

ON THE ISSUE OF PERIODIC TESTING THE COMPETENCE OF FORENSIC EXPERTS

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Purpose: The purpose of this article is to draw attention to the important role of periodic testing of the competence of court experts in the context of quality management of court expert opinions in the justice system. The introduction of this type of testing requires answers to a number of questions. Who should conduct this type of competency testing? What should be its subject matter? Should it be mandatory? What consequences should it entail?

Design/methodology/approach: The article employs the method of in-depth literature studies, the document analysis method and the synthesis method.

Findings: Current legal regulations in Poland do not prohibit periodic testing of the competence of court experts. In practice, however, such tests are not carried out. This has negative consequences for the justice system, as experts are not subject to any quality control of their expert opinions beyond the assessment of their opinions in a specific case by the trial authority. In the future, such testing should be conducted by a state institution. In this way, court experts could learn from their mistakes, and decision-makers could select experts for specific court cases who want to improve their qualifications and are not afraid to have their competence tested.

Research limitations/implications: A significant limitation is the lack of publicly available information on periodic competency tests carried out in state forensic laboratories.

Practical implications: The introduction of periodic competency testing for court experts in Poland would allow experts to learn from their mistakes, thereby reducing the number of erroneous conclusions in their reports.

Social implications: The introduction of periodic testing of the competence of court experts in Poland would allow judicial authorities to select experts who make fewer mistakes. This would increase public confidence in the justice system in Poland.

Originality/value: Introduction to the scientific discourse of a broad approach to the issue of periodic testing of the competence of court experts within the Polish justice system. This article is addressed to entities managing quality control within the justice system.

Keywords: court experts, periodic competence assessment testing, quality management of court expert reports.

Category of the paper: Research paper.

1. Introduction

Polish literature on the subject, as well as government reports, mention competency tests for court experts. Such testing is considered an important element of quality management in court expertise. However, the role of testing the competence of experts in the decision-making process by the relevant authority (in Poland, this is currently the president of one of the district courts) regarding entry on the list of court experts is emphasized above all. Less attention is paid to the periodic testing of the competence of court experts, i.e., the testing of the competence of persons who have already been entered on the list of court experts. While this type of testing takes place in Poland in the case of public forensic institutions, such as the Institute of Forensic Expertise in Krakow or the Central Forensic Laboratory of the Police Headquarters in Warsaw (although the results of such tests usually do not go beyond the institution), thousands of experts operating in Poland as court experts do not participate in any periodic competency tests. It is worth emphasizing this problem, especially in the context of the ongoing debate on the shape of the law on experts, which is intended to comprehensively regulate the situation of court experts in Poland.

In the context of introducing periodic competency tests for court experts who work outside state opinion-giving institutions in Poland, many questions arise that cannot be answered in the literature on the subject. Therefore, the first objective of this study is to formulate the questions that need to be answered when introducing periodic proficiency tests for court experts in Poland. The second objective is to attempt to answer the questions posed. Sometimes this requires formulating alternative answers with examples of the positive and negative consequences of introducing a particular option. In the context of the issue at hand, it is particularly important to answer the following questions:

- What components are included in the competence of an **court** expert? Which of them should be subject to periodic testing?
- Which entity should conduct periodic testing of the competence of court experts?
- Should such tests be mandatory or optional? Paid or free of charge?
- What benefits can the introduction of periodic testing of court experts bring and to whom?

2. Research methodology

In order to answer the research questions, archival data analysis was used, taking into account reports from Polish and foreign public institutions. In particular, reports from the field of quality management of forensic expertise were used. These reports diagnose current

problems and formulate proposals for the future aimed at reducing the margin of error in expert opinions in specific areas of forensic science. Subsequently, a dogmatic method was used to determine the admissibility of periodic testing of the competence of court experts in the light of the law currently in force in Poland. Today, various aspects of the functioning of court experts are covered by many legal acts. At the same time, work is underway on a law on court experts, which would be a legal act comprehensively regulating the legal situation of court experts. On the basis of the published assumptions of the draft law, an attempt was made to determine whether the new law would bring new elements in the context of the issues raised. Next, an in-depth review of the literature on the subject was conducted. The elements that constitute the competences of court experts were identified. Those that play a special role in the context of periodic testing of the competences of court experts were highlighted. Finally, information was collected to justify the answers to the research questions.

3. Results

The classic model of competence distinguishes three basic elements: knowledge, skills, and attitudes (Czapla, 2016). Knowledge is a structured set of information, combined with rules for interpreting it. Skills are related to effective action in the context of achieving a set goal. Attitudes are related, among other things, to the motivation to take specific actions. When testing the competencies of court experts, it is possible to test, in particular, elements of knowledge and skills. In the case of the optional model of periodic competency testing, participation in such testing is a feature of attitude. Similarly, participation in thematic training courses or scientific conferences is not enforced by legal regulations or organizational requirements.

In Polish criminal proceedings (the same applies to civil proceedings), an expert witness plays a subservient role to the decision-maker in the proceedings. Using specialist knowledge (defined as knowledge not available to the average educated person), they interpret facts that are important for the resolution of the case. The scope and subject matter of the examination is determined by the procedural authority (the prosecutor in preparatory proceedings or the court in court proceedings). The procedural authority is also responsible for evaluating the expert's opinion. The preparation of an opinion by a court expert usually involves many stages, among which the following are most commonly distinguished (Widła, 2017; Leśniak, 2012, pp. 349, 350; Achrem, Sołtyszewski, 2022, pp. 32-33):

- Identification of the problem by the expert. The scope of the examination is indicated by the procedural decision-maker by formulating questions to the expert. The expert should be able to transform the questions of the procedural authority into questions formulated on the basis of his discipline. Only then can the expert determine whether

they can answer the questions of the procedural decision-maker. In particular: Do they have the relevant knowledge or skills? Do they have access to the appropriate research methods? Is it even possible to answer the questions of the procedural authority in light of the research capabilities of the specific field? There are situations when the trial authorities formulate questions that experts cannot answer due to applicable legal regulations (Szmit, 2024).

- Collecting research material. In the case of forensic identification tests, this may concern both the material in question and the comparative material. In the case of the work of a forensic psychiatrist or psychologist, on the other hand, it is usually a matter of gathering information from a large collection of various sources.
- Conducting research on the collected material using appropriate research methods. Analysis of research results.
- Interpretation of the research results obtained. Formulation of conclusions.
- Preparing a research report (usually in writing). Information about the chosen research method and its margin of error. If a less common method is chosen or the dominant method is not chosen, the expert should also include a description of the method and a detailed justification for its selection. A report on the research activities undertaken and their results.
- Presentation of the opinion before the court. This stage also includes: citing the most important arguments for their conclusions, answering questions from the decision-maker, and responding to the opinions of other experts.

The question arises: which of these stages should the competence check cover? In this context, it should be remembered that the expert does not always carry out all of the above stages himself. He often relies on information gathered by other entities, in particular information obtained by the prosecutor, the police, and officers of other services. Traces for comparative testing are secured at the scene of the incident by forensic technicians (police officers); the location of the traces at the scene of the incident is described in a report prepared by the prosecutor. However, there are also areas of expertise, such as polygraph testing, where the same expert performs all of the above activities.

In Poland, legal regulations concerning expert opinions are contained in many different legal acts. These provisions are contained in particular in: the Code of Criminal Proceedings, the Code of Civil Proceedings, the Code of Administrative Proceedings, the Act on the Common Courts System and the Ordinance of the Minister of Justice on court experts (Skubisz-Ślusarczyk, 2021). A distinction should be made between being a court expert as a person entered on the list of court experts and the procedural role of an expert in specific proceedings (e.g., a criminal or civil proceeding). In Poland, a separate list of court experts is maintained by the president of each of the 47 district courts. According to Polish law (the Ordinance of the Minister of Justice), a person may be included in the list of experts if they “have theoretical and practical specialist knowledge in a given branch of science, technology, art, craft, or other skill

for which they are to be appointed” and “guarantee the proper performance of their duties as an expert”. The expert's “special knowledge” is verified by the president of the district court; the expert should demonstrate their relevant qualifications with “documents and other evidence”. The procedural role in a specific proceeding is determined by the procedural authority, which usually first considers selecting an expert for the case from among the persons entered on the list of court experts, but may select a person who is not on the list of experts as an expert for a specific case too. The content of reports on the functioning of experts in Poland prepared by the Supreme Audit Office (Najwyższa Izba Kontroli) and the Helsinki Foundation for Human Rights (Helsińska Fundacja Praw Człowieka) indicates that district court presidents do not have the appropriate tools to properly verify the competence of court experts, and that persons who do not have the appropriate qualifications often end up on the list of court experts (and, consequently, as experts for specific cases). Literature in the field of forensic science similarly gives a negative assessment of the model currently in use in Poland for verifying the competence of candidates for court experts and describes examples of opinions prepared for court cases by persons without the appropriate qualifications (Tomaszewski, 2024B; Gruza, 2023; Karsek, Rybicki, 2016). The legal regulations currently in force in Poland do not refer at all to the periodic testing of the competence of court experts already entered on the lists kept by the presidents of regional courts. The authors of the above-mentioned reports also focus on verifying the competence of experts when they are entered on the list of court experts and ignore the importance of periodic testing of qualifications. Within the literature on the subject, few publications emphasize the importance of introducing periodic testing of court experts (Leśniak, 2012, pp. 263-267, 349; Gruza, 2023). The situation is different in the case of state forensic laboratories; in accordance with the requirements of the PN-EN ISO/IEC 17011:2006 standard, they participate in periodic competence tests and in this way, among other things, demonstrate their competence to the accreditation body (Gruza, 2023). In summary, the regulations in force in Poland do not prohibit the periodic testing of the competence of court experts. At the same time, these regulations do not provide for such tests and do not contain guidelines as to who, and how such tests could be conducted.

In Poland, numerous attempts have been made to comprehensively regulate the legal status of court experts in a single legislative act (Tomaszewski, 2024A). Despite the preparation and consultation of many drafts of such a law, none of them has even been submitted to the Polish parliament to date. The most recent attempt to prepare a law on experts was made in December 2023, when the Minister of Justice appointed his representative for court experts, whose tasks include, among others: developing proposals and coordinating work on the status and activities of court experts, monitoring and analyzing the needs of court experts, as well as preparing preliminary assumptions for a law on experts. The representative was assisted by a working group appointed to develop the assumptions for the law, and the prepared assumptions were published in July 2024. These assumptions do not change the legal status of court experts. They indicate that the function of court experts should be performed by persons who have

sufficiently high competences in various fields of science or knowledge and who can use these competences for the purposes of the administration of justice. The new law on experts is intended to introduce certification of court experts and forensic institutions. In specific cases, the procedural authorities should primarily use certified court experts, and only in exceptional cases (e.g., the lack of a certified expert in a specific field) may they use court experts without certification. The representative and his team considered a model similar to the Dutch model (Dutch register of Court Experts – NRGD) to be the “most effective and objective” model for verifying the competence of experts. This model involves the establishment of a Certification Council, composed of members appointed by the Minister of Justice (judges, prosecutors, representatives of expert communities and public institutions that prepare court expert opinions). The main task of the Council would be to manage the certification process for court experts and opinion-giving institutions, including supervising the process of verifying the competence of candidates for experts (in particular by preparing verification criteria and considering appeals against the decisions of the Assessment Teams). Under the discussed assumptions, a single central list of certified court experts (maintained by the Ministry of Justice) would replace the 47 lists maintained by the presidents of individual district courts. When analyzing the assumptions of the draft law on court experts, it should be noted that these assumptions do not provide for the introduction of periodic testing of the competence of experts who receive the appropriate certificate and are entered on the central list. However, a public entity (Certification Council) would be established, which could also appoint teams to periodically test the competence of court experts and supervise the testing process itself. From a legal point of view, this would only require a minor editorial amendment (for example, the introduction of an appropriate subparagraph when defining the powers of the Council). In the discussed draft of the act, the certification process is a paid process, and after the introduction of the above-suggested changes, periodic testing of experts' competences would probably also be a paid process

4. Discussion

Assuming that periodic testing of court experts' competence may primarily concern knowledge and skills, the subject matter of such testing should be specified in more detail. Two approaches are possible (President's Council of Advisors on Science and Technology). The first focuses on the accuracy of the expert's final conclusions; under this approach, the body administering the tests obtains information on the margin of error in expert opinions in a given field. The second approach pays more attention to how experts arrive at their conclusions, what methods they use, and how they apply them in solving the problem identified by the procedural body. This approach prolongs the analysis of the results of expert tests, but provides

experts with more valuable feedback (on how they apply their methods). The second approach also gives those managing the justice system more information about the errors made by experts and the circumstances conducive to making errors. There is no problem in combining the first and second approaches. All the more so because even experienced experts make many methodological errors (Konieczny, p. 61), for example: they only use the methods they learned during their first training (ignoring others), they use certain methods incorrectly, they use their own methods (based solely on personal experience) of unknown accuracy. In every field of forensic expertise, there is a subjective element to the assessments made by experts (Moszczyński, 2011) – as in every area of human decision-making. The cases submitted to experts as part of proficiency tests and the scope of the questions asked must not differ in difficulty from the cases most commonly encountered in a given area of expertise (i.e., they must not be too simple or extremely difficult). The testing conditions must be standardized, i.e., presented in the same way to all experts participating in the testing. This often limits the scope of testing (depending on the nature of the objects examined by the experts), for example, due to the need to send copies of the objects to be examined (for example, a larger number of test participants does not allow the same original object to be sent to them in turn – if several dozen experts were to examine the same original manuscript, testing their proficiency would take many months) or the susceptibility of the original objects to changes as a result of subsequent examinations. Proficiency testing may apply to each of the stages of assessment mentioned above: identifying the problem, collecting material for examination, conducting examinations using appropriate methods, interpreting the results of the examinations, formulating conclusions, preparing an examination report, and defending the conclusions of the opinion in court. In a specific periodic examination of the competence of court experts, the procedural authority will probably select some of the elements described, most often focusing on the methodology of conducting the research itself and the accuracy of the conclusions. Testing competence in presenting opinions in court would require the entity conducting the test to faithfully recreate the conditions of a courtroom and involve lawyers in the roles of judges, public prosecutors, or attorneys for the parties.

Another issue concerns the selection of an entity that would organize periodic proficiency tests. In some countries, these are private entities or scientific associations in the field of forensic science (Leśniak, 2012; Gruza, 2023). In Poland, however, the solution should be to assign such competences exclusively to a state institution. At present, there are no legal obstacles to a private institution certifying experts in a specific field of forensic science or conducting periodic proficiency tests. It does not need to have any formal powers. Any person or group of persons, regardless of their competence, can create such an entity. The literature describes an example of an institution called the Supreme Council of Handwriting Experts (Tomaszewski, 2021). In reality, it is a commercial law company run by two people (a married couple), advertising its training courses as “comprehensive preparation for the profession of graphologist and the role of expert handwriting expert”. The company emphasizes that “every

year, its supervisory department evaluates experts and members of the NRP”, but in Tomaszewski's opinion, the people who give opinions on behalf of this private institution have low competence. In the case of associations of experts (even those bringing together experienced court experts), the question may always arise (especially in fields where there are more associations) as to why these associations should conduct proficiency tests on people from other associations or those who are not members. In order to rule out this type of situation, and taking into account the work described on the new draft law on court experts, the optimal solution would be to grant the appropriate powers to the Certification Council. This commission could develop periodic proficiency tests in specific areas of expertise, as well as appoint appropriate persons to the assessment teams and supervise the testing process itself.

The proposed granting of powers to periodically test the competence of certified court experts involves determining whether such tests should be mandatory or optional. There are significant arguments in favor of the latter solution. The central list of court experts will include persons who have already passed the relevant competency tests and obtained a certificate. Therefore, assuming that the qualifications of experts are reliably verified in the process of obtaining a certificate, there is no reason to impose an additional obligation on experts. Such tests could, for example, be conducted on an optional basis each year (with different types of cases) and experts with high aspirations (wishing to test or improve their skills) could participate in them at their discretion. Since the certification process itself is proposed to be fee-based, periodic competency testing should also be fee-based. Participation itself should be treated as a sign of motivation to provide “better” opinions and should be taken into account by the procedural authorities when selecting a court expert in a specific case.

5. Summary

Periodic testing of the competence of court experts can bring significant benefits to many entities: trial decision-makers (in particular judges and prosecutors), trial representatives of the litigants, decision-makers in the area of justice management (and thus also in the area of quality management of court expert opinions in general), the experts themselves. For procedural decision-makers, the results of the competence assessment should be relevant in the context of selecting an expert. Procedural authorities should select experts who simply perform better in competence tests (the conclusions of their opinions have a smaller margin of error) or who are not afraid to undergo periodic competence tests (in cases where such tests are not mandatory). For the parties to the proceedings (or their professional representatives), the issue of an expert witness's participation in competency tests provides arguments (they may ask the court: why is the expert witness not participating in periodic competency tests?). Decision-makers in the justice system management process could obtain information on: areas of expert opinions

with a higher number of errors, factors contributing to errors made by court experts, and types of errors made by experts. Such a diagnosis in the future (provided that the relevant actions are ordered and financed by those governing the justice system in Poland) could in the future result in fewer judicial errors in Poland, and thus reduce the amount of compensation paid by the State Treasury, as well as increase the level of trust in the justice system among the public. The court experts themselves would finally have the opportunity to learn from their mistakes and deepen their expertise. If decision-makers preferred experts who underwent periodic testing, the experts themselves would perform a greater number of expert opinions, thereby more than compensating for the cost of the fees charged for such tests.

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