the situation of using an expert's opinion in a criminal trial that was prepared for the purposes of another proceeding. The Supreme Court took the position that an expert opinion from another proceeding can be read and used in a criminal trial in accordance with the first sentence of

[55] Ibid.
[56] Ibid.

Article 393 § 1 of the Code of Criminal Procedure and Article 394 § 2 of the Code of Criminal Procedure.[57] This means that such an opinion does not gain the status of a procedural opinion, despite the fact that it was prepared by an expert appointed by the procedural authority to clarify circumstances requiring special knowledge. This is not altered by the fact that the opinion fully explains the issues requiring special knowledge in the proceedings in which it was used. Thus, such an opinion constitutes a private document, which takes the form of a so-called private opinion, and due to this qualification of the opinion, it requires a request for the admission and examination of documentary evidence, which is subject to evaluation in accordance with the principles expressed in Article 7 of the Code of Criminal Procedure.[58] As a rule, such an opinion will be used by a party who became aware of it from a defence attorney, proxy or, possibly, from another criminal case in which the party participates. A request for the admission and taking of evidence of such an opinion may then also be supported by request for the admission and taking of evidence from an expert witness who is the author of the submitted document. Although there is no obstacle to the court's order to appoint as an expert the author of a so-called "private opinion" performed at the request of the accused, such an action should be performed only if the court has no doubts about the reliability and, in particular, the objectivity of the author of such an opinion, his special knowledge and professional experience[59]. A private opinion cannot substitute for expert evidence and, consequently, cannot be the basis for findings of fact, which requires special knowledge. It is clear that since a private opinion is not an expert opinion and cannot replace it, it also cannot have the character of a superopinion[60].

An attempt to identify the trend of changes in the institution of expert and private expert witnesses

Dr Kazimierz J. Pawelec[61] proposed amending the provision of Article 193 § 1 of the Code of Criminal Procedure[62] by adding to its current wording a power from which other parties to the proceedings can obtain a competing expert or specialist opinion relating to the opinion obtained by the state procedural body. The proposed amendment would read as follows: "If the determination of facts that are material to the determination of the circumstances of the case requires special knowledge, the

[57] Order of the Supreme Court of 22.2.2006, II KK 131/05, OSNwSK 2006 No. 1, item 411.
[58] Law of June 6, 1997 – Code of Criminal Procedure, Journal of Laws of 2018, item 1987 as amended.
[59] Judgment of the Court of Appeals in Wroclaw of 7.05.2014, II AKa 71/14, LEX No. 1474821.
[60] Order of the Supreme Court of 15.05.2019, IV KK 167/19, LEX No. 2657472.
[61] K.J. Pawelec, *Opinia pozaprocesowa i jej ocena w procesie karnym. Zagadnienia wybrane. Propozycje de lege ferenda*, in: D. Gil, P. Rogowski (eds.), *Rola biegłych we współczesnych postępowaniach sądowych*, KUL Publishing House, Lublin 2019, pp. 249–258.
[62] Law of June 6, 1997 – Code of Criminal Procedure, Journal of Laws of 2018, item 1987 as amended.

procedural body or a party shall consult an expert or experts or specialists with special knowledge." However, a closer look at this proposal leads to a negative assessment. It seems that the author's desire to amend the current legislation in such a way as to allow a party to the proceedings to have a real influence on the selection of an expert witness and to facilitate the introduction of a so-called private opinion into the proceedings on a basis equivalent to a trial opinion is correct. This is because the proposed amendment implies that an opinion prepared by a private expert whose knowledge is sought by a party would become a trial opinion. However, the very construction of the proposed amendment is not accurate and forces one to determine whether it does not, in fact, give a party to the proceedings powers previously enjoyed only by its authorities. From the proposed wording of the provision, it follows that not only the authority but also a party will gain the authority to assess whether the prerequisites outlined in the provision exist and whether special knowledge is required to establish the facts relevant to the case. Thus, a party would be able to determine which circumstances are, in its opinion, relevant to the resolution of the case and whether their clarification requires special knowledge, and on this basis, consult an expert opinion, which would immediately by virtue of the provision itself become a procedural opinion. It is not difficult to imagine what giving a party such power leads to, and, moreover, the provision as proposed does not make it possible to determine whether, in the event of a conflict as to the need to consult special knowledge, the final position is up to the authority, or whether the authority is forced to accept an opinion prepared at the request of a party despite the lack of grounds for doing so or in the face of its own negative assessment. The above solution leads to further doubts about the party's acquisition of the power to make findings of fact and evaluate them. Under the current state of the law, it is the right of a party to file motions of evidence in a case aimed at presenting its version of the event, which is intended to influence the determination of the facts as they are so that its evaluation is most favourable to the party. In turn, the authority's final determination of the facts and evaluation of the collected evidence is the exclusive prerogative. Instead, the proposed amendment allows a party to make a seemingly binding assessment of the facts to the extent that this leads to the need for special knowledge. Currently, a party's right is limited by the need to file a request for expert evidence, which is subject to the court's review and may be dismissed, making the authority the final decision-maker. K.J. Pawelec's proposal is not a minor editorial change but a change that significantly increases a party's position in the process. From the wording of the proposed amendment, it should be inferred that the opinion consulted by a party to the proceedings becomes a procedural opinion with all the consequences thereof, and therefore the right of a party to evaluate this opinion, to decide whether to supplement it, as well as to the furthest - to disregard it. Thus, does a party thereby gain the right to assess the usefulness of the opinion prepared in criminal proceedings, and what would be the procedural consequences for the party against whom the opinion would turn out to be negative, including whether it can be disregarded for this reason and whether the party makes this disregard? And also, what is the position of the authority itself in

this regard? The above conclusions lead the author of the proposed amendment to ask another question: how a party would seek an expert opinion if it does not have the authority to appoint one by order, and who would bear the costs of preparing such an opinion? Since the proposed amendment does not distinguish between an expert and a quasi-expert, it should be considered that its author assumed that a party seeking an expert opinion would be required to have a court expert or an *ad hoc* expert prepare the opinion. Regardless of the form chosen, each specialist would become a trial expert. Another argument against the above proposal, against the backdrop of the comments already indicated, is that it actually restricts a party to the proceedings from using opinion evidence. If the power of a party were equated with the power of authority in a way Pawelec proposed, then a party would be deprived of the possibility to effectively challenge an expert's opinion utilizing a so-called private opinion – as long as such content of Article 193 § 1 of the Code of Criminal Procedure does not actually lead to the elimination of the so-called private opinion as evidence. If, on the other hand, the cited change were to consist only in the statutory regulation of a party's right to use a so-called private opinion in the proceedings, i.e. the introduction of the institution of a quasi-expert witness into the trial by shaping this institution in the Code of Criminal Procedure, then it would be appropriate to consider regulating it in a separate provision. One may also wonder whether the author of the commented proposal is referring to the party's ability to use experts and experts listed as experts, for example, when the party does not want to seek a specialist on its own. If, on the other hand, it were to be a matter of narrowing the list of specialists that a party is entitled to use in the preparation of a so-called private opinion, this restriction would have to be considered too far-reaching.

Following the proposed change in the wording of Article 193 § 1 of the Code of Criminal Procedure, K.J. Pawelec[63] also proposed a change in the wording of Article 194 § 1 of the Code of Criminal Procedure.[64], which could take the following wording: "If the ascertainment of circumstances that are significant for the resolution of the case requires special knowledge, the opinion of an expert or experts, including those obtained at the request of a party, his counsel or attorney, shall be sought"[65]. This change is not understandable in light of the current wording of Article 194 of the Code of Criminal Procedure[66] and would be a repetition of the wording of Article 193 § 1 of the Code of Criminal Procedure[67], which is not only unnecessary but would also create a contradiction between these provisions. The proposed amendment would have a greater chance of approval if it concerned Article 193 § 1 of the Code of

[63] K.J. Pawelec, op. cit., pp. 249–258.
[64] Law of June 6, 1997 – Code of Criminal Procedure, Journal of Laws of 2018, item 1987 as amended.
[65] K.J. Pawelec, op. cit., pp. 249–258.
[66] Law of June 6, 1997 – Code of Criminal Procedure, Journal of Laws of 2018, item 1987 as amended.
[67] Ibid.

Criminal Procedure[68], for it allows the adoption of an interpretation that would indicate that the authority could, under the conditions indicated in this provision, consult an expert opinion or use an opinion prepared at the request of a party, giving it the character of a procedural opinion. At the same time, such a construction of the provision would leave no doubt that a party is not entitled to decide on the appointment of an expert on the same terms as the authority. Adopting such a solution allows a party to retain the right to use the so-called private opinion at its own discretion and formulate a request to consider it as a trial opinion. Thus, the party would still be the sole decision-maker to use the opinion prepared at its request, which is undoubtedly a significant procedural advantage. The author of the commented amendments rightly recognizes the problem for a party to the proceedings of uncertainty about the fate of the opinion prepared at his request, which by definition is supposed to present the facts in a more favourable light for him. However, some of the proposed changes seem to put powers far beyond the authority's authority into the hands of the party, which does not deserve approval.

The adopted solutions also do not eliminate one of the main problems related to the evaluation of the so-called private opinion conditioning its use in a criminal trial, which is the problem of the lack of impartiality of such an opinion due to the contractual relationship linking the quasi-expert and the party on whose order he prepares the so-called private opinion. At the same time, a party cannot be required not to seek to improve its procedural situation through a so-called private opinion. The possible amendment must be preceded by getting rid of the prejudice against so-called private opinions prepared at the request of a party and paid for by it as having been drawn up based on a party's directives and in order to obtain specific conclusions. Such an effect could be achieved by introducing a statutory definition of a so-called private opinion, which would be subject to evaluation on the same basis as a trial opinion, i.e. also on the grounds outlined in Article 200 of the Code of Criminal Procedure[69] (in terms of its construction) and Article 201 of the Code of Criminal Procedure.[70] The above solutions stem from the desire to make it easier for a party to use a private opinion prepared at its request in a trial by equating it with a trial opinion. Still, they overlook the true interest of a party to the proceedings. The purpose of the so-called private opinion is to demonstrate, through an expert report prepared by a specialist associated with the party, the errors of the expert's opinion and a different analysis of the evidence. For a party, a so-called "private opinion" is a tool to engage in polemics with the content of the opinion of an expert appointed by the authority or, in the absence of such an opinion, to convince the court of the validity of its procedural position. Therefore, what a party to the proceedings cares about, is obtaining the power to use not only a so-called private opinion but also a quasi-expert as an expert, who takes his place on the side of the accused or an auxiliary accuser and thus gains powers similar to those of a defence counsel or attorney.

[68] Ibid.
[69] Ibid.
[70] Ibid.

Introducing a new participant in criminal proceedings, such as a private expert, and defining his powers in such a way as to equate the role of a quasi-expert and an expert appointed by an authority may be a controversial but not unacceptable solution. Such a change would also lead to the strengthening of a party's procedural position. A less controversial solution might be to give a party to the proceedings the power to co-determine the selection of an expert witness, the scope of the opinion, and the questions posed to the expert. It can take the form of setting a deadline for a party to indicate the names of proposed experts along with the reasons for their selection or introducing the possibility for a party to object to a particular expert appointed by the authority. Of course, such a solution makes sense only if it is not a sham, and therefore if the final decision of the authority to appoint an expert can be appealed, and if an objection is filed, it will be heard by an authority independent of the appointing authority. Allowing a party to participate in the selection of an expert may affect the quality of the opinion issued. This is because guided by concern for its interests, a party will review the experience and knowledge of its proposed experts more thoroughly than the authority, which may also consequently translate into higher-quality opinions.

Another benefit is the comprehensiveness of the opinion, the scope of which was agreed upon with the party to the proceedings. The party's ability to ask questions of the expert as early as the appointment stage will allow for a complete opinion that also takes into account the party's interests. Influencing the selection of an expert, as well as allowing a party to actively participate in determining the content of the order for his appointment, could contribute to reducing the number of requests for supplementary or new opinions, which would be important not only for the speed of the proceedings but also for their cost.

Another demand is related to changes within the institution of the expert. Undoubtedly, the quality of the opinions prepared by experts is based on their knowledge and experience, as well as their qualification to be an expert, and not on being registered as an expert in 2014. The Polish Business Roundtable and the Helsinki Foundation for Human Rights presented a report on expert witnesses in Poland, which indicated that the entities responsible for maintaining the list of expert witnesses in Poland, although formally entitled to make an independent assessment of a candidate's competence as an expert and to refuse entry, rarely exercise this right. One reason for the lack of real vetting of candidates is the lack of adequate tools to assess their competence reliably. The cited report assesses that the reliability of verifying the competence of candidates to serve as court experts is the most important problem related to the functioning of this institution. Candidates' possession of special knowledge in a particular field of expertise is not verified in practice, as district court presidents do not have the means to assess a potential expert's level of knowledge[71].

Such means are also not available to the body appointing an expert to prepare an opinion on a particular case, which has led to the formation of two solutions.

[71] B. Grabowska, A. Pietryka, M. Wolny, A. Bodnar, *Biegli sądowi w Polsce*, Report of the Polish Business Council and the Helsinki Foundation for Human Rights, Warsaw 2014, https://www.hfhr.pl/publication/biegli-sadowi-w-polsce/ (accessed 5.12.2022).

The first involves the use by the authorities of several, usually the same experts, in each proceeding with similar facts. The second boils down to the fact that if there are doubts about an expert's competence, the authority appoints a new specialist in his place, whose competence is also not subject to verification. Neither of the solutions adopted is correct; the first may end up intensifying allegations undermining the expert's impartiality, while the second results not only in prolonging the proceedings and increasing their costs but, above all, in the proliferation of opinions in the case. The literature points to the introduction of a system of certification of experts as an example of a solution to the above problem, an element of which will become mechanisms for verifying their special knowledge and eliminating from the market those experts who do not actually have this knowledge or whose expertise is characterized by low quality and lack of reliability, but also those who do not have the preparation or technical facilities sufficient to perform the function of an expert. It also calls for the participation of judges in the certification of court experts, the introduction of recertification and the addition of additional information to the list of experts. The introduction of an organization of expert witnesses bringing together experts of all specialities and the creation of a code of conduct applicable to all experts[72] also appears to be desirable. According to P. Karasek and P. Rybicki[73], the implementation into the routine practice of a certification service for expert witnesses based on universally accepted programs built based on clearly defined requirements seems today to be the only rational solution to the problem of assessing the competence of expert witnesses for the purposes of the registers kept, while in a situation where the appointment of an expert witness is made on an ad hoc basis, tools for structured interviews that allow a candidate for an expert witness to demonstrate his competence before being commissioned to provide an opinion may prove effective. There is no doubt that for both the authority and the parties to the proceedings, the quality of the expert's opinion plays a big role. Hence, the introduction of expert certification and registers, which would show the detailed scope of an expert's competence, while providing access to such a register to other participants in the proceedings would result in a significant increase in the quality of expert reports prepared by experts, but would also provide additional motivation for experts themselves to deepen their specialization. Of course, in determining the conditions for certification, one would have to remember that, in addition to special knowledge, it is equally important for experts to have the right equipment and technical facilities in order to make a correct and reliable opinion. At the same time, it is necessary to take care of the system of updating the issued certificate and preparing cyclical reports on the work of the expert, as well as carrying out verification, for example, based on opinions obtained from the bodies using the assistance of the expert in question. Visits can also be a good way

[72] Ibid.

[73] P. Karasek, P. Rybicki, *Sposoby oceny kompetencji biegłych sądowych*, in: B. Lewandowski (ed.), *Pozycja biegłego w polskim systemie prawnym*, Institute for Legal Culture Ordo Iuris, Warsaw 2016, pp. 170–183.

of verifying the quality of an expert's work, consisting of the visitor reviewing the content of the expert's issued opinions and assessing their merits.

The legislator's lack of interest in organizing the issues relating to expert witnesses may be indicated, for example, by the way in which the lists of experts maintained by the presidents of the district courts are prepared; for one can see complete freedom here, both in terms of the terminology used relating to the competence and special knowledge of experts within particular fields, as well as inaccurate descriptions of specializations, often erroneous or very general and laconic. It would therefore be advisable to postulate that only those whose specializations are actually useful to the authorities of the proceedings should be included in the list of experts, not experts of all identifiable specializations. Such a solution can be considered reasonable in light of the authority's ability to exercise power to appoint *an ad hoc* expert, and therefore in a situation where none of the experts on the list has the specialization required by the circumstances of the case.

Calls for changes within the regulations on experts and the opinions they give should be supplemented by placing greater emphasis on the correct formulation of the scope and subject matter of opinions, as well as the questions addressed to experts. Wojciech Lasek even wonders whether the expert should not be involved in the formulation of specific questions by the trial authority or at least have the right to ask the trial authority to clarify or redraft them. According to the author, the justification for this solution is the lack of qualification of the procedural authority in a particular field of knowledge, which may result in the formulation of specific questions that make it difficult for the expert to give a correct opinion. However, this cannot lead to a situation in which it is the expert who formulates specific questions and then answers his opinion himself[74]. The solution presented seems fair to the extent that the expert would have the right to ask the trial authority to clarify or redraft the questions addressed to them so that it is possible to answer them and not cause the expert to have to prepare an opinion containing a number of assumptions arising from the authority's overly general or imprecise questions, but in no case must such a power lead to an unjustified increase in the expert's procedural role.

Another demand concerns the cost of preparing a so-called private opinion. Currently, these costs are borne by the party that used a private expert. However, it should be considered whether, if the court hearing the case uses the opinion of a private expert in deciding the case, the costs incurred in this regard should be reimbursed to her. They are often very high and at the same time, the so-called private opinion of higher merit than that of a court expert. The submission of a so-called private opinion may also lead to the need for a supplementary opinion or the appointment of a new expert by the court, thereby increasing the likelihood that the case will be properly heard. According to Article 616.1.2 of the Code of Criminal Procedure[75], the legisla-

[74] W. Lasek, *O wadliwości opinii biegłego w procesie karnym. Kilka uwag na tle praktyki wymiaru sprawiedliwości*, in: D. Gil, P. Rogowski (eds.), op. cit., pp. 215–230.

[75] Law of June 6, 1997 – Code of Criminal Procedure, Journal of Laws of 2018, item 1987 as amended.

tor includes "reasonable expenses of the parties" among the trial costs. However, it does not rule on whether the costs incurred for the preparation of a so-called private opinion constitute a legitimate expense of the party that provided the opinion. According to Prof. Dr Cezary Kulesza, if this expense is treated as a legitimate expense of the parties, the evaluation and reasonableness of a private expert's fee for preparing an opinion[76]may become problematic. Indeed, determining the scope of reimbursement for the preparation of a so-called private opinion may raise difficulties. Still, the changing role of the legal expert and the value of their opinion for the criminal process must lead the legislator to consider the legitimacy of reimbursement to the party who provided such an opinion, particularly if the opinion was valuable to the ongoing proceedings. This postulate found more support when the so-called private opinion led to the acquittal of the accused or the discontinuation of the proceedings at the pre-trial stage.

Despite the significant differences that exist between the institution of an expert appointed by the body of the proceedings and a private expert, the competitiveness of these entities leads to the positive conclusion that their joint appearance in the criminal process affects its course, often also increasing the correctness of the court's decision. The opinion of an expert appointed by the authority makes it possible to clarify the circumstances requiring special knowledge, and the admission of evidence from a so-called private opinion is important for verifying the procedural opinion and increasing its quality, as well as significantly strengthening the position of the parties in the process. The signalled need for changes is aimed at improving the quality of trial opinions by introducing powers to increase the possibility of verifying an expert's knowledge and skills, such as through a certification system. A proposal for solutions to increase the possibility of using the so-called private opinion in proceedings as evidence coming from a party to the proceedings and serving its interests was indicated.

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Conflict of interest

None

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