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COMPARATIVE STUDY ON EXPERT WITNESSES IN COURT PROCEEDINGS

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Executive Summary

The Turkish Ministry of Justice has identified the existing system of expert witnesses as an obstacle to the efficiency and effectiveness of the judicial services. The 2009 Judicial Reform Strategy and the Judicial Reform Action Plan call for a comparative study analyzing the experience in other countries to provide input into the policy debate in Turkey.

This study provides descriptions and analyses of approaches to the use of expert opinions in civil, criminal, and administrative court proceedings in **France, Germany, Italy, and the United States**. It focuses on five key areas:

- Access to the function of expert
- Execution of an expert opinion
- The opinion and its use in evidence
- Remuneration
- Liability

Background

Expert opinions are widely used throughout different justice systems. They relate to professional, scientific, or technical matters and serve as evidence in a legal proceeding and **cannot examine issues of law**. The countries under study have similar stages of development, but have different approaches to the issue. The most fundamental difference is due to the different role of the judge and the parties in civil law and common law systems.

In **common law systems** such as the United States, the judge is more of a passive and neutral arbiter who listens to what the parties bring forward, including contradictory expert opinions. In these systems, experts function as witnesses for the respective parties, including the accused and the prosecutor in criminal proceedings, who hire and pay them. The advantage is that the court retains its full impartiality as it does not get involved in generating evidence whose validity it may be reluctant to challenge later. There is a risk, though, of biased expert opinions that just operate as "hired guns" in the process, potentially leading to a "battle of experts".

In **civil law systems** such as France, Germany and Italy, the judge has a more active and managing role in the process. The expert is an auxiliary commissioned by the court. They operate under its direction and have a special status. This is to ensure that experts are neutral, because a battle of experts may be difficult to settle for a judge who does not have

the required technical expertise. However, these systems require a mechanism to ensure the quality and speediness of the expertise hired. This may create opportunities for corruption.

There are **exceptions** in both systems allowing for elements of the other one. In the U.S. there is a little used option of court appointed experts. In civil law countries, parties can appoint "party consultants. More recently, civil law systems have experienced an increased introduction of elements of Anglo-American procedure leading to **some conversion**.

Access to the function of expert

In **civil law** countries, the court appoints the expert. The decision requires scrutiny, as it has implications for cost and speed of the trial, but it is not a matter of negotiation between the court and the parties. To ensure quality, many countries have a system of official lists that requires active management and regular updating. Experts have to request the admission to the list. They need to fulfill requirements of integrity and competence. Although the authority managing the lists ensures compliance with ethic standards, professional organizations tend to take over this role. There are rules for renunciation and recusal of experts in case of conflict of interest.

In **common law** countries, the parties appoint the expert and decide whether they want to introduce them to the proceedings as evidence. When that happens, the other party takes the deposition of the expert and has the right to know details about the expert's background and the amount he or she was paid for this opinion.

Execution of an expert opinion

In **common law** countries, the scope of the assignment is defined by the relevant party in the retainer agreement. Courts are neither required nor expected to monitor the execution of the mission. The expert is a simple witness. Instances of delay are a private matter to be resolved between the attorney and the expert.

In **civil law** countries, the court supervises the activities of the expert who derives extensive rights from her or his mission as auxiliary of the court. Parties will have difficulty challenging the findings of an expert. It is therefore important to ensure fairness in the execution process. The courts also monitor the timeliness of the delivery and sanction experts when they are delayed. The European Court of Human Rights considers the arrangements for expert opinions an essential element of a fair trial and sanctions violations accordingly, including those based on delay caused by poorly managed delivery of expert opinions.

The opinion and its use in evidence

In **common law** countries, the court supervises the admissibility of expert evidence and acts as a gatekeeper. The reason is that experts may be freely appointed, and jurors may be

unable to distinguish between "good" and "bad" science. In general, the expert opinion is introduced orally.

Civil law countries mainly rely on the written reports submitted by the experts, an oral hearing being an additional option. The question is rather to what extent the court is bound by the expert opinion. Courts can in principle disregard the expert opinion if they do not find it convincing.

Remuneration

In **common law** countries with contradictory expert witnesses, the parties negotiate fees and remunerate their own experts. The party paying excessive fees for an expert opinion runs the risk to undermine the opinions credibility. It is prohibited for an expert witness to tie the level of compensation to the outcome of the case (contingency fees).

In **civil law countries**, the remuneration is rather rigidly governed by statutory provisions or regulations, which may not attract the top experts. The principle in the law on the books is generally that the costs of an expert opinion are suffered by the party that loses the litigation. In practice, however, the costs are often split.

Liability

Despite the differences, both civil law and common law countries require an expert to provide impartial, independent and unbiased evidence, even in systems of contradictory expert witnesses. A violation of this obligation through misconducts of different kinds will entail their liability for the damage caused. Professional organizations have defined rules in various codes of ethics. The sanctions against experts can involve civil reparation, criminal punishment, and disciplinary actions.

Lessons and Considerations for Addressing Current Challenges

The study identifies possible ways how the legislative, executive and judicial branch of government can each contribute to improving the use of experts in courts proceedings, successful reform being more likely if these actions are closely coordinated.

Legislative Framework

1. Undertake an empirical analysis of the issues around the use of expert opinions in the courts when planning revisions of the legal framework.

An empirical analysis can help the basis for a well grounded assessment of the rules of administrative, civil, and criminal procedure to check and confirm or reject concerns. Such an analysis and comparative practice and experience can then provide

inspiration for the development of suitable solutions. By contrast, the import of wholesale solutions from abroad to Turkey would likely to fail without a thorough empirical analysis of the current situation in Turkey. Experience from Mexico and Argentina, for example, shows that so-called "common knowledge" about problems and their solutions can often be misinformed and that empirical data are a more solid basis for identifying the real issues as well as effective solutions.

2. Strengthen the expert witness system in line with Turkey's legal tradition as a civil law country.

Rules on expert opinions in legal proceedings are significantly influenced by the legal tradition of a given jurisdiction. Turkey has a civil law approach to administrative, civil and criminal procedure in general and to expert opinions in particular. Experience with law reform in Europe and Central Asia highlights the major challenges and unpredictable outcomes of transplanted solutions from different legal systems. Inspiration from other systems can be useful, but requires especially careful analysis of facts and possible implications.

3. Improve clarity of the legal framework by specifying that expert opinions are about questions of fact and cannot be about questions of law.

In all systems under study, civil law and common law systems alike, the scope of the mission of an expert is limited to questions of fact. Experts cannot be used to answer questions of law. If the practice in Turkey is indeed different, a first step to address this is to see whether the law provides sufficient clarity about the scope of the expert mission and, if necessary, improve the law.

4. Enable judges to supervise the activities of the expert effectively to ensure timely execution of the mission, for example by introducing mechanisms allowing and encouraging them to impose financial and other sanctions on experts in non-compliance with timeliness or professional standards.

Since the court supervises the activities of the expert, judges need appropriate tools to manage the way the experts carry out their mission. Otherwise, they will not be able to monitor the timeliness and quality of the delivery. The law should provide the possibility of sanctions for experts who are in non-compliance. In Germany and Italy, for example, in case of unjustified delay the expert is subject to a fine.

Cooperation between Judiciary and Ministry of Justice

5. Option for action: The Judiciary and the Ministry of Justice can constructively discuss differing perspectives and objectives, build consensus, and reach evidence-based decisions through the systematic use of empirical research. Such consensus building, while challenging, is essential for the effectiveness of the judicial system to reconcile and manage the intrinsic structural tension between the Judiciary focusing on its independence and the Ministry of Justice emphasizing the Judiciary's accountability to the public for its performance.

Judges take pride in their independence. Identifying the judiciary's focus on independence as a problem carries the risks of generating resistance to change. Empirical research based on a methodology that is agreed among the judiciary and the Ministry of Justice can provide a sound and objective basis for change. In the Netherlands, for example, far reaching improvements to the way court performance is managed were possible because the Judiciary did not opt to reject improvement initiatives. It addressed concerns based on judicial independence by actually taking the lead in the change process and developed mechanisms for performance accountability itself.

Provide an Enabling Operating Environment

6. Options for action: When changes are made to the legislative framework or the workflow of judges and support staff, they may need to receive appropriate training to be able to implement solutions effectively.

Justice Reform projects worldwide generally have components providing for judicial training to make sure that implementation is grounded in adequate knowledge about how the improved system is supposed to work. Training is commonly used to familiarize judges with new areas of law or changes introduced by new legislation. It is also used, for example, to ensure judges and staff are able to use a newly introduced IT based case management system.

7. It is important for the Ministry of Justice to allocate adequate resources to provide an operating environment in which judges can implement the improved expert witness system as intended. If the empirical research identifies constraints that exacerbate the challenges around the use of experts, these constraints should be addressed. If excessive workload, for example, is a contributing factor, the potential of reallocating work, of preventing cases from getting into the system by

introducing filtering mechanisms such as alternative dispute resolution, or of increasing the number of judges should be explored to find a sustainable solution.

The current analysis by the Ministry of Justice suggests that one of the underlying reasons for judges to make use of experts is the fact that they are crumbling under a heavy workload and use this as a way of delegating work. It is important that the empirical analysis include aspects such as this one to have clarity about the incentive structure for judges to behave the way they do. It is the responsibility of the Ministry of Justice to providing a supportive operating environment by allocating appropriate financial, human and material resources and managing them in a way that constraints do not translate into dysfunctions.

Seek Outside Support

8. The Ministry of Justice could seek the active cooperation of professional organizations to improve the external accountability of experts to ensure they act according to the rules. The possibility of disciplinary sanctions by such institutions has turned out to be useful in other countries as well.

The study has identified mechanisms that are conducive to holding experts accountable for the delivery of their services. The existence of appropriate tools for judges to manage experts in the process has already been mentioned. However, the existence of disciplinary and other sanctions for experts who transgress the scope of their competencies may be useful. The Ministry of Justice may therefore look into cooperation with professional organizations in this respect, develop or improve codes of ethics for experts, and set up an effective system to ensure compliance with these standards. France, for example, has taken active steps to remove such experts from the official lists, and in call civil law countries under study professional organizations to which the experts belong play an important role in monitoring expert behavior through the enforcement of professional codes of ethics.

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INTRODUCTION

The delivery of judicial services to citizens and businesses relies on the effective interplay of numerous actors and institutions of the broader justice sector. The process in which they are brought together to contribute to the settlement of disputes is governed by the rules of procedure. This is true for administrative, civil as well as criminal procedure. Bottlenecks in various places of this process can seriously affect the efficiency and effectiveness of the entire service delivery chain.

The Turkish Ministry of Justice has identified the way the expert witness system currently operates in the courts throughout the country as a major obstacle to the efficient and effective delivery of judicial services to citizens and businesses. There are widespread complaints that judges crumbling under a heavy workload delegate decision making by resorting to experts who issue opinions that then serve as substitutes for legal reasoning by the judge. This has an impact on judicial service delivery as it negatively affects the length of court proceedings as well as their costs.

This dysfunction in the justice delivery chain can have serious implications. It makes justice more expensive and procedures more protracted. Aspects such as length and cost of court proceedings, however, are important factors for the business environment, as businesses rely on the courts as arbiters of the rules of the game to deliver their services.

In addition, this dysfunction negatively affects Turkey's ability to live up to its commitments under the European Convention for Human Rights. Its article 6 grants those seeking justice the right to a fair trial within reasonable time. Citizens and businesses bring complaints to the European Court of Human Rights which has the power to condemn signatory States for non-compliance. This has financial implications as a country found in violation of this Convention has to pay compensation. Beyond the financial implications, though, it negatively affects the image of the Turkish justice system abroad and particularly in Europe, which casts a cloud over European Union accession negotiations.

The Turkish Judicial Reform Strategy and Action Plan have therefore identified the functioning of the expert witness system throughout the country as an obstacle to the efficiency and effectiveness of judicial service delivery. They foresee field studies to be carried out in civil, criminal, and administrative procedure to access the situation in more detail. Based on findings of these field studies reforms will be undertaken to improve the current system. This comparative study on the use of experts in civil, criminal and administrative proceedings in other countries together with the findings of the field studies will feed into the preparation of these reforms to improve the delivery of justice services to businesses and citizens in Turkey.

This study provides descriptions and analyses of approaches to the use of expert opinions in civil, criminal, and administrative court proceedings in Italy, Germany, France and the United States of America.

This comparative study focuses on 5 (five) key areas of major importance with regard to the role and functions of expert witnesses:

a) access to the function;
b) execution of mission;
c) the opinion submitted (and its use in evidence);
d) remuneration;
e) liability.

In an opening chapter on "Foundational Concepts", some broad remarks are offered with regard to the concept of expert opinion, the role of the expert and the differences between the common law and the continental approaches to expert evidence in legal proceedings. A few comments are also made in relation to the sources of law in Germany, France, Italy and the United States of America as well as to the definition of "administrative court proceedings". In the following chapters discussion will focus on domestic arrangements and occasional references will be made, when necessary, to the case law of the European Court of Human Rights.

In Appendix A and B readers will find a list of relevant literature and basic domestic statutes and cases on expert evidence.

For ease of reference, some "lessons to be learned" as well as some recommendations are summarized at the end of this report. Some of them are addressed to the legislative, because changes in the law may contribute to a better functioning of the system. Others are addressed to the Government, as the Ministry of Justice plays an important role in the management of the courts. Finally, some recommendations are addressed to the Judiciary who is primarily affected as the front line provider of judicial services.

CHAPTER 1

FOUNDATIONAL CONCEPTS

This chapter explores a number of foundational concepts designed to provide the Turkish authorities with basic knowledge over the options available in the management of expert evidence in legal proceedings. Some clarifications are offered on various matters in order to ensure a full understanding of the cross-country comparison that is developed in the following sections. Further, some attention is paid to the domestic sources of law in the jurisdictions under examination (France, Italy, Germany, and the USA) and to the definition of "administrative court" proceedings.

1. Introduction: Science, Technology and the Law

The intersection between science, technology and the law is an area rich in controversy. The more science develops, the more the courts of law need expert assistance with scientific questions. This is why it is fair to say that **expert evidence is often a crucial feature of criminal, civil and administrative cases today**. To give an idea about the frequency of legal expertise in the Continent of Europe, one could consider a 1992 study - carried out by the French Ministry of Justice – which suggests that an expert opinion was required in 13% of cases dealt with in 1991 by the courts of first instance (*Tribunaux de Grand Instance*). Unfortunately, more recent empirical data does not seem to be available, but there is little reason to believe that the situation has fundamentally changed. Given the increasing complexity of societies in the process of globalization as well as the growing role of technology in everyday life, it seems safe to say that the need for using experts has not decreased over time.

This report **does not address the issue of the origin and development of expert evidence in an historical perspective**. For a comprehensive and thoughtful account of such aspects readers could refer to a 1996 study by Prof. Taylor, which is mentioned in Appendix B.

In essence, the problem that scientific evidence presents to courts all around the world is that some science is presumably better than other science. As a consequence, **all contemporary jurisdictions need to make significant and structured efforts to ensure the quality and reliability of expert opinions** which, in turn, will ensure due process of law and the accuracy of the fact-finding process.

In this perspective, rules may be found in domestic law that:

a) govern the court discretion in the decision to allow expert evidence in the proceeding;

b) prevent "bad" (or "junk", a term often used in American legal scholarship and jurisprudence) science from entering court proceedings;

c) sanction perjury, frauds and/or malpractice by those who provide the court with an expert opinion.

Expert opinions are provided by individuals (or legal entities) that - by virtue of advanced education, training, skill, or experience - are believed to have **significant expertise and specialized knowledge in a particular subject beyond that of the average person and beyond the province of the court**. Such knowledge must be sufficient that others may officially and legally rely upon the person's specialized (scientific, technical or other) opinion about an evidence or fact in issue within the scope of his/her expertise – commonly referred to as the "expert opinion" - as an assistance to the fact-finder.

A preliminary - rather obvious - distinction must be made between experts relevant to court proceedings (whether civil, criminal or administrative) and **experts that are appointed by parties purely to evaluate their own legal case or assist them in taking unilateral decisions concerning the progress of their case**.

For example, a manufacturer could hire an independent external expert to assess the quality of its products in order to decide whether to litigate or settle a dispute. Often, car makers hire experienced mechanics to decide if their cars were built to specification when they are sued by clients. This kind of expert opinion is obviously protected from "publicity" or "discovery" as it bears no direct impact in court proceedings. In principle, if the expert finds something that is against its client, the opposite party will not know it. Similarly, in a criminal investigation the prosecution might employ an expert in "criminal profiling" to concentrate subsequent efforts of the criminal investigation on certain "categories of suspects". The point is that this may well happen even if criminal profiling is - as it is normally the case - inadmissible evidence in the criminal trial.

Instead, the present report focuses exclusively upon **experts that may eventually be called to give their opinion in a court of law**, on behalf of

a) the court or;

b) the parties to the proceeding.

Such opinion is extremely significant in a legal perspective, as it may be relied upon

by the court (or jury) when deciding the case.

Typically, when the opinion of an expert is submitted to a court of law, the aforementioned privilege (no "publicity", no "discovery") is no longer protected. The expert identity and all documents used to prepare the expert opinion will - under the rules of procedure of any given jurisdiction - become known at some point in the proceeding by the other party. Moreover, parties may be allowed to take an active role during the execution of the mission of the expert, by appointing counter-experts or in other manners that are described in the present report. At this early stage, it is important to stress that **in the domestic rules of procedure and evidence one may easily find the specific manner through which the opinion of the expert becomes admissible evidence in court proceedings** (oral examination of the expert, submission of a written report, etc…). Further, domestic rules describe the respective roles of the court and the parties to the proceeding whenever an expert opinion is needed in the case.

2. Definition of "Expert Opinion"

For the purposes of this report an expert opinion may be defined - in line with the definitions provided by the jurisdictions under scrutiny (Italy, Germany, France and the U.S.A) - as **any statement (whether oral or written) relating to a professional, scientific, or technical matter that is offered as evidence in a legal proceeding**. Expert evidence must relate to a "specialized field of knowledge" (the existence of which may be controversial) and it is based on formal and/or special study, training, or experience that imparts the competency to form an opinion upon matters associated to that subject.

3. "Specialized Fields of Knowledge"

The listing of all areas of expertise that may be relevant in legal proceedings falls well beyond the scope of the present report. One could reasonably argue that *any* area of science and technology may theoretically become relevant, should a dispute arise over a matter related to it.

Medical examinations, fingerprint examination, blood analysis and DNA fingerprinting are common kinds of expert evidence heard in serious criminal cases. In civil cases, the work of accident analysis, forensic engineers, and forensic accountants is usually important, the latter to assess damages and costs in long and complex cases. Intellectual property and medical negligence cases are also typical examples of legal proceedings for which an expert opinion is needed. Electronic

evidence has also entered the courtroom as critical forensic evidence. Voice mail recordings and closed circuit television systems produce electronic evidence often used in litigation, more so today than in the past. Video recordings of bank robberies and audio recordings of life threats are presented in court rooms by electronic expert witnesses. In the realm of medical malpractice litigation, an expert is typically asked to define the applicable standard of medical care in a given case and then to offer his or her opinion as to whether the defendant physician deviated from that standard in the given case.

4. Inadmissibility of Expert Evidence

This section discusses some major cases and situations for which **an expert opinion is excluded** *in abstracto* by domestic law.

4.1. Relevance

Expert evidence is a *species* of the *genus* "evidence": an obvious, but frequently overlooked, point. Thus, like all other evidence, expert evidence is subject to the general principles of evidence law in domestic proceedings. It is not the purpose of this report to discuss such principles, but readers must be aware that in all contemporary jurisdictions the basic rule is that **evidence is only admissible if it is relevant.**

Both epistemology and logic offer structured definitions for "relevance". What is central to the present report is that reference to "relevance" as a pre-condition for admissibility of evidence is common in all contemporary jurisdictions (see, among many others, §190 Italian code of criminal procedure, U.S. Federal Rules of Evidence 401). While the specific meaning of relevance depends upon the jurisprudence of each Country, the basic rule is that evidence may be admitted only if **it has a tendency to prove or disprove one of the legal elements of the case, or to have probative value to make one of the elements of the case likelier or not**.

The ultimate judgement on relevance lies with the court, based upon domestic jurisprudence.

4.2. No expert opinion on "issues of law" and "ultimate facts"

As suggested in the definition provided above, it is generally recognized by the domestic laws of the jurisdictions under examination – as well as other Countries in the Western World – that the opinion of an expert is needed in order to assist the judge (or jury) with **scientific and technical knowledge that goes *beyond* the province of the court** (or the general public). In no case may the expert take up the role of the court or else the role of the trier of fact (when the trier of fact is a lay witness, or juror).

As a direct consequence, the evidence of an expert is **inadmissible when, albeit relevant, it is tendered to offer legal conclusions or conclusions on ultimate facts**. Such expert opinion would clearly usurp the function of the court, or jury.

A few examples may clarify the matter. In Italy, France, Germany and the U.S.A. it would be **illegal to appoint a law professor as an expert to provide the court with an explanation on the "true" meaning of a statute or a court authority**. The statements made by the law professor in such cases would offer nothing other than arguments, or a "discussion", of the law and an application of the law. They would then read more like a legal brief (U.S. scholarship would probably refer to it as an "*amicus curiae*") than an expert report. In Italy, this rule may be inferred from the definition of expert opinion under the terms of §61 Code of civil procedure and §220 Code of criminal procedure. In France, the principle is that the questions posed to the expert may not be "legal" in nature (§232 French Code of civil procedure refers to "*questions de fait*", which implies that issues of law are excluded). As a result, it would be clearly **illegal to engage an expert in the determination of the correct qualification of a given contract** ("is it a sale or a lease?") or to assess whether a party owes a given amount of money to the opposing party (French Court Cassation, 8 January 1980 mentioned in PINCHON, *L'expertise judiciaire en Europe*, 293, footnote 630).

This does not necessarily mean that **law professors** will never be appointed as experts in a legal proceeding. It is in fact generally accepted that a *legal* expert may be instructed to specifically report on the system of rules and regulations of *a*) a given profession or *b*) a foreign jurisdiction (French Court of Cassation, 25 May 1948, quoted in PINCHON, *L'expertise*, page 293, footnote 632). Here, the obvious assumption is that a domestic court of law is not supposed to have knowledge of such rules and may therefore require assistance in finding out what the state of such (professional or foreign) law is. In other words, since professional conduct and ethics are to be regarded as "sciences" for the scope of the definition provided above, in a legal malpractice case law professors or lawyers may well offer opinion evidence over, for example, whether a conflict of interest existed such that counsel should have advised their client to seek alternate counsel.

In the United States of America **it is plainly inappropriate to ask the expert to speculate on whether a specific conduct allegedly violates the law** (*Koss v. Del. River Port Auth.*, USA). This rule is expressed by the Federal Rules of Evidence (FRE), by virtue of which the expert opinion may not "embrace an ultimate issue to be decided by the trier of fact" (FRE 704).

In all the jurisdictions under examination an expert testifying with respect to the mental state or condition of a defendant in a criminal case may not state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defence thereto. Such ultimate issues are obviously matters for the trier of fact alone.

To summarize, expert opinion should cover "issues of fact" and may not:

a) **substitute** or take the place of **the court opinion, by offering "legal" conclusions** (i.e. whether the conduct of a party is "legal or illegal");
b) **substitute** or take the place of **the court or jury decision on facts that have to be ascertained solely by the court or jury** (i.e. whether one defendant Mr. Smith committed a given action on a given day, whether the event "death of Mr. Smith" was caused by a given conduct by defendant Mr. Green, etc.).

4.3. Additional grounds for exclusion of expert opinions

In addition to the general criteria mentioned above, each jurisdiction may have its own specific reasons for excluding certain types of expert opinions from evidence in domestic proceedings.

In this respect, several major differences may be found in each Country, as each legal system may be more or less inclined to allow certain types of "science" in the courtroom. Readers must be aware that a careful analysis of each domestic law and jurisprudence would be needed to fully describe the grounds of exclusion that are enforced in each Country. Discussion below is therefore purely exemplificatory.

Polygraph evidence is a typical example of controversial evidence. Polygraphs - popularly known as "**lie detectors**" - are instruments that simultaneously record changes in body processes such as heartbeat, blood pressure, respiration, etc.... Scientific literature is divided over the reliability of lie detectors as scientists disagree over whether those changes actually occur when a person lies. What is crucial for this report is that while this type of evidence is admissible in some state jurisdictions of the United States, no expert could be appointed in Italy – even with the consent of all parties - to express an opinion on whether the statement made by a defendant (or witness) are "sincere" (by virtue of §188, Code of criminal procedure). This is because, in Italy as in France, the assessment of the sincerity of a declarant is considered to be "in the province of the court" (cf. MAFFEI, *Ipnosi*).

Further, Italian and U.S. criminal courts are not allowed to appoint an expert to determine "propensity to commit a crime" or the psychological character of the defendant (cf. in Italy, §220 para. 2, Italian Code of criminal procedure). The idea is that "psychological" conditions or state of minds of a defendant are irrelevant in a criminal trial. Instead, the criminal court may well - and often does - employ a medical expert (psychiatric, etc...) to determine whether the defendant was "sane" (*infermo di mente*) at the time in which he allegedly committed the offense.

5. Notes on the Jurisdictions under Examination

The decision to select France, Germany, Italy and the United States of America for the purpose of this study may be easily explained. Beyond their respective belonging to the families of "civil law" (Italy, Germany and France) and "common law" (the United States of America) Countries, the choice is justified by their **similar stage of development**. These are among the most industrial, productive and advanced democracies of the Western World, and their systems of justice may be said to mirror the problems that characterize contemporary highly developed societies. They also presumably offer a wide array of possible solutions to such problems.

Further, one should not forget that the matter under investigation (the management of experts and the use in evidence of expert opinions) is subject to ongoing debates among domestic scholars, courts and practitioners. What is offered in the present report is for the most part the view of the "majority" of legal scholars, practitioners within each Country. This is not to deny, however, that on some issues there may be significant conflicts between lower courts and higher courts, or between the view of academic jurisprudence and the opinion of the courts. Whenever possible, mention will be made to such conflicts of opinion and precedents.

Finally, Italy, France and Germany seem ideal for the purposes of this comparison as they all - albeit in different ways - were recently under pressure to borrow some of the features of the Anglo-American system – especially for reasons of procedural economy and judicial fairness. In spite of this, they also experienced a process of "resistance" against such borrowings, in the name of some traditional principles and reasons explained later in this report.

5.1. Sources of domestic law on "expert evidence" and "expert opinion"

In Italy, France and Germany the basic rules on admissibility of expert evidence, the execution of the expert mission and the use of the expert opinion in evidence may be found in the **respective codes of civil procedure, criminal procedure** and – in the case of France – the code of administrative justice. Below a **chart** is offered for convenience with regard to major fields covered in this study: the full text of the statutes is provided in Appendix B (when available, a translation in English is offered for ease of reference to the Turkish authorities).

CHARTS OF STATUTORY PROVISIONS CONCERNING EXPERT EVIDENCE IN FRANCE; ITALY, GERMANY

France

Civil proceedings	Code de procédure civile (2007)	§§232/284-1
Criminal proceedings	Code de procédure pénale (1959)	§§156/169
Admin. proceedings	Code de Justice Administrative	§§ R621-1/R621-14

Italy

Civil proceedings	Codice di procedura civile (1940)	§§61/64; §§191/201
Criminal proceedings	Codice di procedura penale (1942)	§§ 220/233
Admin. proceedings	(refers to civil proceeding)	§35 Statute 80/1998

Germany

Civil proceedings	Zivilprozessordnung, ZPO (1879)	§§402-414
Criminal proceedings	Strafprozeßordnung, StPO (1877)	§§72-93

The **specific features of the system of justice of the United States of America** requires a few additional remarks.

Firstly, in the U.S.A. major rules concerning expert witnesses and opinions are to be found in both statutes (namely the state and federal rules of evidence, see below) and precedents (common law). In principle, readers should be aware that **Federal and State laws of evidence apply to both civil and criminal proceedings**.

Secondly, it is perhaps worth recalling that in the United States of America;

a) in both civil and criminal proceedings the trier of the fact is the jury;

b) although the size of criminal and civil litigation is comparable to that of the European jurisdictions under examination, civil and criminal *trials* are far less frequent, as the U.S. system of justice is designed to encourage

i) settlements in civil proceedings and;

b) plea bargaining in criminal proceedings.

Only 10-15% of civil and criminal litigation reaches the stage of a jury trial. In the U.S., nevertheless, the role of experts and their opinions play a highly significant role *not only* at the trial stage (before the jury), *but also* during the phase of pre-trial (which is termed “discovery” in civil proceedings and “investigation” in criminal proceedings)

Thirdly, it is well known that the U.S. operates on a Federal system and a State system. The Federal system and the State system are in principle separate and independent. In other words, the fifty (50) American states are separate sovereigns with their own constitutions, governments, and state courts (including state supreme courts). They retain plenary power to make laws covering anything not preempted by the federal Constitution, federal statutes, or international treaties ratified by the federal Senate. Normally, state supreme courts are the final interpreters of state constitutions and state law, unless their interpretation itself presents a federal issue, in which case a decision may be appealed to the U.S. Supreme Court by way of a petition for writ of certiorari.

In the light of the above, a full account of U.S. law on expert evidence would require the analysis not only of the Federal system but also of a number of major State systems. Nonetheless, the present study confines its analysis to Federal law alone. This is due to the fact that **expert evidence is governed primarily by the Federal Rules of Evidence (FRE)**. The Rules were the product of protracted academic,

legislative, and judicial examination before being formally promulgated in 1975. Although U.S. **States** are free to adopt or maintain evidence rules different from the Federal Rules, a substantial majority **have adopted codes in whole or part based on the FRE**. As a consequence, it is reasonable to argue that a comprehensive analysis of the FRE ensures sufficient understanding of the U.S. approach to the matter of expert evidence.

More specific rules governing discovery and other procedural aspects of expert witnesses and opinions may be found in the **Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure** (see appendix).

The **Federal Rules of Civil Procedure** (FRCivP) govern civil procedure (i.e. for civil lawsuits) in United States district (federal) courts. The FRCivP are promulgated by the United States Supreme Court pursuant to the Rules Enabling Act, and then approved by the United States Congress. The Court's modifications to the rules are usually based upon recommendations from the Judicial Conference of the United States, the federal judiciary's internal policy-making body. Although federal courts are required to apply the substantive law of the states as rules of decision in cases where state law is in question, the federal courts almost always use the FRCivP as their rules of procedure (States may determine their own rules, which apply in state courts, although most states have adopted rules that are based on the FRCivP.) The **Federal Rules of Criminal Procedure** (FRCrimP) are the procedural rules that govern how federal criminal prosecutions are conducted in United States district courts, the general trial courts of the U.S. government. As such, they are the companion to the Federal Rules of Civil Procedure.

5.2. Definition of "administrative court proceedings"

While the distinction between "civil" and "criminal" litigation is self-explanatory and does not require elaboration for the purposes of this study, some attention must be paid to the concept of "administrative court proceedings".

In the Continent of Europe, in fact, administrative law is an entirely separate body of law with specific sources and a dedicated court system. The Federal Administrative Court (*Bundesverwaltungsgericht*) is one of the five federal supreme courts of Germany. It is the court of the last resort for generally all cases of administrative law. It hears appeals from the *Oberverwaltungsgerichte*, or Superior Administrative Courts, which, in turn, are the courts of appeals for decisions of the *Verwaltungsgerichte*. In Italy courts of administrative law are established at the Regional level and they are termed *Tribunali amministrativi regionali*, while the national appellate

court is based in Rome and it is termed *Consiglio di Stato*. Similarly, French law establishes *Tribunaux administratifs*, *Cours administratives d'appel* and the *Conseil d'Etat*. Broadly speaking, in such jurisdictions administrative courts are empowered with jurisdiction to resolve disputes between citizens (and/or corporate entities) and the State and its agencies (Ministries, Local authorities & Municipalities, State Schools and Universities, etc…) when the State or agency act in a "public" capacity.

By contrast, **this concept of "administrative justice" is alien to U.S. law**. In the U.S.A., instead, the expression "administrative proceedings" refers primarily to "non-judicial" determination of fault or guilt by certain Governmental or public bodies such as schools, professional councils, public committees, etc. Often, the exhaustion of these types of administrative proceedings is required before an official civil litigation may be initiated. In this respect, U.S.A. administrative proceedings do not qualify as "administrative court proceedings" for the purpose of this study, while extensive mention will be made, in due course, to proceedings before administrative courts in Italy, France and Germany

6. Comparing Different Approaches to Expert Evidence

6.1. Experts as "witnesses" v. Experts as "auxiliaries"

In the Western World, there are two different systems for equipping a court of law with an expert knowledge or opinion.

The first is the system of **contradictory expert witnesses** adopted by the common law (*i.e.*, among others, the United Kingdom and the United States of America). Here the plaintiff and the defendant - or the public prosecutor and the accused, in criminal cases - each choose and appoint an expert. These experts carry out their task not under the direction of the court, but under the direction of the party which has chosen them. Under the law, **they have no special status** and they are treated in principle as "witnesses". This is why, in England and in America, they are commonly referred to as expert witnesses in both statutory and case law.

The second system is that of the **official court appointed expert** ("*perito" or consulente tecnico*", in Italy - "*expert judiciaire"* or *"technicien*" in France - "*Sachverstaendiger*" in Germany), a system that exists throughout the continent of Europe (including, among many others, the procedural laws of Italy, France and Germany). In the jurisprudence of Continental Europe - heavily influenced by French case law and legal scholarship - experts are commonly referred to as **auxiliaries** to the court. In essence, this is just another word for "assistant" (in German the term is *Richtergehilfe*),

and therefore **experts have their own special status** (in French literature, for example, one can read that the "experts is not a witness", cf. PRADEL, 178).

Since experts are appointed by the court (or the investigating judge, if such judge is in charge of the pre-trial phase), the reasoning goes that they must carry their mission **under the direction of the court** and abide to the scope of research that the court has specifically commissioned to them, typically through **a set of questions** addressed to the expert.

Although it is principally the systems influenced by the French law that have opted for the official expert, and the common law systems that rely on expert witnesses, in fact things are rather more complicated. On the one hand, in French law there are very specific cases where a legislation provides for a system of contradictory experts: for frauds and falsification, for example. On the other hand - a fact little recognized by U.S.A. lawyers themselves - the U.S. Federal Rules of Evidence explicitly provides for court appointed experts under FRE 706. For instance, in U.S. criminal cases, once the guilt of the accused has been established, the court frequently wishes to obtain information about his/her mental or physical health before pronouncing the sentence. For this an expert is called in to examine the defendant; and this expert is generally chosen, nominated and paid by the court.

6.2. Advantages and disadvantages of civil and common law systems

The system of expert witness and the system of official court appointed experts each present their own particular problems.

It is often said that the major disadvantage to **the system of the "expert witness"** is the fact that the experts are tied to one or another party, which create a risk of them bending their opinion to make it match those of the party which introduced them. According to this view, expert witnesses are referred to by certain legal scholars as "*jukebox experts*...who sing the tunes they are paid for" (another common derogatory term is "*hired guns*"). By contrast, common law lawyers claim that this prejudice, in so far as it exists, is neutralized by the fact that the other party also has their own expert, subject to the same pressure but in the opposite direction, something which is said to guarantee a balance at the end. In reality, a balance is not always the result. In criminal prosecution, for instance, very often the defense is worse placed than the prosecution when it comes to paying for experts, with the consequence that there is no equality of arms between them. Even when the defence is able to recruit a good quality expert, there is the difficulty that the prosecution's expert may already have carried out experiments which have altered the clues, so the defense's expert is no longer able to carry out his own tests, being left with no useful role to play, except perhaps that of criticizing in general terms the method the first expert has used.

And when the expert evidence of one of the parties is contested by the other, the court often finds itself lost in the middle of the infamous "**battle of experts**", without the means of choosing in a rational manner between the different opinions it has heard. The difficulties are not purely theoretical ones. Incompetent or biased experts and the confusions resulting from battles of experts are to be found, alas, at the root of a number of extremely worrying miscarriages of justice.

By contrast, the advantage of this system is that the court retains its full impartiality, as it is by no means involved in the appointment of the expert. Sitting as an umpire, the reasoning goes, the court (and jury) will **listen to the questions and answers of each expert during direct and cross examination by parties, and then come to a conclusion over the reliability of the expert opinion**. Such decision will not be biased by any prior contact between the court and the expert.

In theory, the **system of official court appointed experts** deals precisely with the following two problems:

a) experts may be prejudiced when recruited and instructed by a given party;

b) "battle of experts" may generate more heat than light.

This system moves from the assumption that it is safer to empower the court (rather then the parties) with the decision to select and appoint an official expert in the case, as such *official* appointment will automatically generate respect for the role and activities carried out by the expert, in the interest of justice (rather than in the interest of the parties alone). The obvious disadvantage is that this system is that it is more seriously exposed to risk of corruption and the risk of incompetent experts (as **parties - albeit allowed to appoint their own "independent or private" consultants** may only challenge the court appointed experts in relatively few cases). In other words, the Continental European approach is meant to avoid "biased" experts, but it lacks efficient mechanisms to restrict and control the substantial authority of the court expert.

Risk of corruption is significant in many respects. First, courts may use appointment of experts in return for favors. Second, parties may bribe judges to secure appointment of a given expert in their case. Third, parties may bribe the court appointed expert to deliver an opinion favorable to them.

In this system, parties are very often faced with an expert that the court is inclined to believe, since it was the court who appointed him/her. Broadly speaking, the **official experts have a legal status that is more elevated than that of the simple witnesses, making them harder to attack**.

To cope with these problems the statutes of continental jurisdictions set a number of provisions aimed at guaranteeing the quality of experts by means of a mechanism of **official lists**, supervised by a variety of authorities (courts, professional committees, etc...). The bottom line, however, is that once an expert is appointed among those mentioned in such lists, it is rather difficult for the parties to successfully cast doubts on the reliability of his/her opinion, even though the parties are entitled to appoint their own party consultants

It is also worth recalling that the system of court appointed expert normally gives the court - in difficult and complicated cases - the option of appointing multiple experts rather than a single one.

In the last decade, legal scholars in continental Europe – sometimes ignorant of the very serious problems to which it sometimes gives rise – have praised the system of expert witnesses and advocated its introduction in their own systems. This point of view did not entirely convince the reformers in either Italy, France or Germany. By way of illustration, the **new Italian code of criminal procedure** (enacted in 1988), despite having borrowed a number of ideas from the common law (i.e. cross examination by parties, defense investigation, plea bargaining, etc...), **has retained the system of official experts** - whilst giving the parties the right to designate a consultant of their own, who can monitor the mission of the official expert, and be heard with him/her or against him/her at the trial. In France in 1990 the *Commission justice pénal et droits de l'homme* also reaffirmed the principle of official experts, although it proposed to modify the current system by giving the parties the right to participate in the choice of expert – a modification that has not so far been enacted.

Still, some **elements of convergence** between the Anglo American world and the Continent of Europe may well be found. In both Italy (for criminal cases) and Germany (in civil and criminal cases), statutory provisions explicitly suggest that the examination of the expert should follow, in principle, the very same rules applied to witnesses, unless it is specified otherwise (i.e. among many others, §402 German ZPO). Further, one should not underestimate the possibility, under FRE 706, for the U.S. courts to appoint experts, should the system of contradictory expert fail to cast light on the scientific matters at issue.

7. "Simple" and "Undisputed" Scientific Evidence

A question to be addressed now is whether the law may or should require a fully fledged expertise even when the scientific opinion is rather simple or not disputed among the parties.

While in some Countries under investigation (Italy, Germany, U.S.A) the law makes no explicit distinction between "simple" and "complex" scientific opinions, French law has its own significant peculiarity.

Under §258 of the French code of civil procedure:

> *Lorsqu'une question purement technique ne requiert pas d'investigations complexes, le juge peut charger la personne qu'il commet de lui fournir une simple consultation.*
>
> (Unofficial translation: When a technical issue does not require complex analysis, the court may instruct an expert to provide a simple "advice")

The "**consultation**" (literally "advice") **is** thus a **lighter form of expert opinion** (PINCHON, p. 248), to be employed when the "specialised knowledge" – that falls outside the province of the court - is not so complex to require the whole panoply of guarantees of an expertise.

For ease of reference, rules governing the consultation may be found in §256-262 of the French Code of civil procedure.

A typical example is that of a bank manager, required to report on the "average contractual practice" offered by the banks in the areas, or a "Head hunter" required to report on whether the job market in the area is growing or falling, etc…

Also in criminal proceeding, French law allows for a simplified type of scientific opinion, termed "*investigation*", which is governed by §81 para. 1 of the French code of criminal procedure

In all jurisdictions under examination, **an alternative way to secure the introduction into evidence of simple scientific facts may come through the theory of "judicial notice"** (in Italy, the term is *fatto notorio*). Judicial notice may be interpreted largely by the courts, and this may allow - especially when parties consent - the introduction into evidence of basic scientific facts for which there is no major controversy in the case.

In the United States of America, FRE 201 addresses judicial notice in federal courts, and this article is widely copied by U.S. States. FRE 201(b)) permit judges to take judicial notice of two categories of facts:

a) those that are "generally known within the territorial jurisdiction of the trial court" (e.g. locations of streets within the court's jurisdiction) or
b) those that are "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned"

CHAPTER 2

ACCESS TO THE FUNCTION

This chapter covers aspects such as the decision on whether an expert witness is required in the proceeding, the decision about the choice of the expert, the establishment of expert witness lists, the criteria and procedure for admission of experts to these lists, oversight of these experts for compliance with ethical standards, renunciation and recusal of expert witnesses.

1. The Decision about Whether an Expert Witness is Required in the Proceeding

This section investigates who has the authority - under domestic law - to take the decision to introduce expert evidence in legal proceedings.

1.1. Italy, France and Germany: the leading role of the court

In Italy, France and Germany - in civil criminal and administrative court proceedings - the answer is simple and straightforward. The decision to require an expert opinion is taken **by the court**:

a) either on its own motion;
or
b) upon the request/motion of any party.

The general rule - relevant to both civil and criminal proceedings - is that the court decision is “discretionary” in the sense that courts may appoint an expert whenever they are satisfied that there is a **need to acquire specialized knowledge in relation to facts relevant to the dispute. Reasons must be provided for such a decision in both civil and criminal proceedings**. Typically, when the court denies the appointment of an expert upon the request of a party in first instance, such party remains entitled to reiterate the request on appeal (in cases in which an appeal is admissible according to domestic law). According to the case law of the European Courts on Human Rights, **there is no obligation on the court to obtain an expert report merely because one party seeks it** (see, among others, *H. v. France*, 1989)

The decision to require an expert opinion bears significant consequences on the legal proceeding. Firstly, the execution of the mission will require some time, and this may translate in important delays in the proceeding. Secondly, the execution of the mission involves significant costs which may burden either the parties or the State (see below). For all these reasons, courts are required to make a careful scrutiny in allowing expertise in the proceeding and may well reject the application of the party ,

whenever the request appears to be dilatory, or the evidence irrelevant or subject to an exclusionary rule of evidence.

In France, the Code of civil procedure specifically provides that an expert opinion may be required **only when other forms of expert opinions** (such as the consultation, described above in chapter 1) **are not capable to clarify the scientific matter to the eyes of the court** (§263 French Code of civil procedure).

While the general rule is that the decision of the court is "discretionary" (in the sense mentioned above) different arrangements are possible. In German criminal proceedings, for example, the rule is that some kind of expertise must necessarily be allowed, given their special importance (it is the case of DNA analysis, whenever the accused person is suspected of a criminal offence of substantial significance or of a crime against sexual self-determination" (§81g of the German code of criminal procedure).

Further, in German civil proceedings the rule in the books is that a court may not refuse an expert opinion when the request is jointly made by the parties (404 ZPO) but this almost never happens (PINCHON, p. 18)

1.2. U.S.A.: the leading role of the parties.

By contrast, in the U.S.A. **the decision to appoint an expert to provide evidence in the case is in principle left to the parties**. This aspect requires some discussion.

At its most basic, parties to civil and criminal proceeding may freely appoint their own experts and instruct them to execute a mission in order to form an opinion over the matter in issue. Initially, this decision is not subject to judicial involvement or review. Parties may well assess whether the expert opinion is conducive to their case and, in the negative, they may well a) seek another opinion or b) abandon the idea of introducing expert opinion in the case.

When the evidence appears to be relevant and favorable, parties may then take the decision to introduce the opinion in the related legal proceedings. This decision is based on the assumption that, should the case go to trial, the expert will then be called to **give oral evidence** as a witness in the case. It is important to notice that in all cases the expert will have to come to court in person, and he/she will have to testify orally (no affidavit) before the jury.

The key point, however, is that very **often there will eventually be no trial**. As suggested above, in civil proceedings the pre-trial phase of **discovery** is designed to encourage the parties to settle the case, precisely on the basis of the strength of the respective arguments and evidence (including the evidence of the experts). **Discovery may be defined as the process where parties seek and exchange information**

from each other and third parties before trial. This is based on the notion that there should be no surprises at trial and that both parties should be aware of all of the evidence including names of witnesses, experts, theories to be used and hard evidence to be presented at trial.

In formal terms, the rule in the United States is that experts who are retained in anticipation of litigation, but not expected to be called at trial, are not discoverable. By contrast, every expert whose opinion is offered into evidence is subject to discovery. **This means that the opposing party has the right to be informed about the identity of the expert and to have access to the report prepared by the expert**. Further, any communication between the attorney and an expert is subject to discovery, including terms of payment of the expert.

The matter is governed in some detail by Rule 26 FRCivP according to which a party must disclose to the other parties the identity of any witness it may use at trial to present evidence. "Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report — prepared and signed by the witness — if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report must contain:

> (i) **a complete statement of all opinions the witness will express and the basis and reasons for them**;
>
> (ii) **the data or other information considered by the witness in forming them**;
>
> (iii) **any exhibits that will be used to summarize or support them**;
>
> (iv) the **witness's qualifications, including a list of all publications authored in the previous 10 years**;
>
> (v) a **list of all other cases in which, during the previous 4 years, the witness testified as an expert** at trial or by deposition; and
>
> (vi) a **statement of the compensation to be paid** for the study and testimony in the case.

Similarly, in criminal proceedings, under Rule 16 FRCrimP the government must give to the defendant a written summary of any testimony that the government intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence during its case-in-chief at trial. …**The summary provided under this subparagraph must describe**

the witness's opinions, the bases and reasons for those opinions, and the witness's qualifications.

Discovery will normally lead the opposing party to depose the expert (that is to **take the deposition of the expert)**. It may be worth recalling that the taking of deposition is a crucial pre-trial aspect of litigation in the U.S.A., which is in principle held with no direct judicial involvement.

A deposition is the taking of an oral statement of a witness under oath, before trial. It has two purposes: to find out what the witness knows, and to preserve that witness' testimony. The intent is to allow the parties to learn all of the facts before the trial, so that no one is surprised at trial. By the time a trial begins, the parties should know who all of the witnesses will be and what they will say during testimony.

A deposition does not take place in court. Instead, it usually takes place at an attorney's office. The attorney will ask the witness, or deponent, a series of questions about facts related to the lawsuit. The rules allow some latitude in the areas that can be inquired into. The deponent must answer all proper questions under oath. The deponent does not ask any questions. He or she only answers questions.

The entire deposition is preserved word-for-word by a court reporter, who is present throughout the session. A transcript is produced at a later time. **The deponent can have his or her attorney present at the deposition, and the parties to the case can also be present**. **Judges are not present at depositions, except in special cases**.

The **deposition of an expert is a crucial moment** in the litigation as it will typically enable the opposing party to:

- assess the strengths and weaknesses of the scientific opinion that the expert is going to offer in evidence at trial
- prepare for cross–examination;
- make a decision whether to move to exclude the expert from the list of witnesses that may be called to testify (*Daubert* motion; see below, in chapter 3).

1.3. Court appointed experts in the U.S.A: reasons for infrequent use

As suggested above, in the United States experts are in principle appointed by the parties and **court appointed experts are relatively rare** in the practice of litigation. Nevertheless, the law provides explicitly for court appointed experts under FRE 706

The general rule is that "the court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations". The court may appoint any expert witnesses agreed upon by the parties, and may appoint expert witnesses of its own selection. An expert witness shall not be appointed by the court unless the witness consents to act.

As mentioned earlier, Rule 706 of the FRE directly addresses the role of the court appointed expert as a testifying witness; the structure, language, and procedures of Rule 706 specifically contemplate the use of appointed experts to present evidence to the trier of fact. In the words of the Advisory Committee on the Rules of Evidence, "the inherent power of a trial judge to appoint an expert of his own choosing is virtually unquestioned." FRE 706 advisory committee's note; *see also U.S. v. Green* 544 F.2d 138, 145 (3d Cir. 1976), *cert. denied sub nom. Tefsa v. U.S.* 430 U.S. 910 (1977) ("[T]he inherent power of a trial judge to appoint an expert of his own choosing is clear."); *Scott v. Spanjer Bros.*, 298 F.2d 928, 930 (2d Cir. 1962) ("Appellate courts no longer question the inherent power of a trial court to appoint an expert under proper circumstances…"). 24. 253 U.S. 300, 312 (1920)

A significant question to be addressed now is why court appointed experts are so infrequently used in the United States of America. Many commentators have mentioned that the use of court-appointed experts appears to be rare, an impression based on the infrequent references to such experts in published cases. In a 2000 empirical study (CECIL–T.E. WILLGING), a sample of federal judges was interviewed with the purpose of casting light over the matter. Findings of the study may be summarised as follows: much of the uneasiness with court-appointed experts arises from the difficulty in accommodating such experts in a court system that values, and generally anticipates, adversarial presentation of evidence.

More specifically:

a) U.S. judges view the appointment of an expert as an extraordinary activity that is appropriate only in rare instances in which the traditional adversarial process has failed to permit an informed assessment of the facts. No evidence was found of general disenchantment with the adversarial process by judges who had made such appointments;

b) Parties rarely suggest appointing an expert and typically do not participate in the nomination of appointed experts;

c) The opportunity to appoint an expert is often hindered by failure to recognize the need for such assistance until the eve of trial;

d) Compensation of an expert often obstructs an appointment, especially when one of the parties is indigent;

e) Judges report little difficulty in identifying persons to serve as court-appointed experts, largely because of the judges' willingness to use personal and professional relationships to aid the recruitment process;

g) *Ex parte* communication between judges and court-appointed experts occurs frequently, usually with the consent of the parties;

f) The testimony or report presented by a court-appointed expert exerts a strong influence on the outcome of litigation.

The trial court has broad discretion in deciding whether to appoint a Rule 706 expert. Although it has been suggested that "extreme variation" among the parties' experts is a circumstance suggesting that such an appointment may be beneficial, the trial court retains discretion to refuse to appoint an expert despite such a circumstance.

Appellate courts on occasion have reminded judges of this authority. Where a trial court has been unaware of its authority to appoint a neutral expert under Rule 706 or its inherent power to do so, a reviewing court may order the trial court to exercise its discretion and decide whether appointment of a neutral expert is justified in the circumstances of the case. Indeed, in a case in which the experts' testimony is especially disparate on an issue of valuation, a trial court should consider the value of "a court-appointed witness [who] would be unconcerned with either promoting or attacking a particular estimate of . . . [plaintiff's] damages."

The standard for review of a trial court's appointment of an expert under Rule 706 is whether the appointment constituted an **abuse of discretion**. One factor to consider in such a review is whether the expert selected by the court had any bias toward one party or one side of an issue.

The use of appointed experts to comment on the acceptability of scientific methods that underlie expert opinions may expand as courts assess the scientific validity of expert testimony under the standards established by the Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*

The court's authority under Rule 706 FRE to appoint an expert to offer testimony represents a specific application of its broader inherent authority to invite expert assistance in a broad range of duties necessary to decide a case. The most striking exercise of this broader authority involves appointing an expert as a technical advisor to confer in chambers with the judge regarding the evidence, as opposed to offering testimony in open court and being subject to cross-examination.

2. The Decision about the Choice of the Individual Expert

The question to be answered here is which subject (parties, court) has the authority to select the expert for the required scientific opinion. Answer to this question may be easily drawn from the principles described earlier in this report.

In the Continent of Europe the decision to appoint an expert is taken by the court, while parties are entitled to appoint their own party consultants. Consequently, the choice of the specific person (or legal entity) to be appointed in a given case as a court expert is **not a matter of prior negotiations/agreements between the parties and the court**.

Courts select the expert in the manner described below (typically from an official "list" of expert witnesses) and simply notify the parties of such decision.

In the United States, experts are appointed freely by the parties. This freedom is balanced by two scenarios:

a) occasionally, an expert may be **disqualified by the court in case of blatant conflict of interest** (i.e. expert who served for opposing side, or an expert who once an employee of opposing party). Rules for disqualifications are not explicitly provided for in the U.S. Federal Rules of Civil and Criminal Procedure but a handful of cases provide guidance to lawyers in this respect.

b) more frequently, a party has the right to motion the court to exclude the expert from the list of witnesses via a *Daubert motion*. This occurs when such party believes that an opposing expert may offer **junk science** (see below, chapter 4).

In the case of a court appointed expert, instead, the court may occasionally invite parties to submit nominations for appointment. In practice, however, the identification of a need for and the selection of a court-appointed expert appears to be a process in which the parties infrequently play an active role. The judge typically identifies the need for assistance and raises the possibility of such an appointment, sometimes very late in the pre-trial process. The judge is usually responsible for identifying suitable candidates and often relies on **informal recommendations from friends and associates**. Such unsystematic approaches to identifying needs and recruiting experts might raise doubts about the extent to which the procedure provides the timely and neutral assistance warranted by the central importance of the expert's task (CECIL-WILLGING).

3. Establishment of Expert Witness Lists

The questions to be answered here are whether the Country under examination operates a system of official expert witness lists, whether the court (or parties) are bound by such lists in the choice of experts and under what circumstances may allow the court or parties to appoint experts who are not enlisted.

No system of official lists is established in the United States. There, the competence of the expert is ensured by the assumption that no party would appoint a junk expert, for fear that the opposing party may move to exclude the expert from the list of witnesses via a *Daubert motion* (see below, chapter 4).

By contrast, Italy, France and Germany operate a structured system of expert witness lists in civil, criminal and administrative court proceedings. **In these jurisdictions, the lists are designed to ensure *prima facie* competence of those called up to serve as experts in court proceedings**. Typically, multiple lists are kept with regard to different scientific fields and areas of expertise. Rules are established in domestic laws to govern the management and regular updates of such lists.

It is crucial to underline that - in all the said jurisdictions - courts are under no legal obligation to select the experts among those registered therein. In fact, such lists are designed primarily to **facilitate** the court in the appointment of competent individuals in any relevant field of science and/or technology (LECLERC, 205, §2, French Statute 498/1971. In Italy, §61 of the Code of civil procedure states that experts must *normally* be selected from the list, a wording that clearly allows exceptions).

Lists should therefore not be regarded as automatic and rigid restrictions to the court discretion in the selection of experts. In France, a statute explicitly states that courts may appoint experts of their own choosing (§232 French Code of civil procedure) , and the same is true in Italy.

In brief, although in the vast majority of cases courts in the Continent of Europe will select the experts among those mentioned in the lists, there is no absolute requirement that they do so.

Occasionally, the discretion of courts in choice of experts may be further limited by domestic law.

In France, for example, the possibility to select experts off lists is broader in civil and administrative proceedings than in criminal proceedings (§157 para. 2 *Code de procédure pénale*. In criminal proceedings, specific reasons must be provided by the courts for the appointment of experts off lists. Failure to provide such reasons results in the nullity of the expert opinion). Further, in France, **DNA expert opinion** may only be requested to the individuals (or legal entities) selected according to §6-1. Statute 29 July 1971 (as amended in 1994). Similarly, with regard to I.P. law, experts must be

chosen upon consultation with a special committee appointed by the Ministry of Justice.

In Italian criminal proceedings, the court that wishes to instruct an expert who is not registered in a list should appoint with preference an expert among those who are employed in a State Department or other public administration (§67 Enactment provisions of the code of criminal procedure).

Some more information on the **management of expert witness lists** is provided below.

In France, the foundation of the list may be found in §2, Statute 498/1971, amended by Statute 130/2004, according to which there are lists available both at the Court of Cassation and at the Court of Appeal level (see extensively LECLERC, 203). In criminal procedure the rule is that experts are chosen among the individuals or legal entities mentioned either in the national list or in the lists kept by the Court of Appeal, under the terms of Statute 498/1971 (§157 al. 1 *Code of procédure pénale*). Lists are maintained and updated **yearly** in France (cf. extensively, PINCHON, p. 274). It must be noted that, in France, enlistment gives to an expert (or legal entity) the opportunity to use the formal title of "*Expert agréé par la Cour de cassation*" or "*Expert près la cour d'appel*" , the abuse of which is subject to criminal prosecution (§433-17 of the French criminal code, see chapter 6)

In Italy, lists are termed "*albi speciali*" and they are to be found in each court of first instance (§61 Code of civil procedure). There are around 150 courts of first instance in the country. The official lists are maintained and updated under the control and the supervision of the *Presidente del Tribunale* (the court president), who is in charge of supervising that the areas of expertise submitted by candidates match the areas covered by each specific list.

Under the terms of §23 of the enactment provisions of the Italian Code of civil procedure, the President must ensure a **rotation in the appointment of experts in civil proceedings, in order to avoid over-bookings and undue advantages for those registered therein**. Under the terms of this rule, **missions assigned to each expert should not exceed 10% of the overall number of missions assigned by each court of first instance in a given area of practice**. Although the law states that "transparency and publicity of the expert witness assignments must be ensured through appropriate means of information" I was personally unable to find any court website with a public list of assignments.

In criminal proceedings any prior criminal record is a ground for exclusion of the expert from the list.

4. The Criteria and Procedure for Admission of Experts to the Lists

This section explores the criteria and procedures under which a perspective expert may be held to be included in an expert witness list

This information is **country specific** and may be inferred through a detailed analysis of the provisions included in the Appendix to this report.

In general terms, admission to a list is subject to a specific request on the part of the expert. The request – in both criminal and civil proceedings - must be addressed to the authority in charge of keeping the list (either locally or nationally, depending upon the jurisdiction in question). In France, the request must be sent to the *Procureur de la Republique* at the courts of first instance, although lists are kept by the Court of Appeal (or Cassation).

Nationality in the Country does not appear to be a condition for appointment in Italy, France and Germany (**any discrimination against foreign expert would be illegal under EU law**, cf. PINCHON, p. 22). Nevertheless, domestic regulations still do require that experts be primarily based – in a professional sense - in the area in which the mission will have to be executed.

Typically, **requests for enlistment** must include:

-birth certificate of applicant;
-proof of residence in the court district;
-copy of criminal record of the applicant;
-proof of enlistment in a given professional association;
-further proof of professional qualifications (academic degrees, publications, etc…).

More specifically, to describe the **conditions for enrolment**, one could look at French civil procedure as an example of the Continental approach to the matter.

In France, conditions are listed by statute (§4, Decree 31 December 1974) and they include:

a) no prior record of bankruptcy filing;
b) age below 65 years;
c) for candidates seeking enrolment in a list kept by a Court of Appeal exercise of profession within the corresponding District;
d) no **prior criminal record**;
e) no disciplinary sanctions such as destitution, radiation, etc…;
f) **work experience in the field (10 years in France. In Italy, the experience required is typically 5 years**);

g) no grounds of incompatibility with regard to the specific mission executed in the case (i.e. when party of the proceeding is client of expert)

Conditions for **legal entities** include (§3, Decree 31 December 1974), among others,

a) sufficient financial and operational means to carry out the mission;
b) sufficient personnel to carry out mission;
c) proof of integrity in the conduct of the administrators,
d) proof of establishment of seat, or local branch, within the corresponding district of the Court of Appeal

In case of legal entities, however, courts must specify in the appointment the name(s) and surname(s) of the individuals who will personally carry out the mission (see, in Germany, PINCHON, p. 23).

In Italy, only a **natural person** may be appointed to serve as an expert in legal proceedings.

In Italy, applications for registration in the lists are addressed to the Committee described in the following paragraphs. Basic requirements for enlistment are:

a) a proven knowledge of the candidate in a particular field of science/technology;
b) enlistment of the candidate in a professional association or group (Medical doctors, engineers, architect, geologist, etc…). When no professional category exists, this requirement is waived;
c) "strict integrity" of the candidate (R.D. 1368/1941) in civil proceedings or b) a clean criminal record in criminal proceedings.

5. Oversight of Expert Lists for Compliance with Ethical Standards

In the Continent of Europe, expert witness lists are subject to specific rules designed to monitor their management and regular updates in an effort to ensure that the enlisted experts satisfy the legal requirements mentioned above

Typically, the authority at which the list is kept is primarily responsible for its update and management. This translates in **regular schedules for update** (i.e. one year in France, 4 years in Italy) and in specific regulations for re-inscription in case of cancellation from the lists. The idea is that the authority will be informed by the professional order whenever a disciplinary sanction is applied to members that are included in the list of available legal experts.

This being said, the management of lists is to be regarded primarily as a "bureaucratic" task, and judicial authorities will for the most part check for compliance with legal standards, not ethical standards**. In practice, beyond the**

letter of the law, courts will most often accept to include in the list all individuals that are member of a professional order, with no further scrutiny relating to the quality of his/her work

In Italy, however, further effort were made to directly engage professional organizations in the management and maintenance of expert lists. For this reasons, **an ad hoc Committee is appointed in each court of first instance to review applications for enlistment and monitor the enlistment procedure.** Such Committee is composed by

a) the Court President;
b) the chief prosecutor;
c) the president of the local bar and;
d) the President of the professional association related to each list.

In France, monitoring of lists is the responsibility of the First President and the *Procureur General* of the Court of Appeal, or Cassation (see extensively PINCHON, p. 374).

6. Renunciation and Recusal of Experts

The questions to be answered here are *a*) whether national law allows the renunciation of expert witnesses and *b*) whether national laws allow parties to challenge experts appointed by the courts.

6.1. Renunciation

In principle, experts appointed by the courts in the Continent of Europe are **under an obligation to serve** since they are regarded under the law as auxiliaries to the court. By way of illustration, in Italy, the foundation of such obligation is to be found in both civil (§63 Code of civil procedure) and criminal (§366 Code of criminal procedure) proceedings.

On some occasions, however, an **expert may decline the appointment**. Refusal to serve does not result in sanctions, however, provided it is due to incapability or an intervening legal incapacity. Although in theory, sanctions are available for failure to accept an assignment without such good cause, the effectiveness of such sanctions is questionable. If an expert does not accept an assigned duty, or if there is a legal reason for the rejection, the courts in Italy, France and Germany will simply choose another expert.

If an expert discovers facts that affect his/her ability to render an impartial opinion, he must notify the judge immediately and withdraw from the case. Upon acceptance of the expert's withdrawal, another expert will immediately replace him/her.

This being said, the law in the domestic jurisdictions under scrutiny (Italy, France, Germany) allows for renunciation in the following cases:

a) when expert is aware of the existence of a ground for recusation (see below)
b) when expert is unable to execute the mission within the specified deadline;
c) when expert reasonably believe to have insufficient qualification/operational means to carry out the mission and answer the instructions of the court

6.2. Recusal (or "recusation")

While "recusal of experts" is a concept alien to U.S. law, one could take the **rules of German civil proceedings as prime example** of the traditional approach to the matter in the Continent of Europe.

Across Europe recusation, or recusal, is a procedure whereby one or more of the litigants may object to the appointment of the court's chosen expert on the basis or prejudice, conflict of interest, or bias.

In Germany, if the civil court appoints an expert without the parties' consent, each party may seek to recuse the expert, but only for certain narrow reasons. Regarding the reasons which justify recusing the expert, §406 ZPO refers to §42-45 which deal with the reasons for recusing a judge. **Therefore, the standard for recusing the expert and recusing the judge is the same.** This makes sense, if one considers that in Germany, exactly like in France and Italy, experts are regarded as court auxiliaries rather than witnesses.

In broad terms, a judge may be recused only when it appears that he/she is not neutral *e.g.* when the judge has expressed an opinion on the case in public or is friend or relative to one of the parties. **Similarly, a party can reject the appointment of a court expert for the same reason it can reject a judge.** If one party seeks to recuse the expert the court decides whether to grant the party request and , in the meantime, the execution of the mission if often suspended (this is always the case in Italy). If the court denies the request, the party can appeal under §406(5) ZPO.

In France, grounds for recusation of experts are also identical to those prescribed for recusation of judges and they are listed in the Code of civil procedure (§341). They include, among others.

a) personal interests in the case;

b) experts who are debtors, creditors of the parties;

c) experts who are relative of parties, court members;

d) proof of friendship/hatred between expert and any of the party

e) experts who previously expressed their opinion in the case as arbitrators, mediators, or advisors to any of the party.

CHAPTER 3

EXECUTION OF MISSION

This section covers aspects such as the definition of the scope of the expert mission, the respective role of the court and parties during the execution of the mission, the authority of experts and the control over the execution of the mission.

1. The Definition of the Scope of the Expert Mission

This section describes in which manner the specific scope of the mission of an expert is defined in the practice of domestic litigation.

In the U.S., the scope of the mission is defined **by the relevant party in the retainer agreement** (for ease of reference, a copy of such agreement is available in chapter 5). As a consequence, the opening of the mission is set in the retainer agreement with no prior judicial involvement.

By contrast, **in case of a court appointed expert** – as it is the case in the Continent of Europe, and occasionally also in the U.S.A. - **the scope of the mission is defined by the court.** The mission of a court appointed expert begins with the **formal assignment** given by the court. Typically, the court defines the scope of the mission via a set of directions or **questions** put to the expert. Questions refer to the "specialized field of knowledge" for which the expert has been deemed indispensable. Directions and questions are drafted by the court and notice of such questions is given in the order which designates the expert (cf., among others, in Italy, §224 Code of criminal procedure). In German, French and Italian proceedings, the opening of the mission requires a formal **hearing** in which the expert appears in person before the court and swears to perform the mission with care and diligence (§226 Italian Code of criminal procedure). The expert is admitted to not appear in court at the hearing mentioned above only in rare and compelling circumstances.

It must be noted that while in the U.S.A. an expert is required to take the oath *only* when he comes to court to testify, in Europe an oath (or other equivalent statement or affirmation) is required from the expert at the time of the appointment. This is a direct consequence of his/her taking up the role of court auxiliary.

For readers interested in the **wording of the oath**, Italian law is a good example.

In criminal proceedings, the experts are expected to swear that:

"In light of the legal and ethical responsibilities related to the execution of this mission, I swear to execute it with no other purpose than to assist the court in

> the establishment of truth and I promise to keep all the information acquired during the mission as a court auxiliary secret" (§226 para. 1 Italian Code of criminal procedure).

In civil proceeding, the statement is shorter and simpler, as the expert is expected to declare that he/she will

> "accurately and faithfully execute the mission with the only purpose of assisting the court in establishing the truth" (§ 193 Code of civil procedure).

Following notification of his/her appointment, the expert must accept or reject the mission promptly. All relevant documents, pleadings, and exhibits are made available in order that the expert may make an informed decision (cf., among other provisions, §268 para. 1, French code of civil procedure).

2. The Respective Roles of Courts and Parties during the Execution of the Mission

This sections describes the respective roles (including rights and duties) of the court and parties during the execution of the expert mission, and then turns to more specific matters such as the **authority of the expert** and the **control over the execution of the mission**. Discussion in the present section treats the U.S. and the Continent of Europe separately, as legal arrangements are extremely different with regard to the execution of the expert mission.

2.1. U.S.A.

Only a few remarks are needed with regard to U.S. law in this regard. In the U.S.A. - apart from the infrequent cases involving a court appointed expert, for which extensive discussion is provided in chapter 2 - courts are neither required nor expected to monitor the execution of the mission on the part of a perspective expert witness. Such a role is left entirely to the parties, through the procedure of **discovery**, which is described earlier in chapter 2. In brief, parties have access to the written report of the expert pursuant to the relevant provisions of the FRCrimP and the FRCivP and may well seek the deposition of any expert witness that the opposing party intends to call to testify at trial. Following the taking of deposition, parties may move for the exclusion of the expert from the list of witnesses, and this normally triggers a court hearing at the end of which the court will issue a reasoned decision on the motion.

2.2. Continent of Europe

In the Continent of Europe, matters are significantly different, mainly due to the role of the officially appointed expert as an **auxiliary of the court**.

2.2.1. The role of the court during the execution of the mission

During the course of the mission, the court retains the power to direct and supervise the activities carried out by the expert. To facilitate the expert's efforts, for example, the court may modify the mission or assist, either personally or through the exercise of his/her judicial authority. Broadly speaking, domestic laws also require that the expert and the court collaborate closely in order to ensure that the mission is completed quickly and due process is preserved.

It must be noted that **court appointed experts derive their authority** in the exercise of the mission directly from the court.

In practice, depending upon the specific needs of the expertise, courts may allow the expert to:

a) appear at court hearings (see *e.g.* §228 Italian code of criminal procedure; §194 Italian code of civil procedure)

b) examine the case file (including pleading, affidavits, motions, sworn statements, exhibits);

c) contact and interview informants (in France these are termed *sachants,* pursuant to §242 of the Code of civil procedure) and third parties;

d) require information, documents from third parties;

e) access venues and places for the purpose of securing an informed opinion on the matter at issue;

f) promote settlement between parties, when applicable (this rule, however, finds only very limited application in practice. To be more accurate, experts do not enjoy this power in Germany while in Italy experts are expected to encourage settlements only in limited cases related to financial matters)

In principle, domestic laws assume that an expert will accomplish the mission **personally** (see, for example, §233 of the French code of civil procedure and §407 para. 2 German ZPO). However, this may not always be possible (as in case of very complex missions) or necessary (i.e. when some of the activities consist of mechanical verifications). For these reasons, the aforementioned rule suffers a number of exceptions as domestic provisions allow courts to **authorize experts to employ the service of additional individuals during the execution of the mission**. In Italy, most experts require permission to employ aid from technical assistants in the appointment hearing. In France, courts typically allow experts to require the

assistance of a *sapiteur* (see, in administrative proceedings, §R621-2 of the Code de Justice Administrative). In no case, however, the cooperation of an assistant may consist in the issuing of a scientific opinion, which is the exclusive realm of the court appointed expert. In brief, the practice of Continental litigation suggests that an expert is not precluded from seeking the aid of assistants, provided that the expert verifies all such work and retains full responsibility for their conclusions

For more remarks concerning the liability of experts in the execution of the mission see later, chapter 6.

2.2.2. The role of the parties during the execution of the mission

As explained above, one of the obvious disadvantages of Continental systems is **the difficulty, for parties, to question and challenge the substantial authority of the opinion of the court expert**. In other words, in Italy, France and Germany parties often face a situation in which the opinion delivered by the court appointed expert – albeit not binding (as explained in the following chapter) – is regarded so highly that no alternative opinion is likely to persuade the court.

This is why in these jurisdictions a system of checks and balances is absolutely necessary to ensure **judicial fairness** to the parties **during the execution of the mission**.

Whenever the court appoints an official expert, parties have a fundamental right to:

a) appoint their own **party consultants** (see, for instance, §225 of the Italian code of criminal procedure or §201 Italian code of civil procedure)

b) be informed of the schedule of the expert mission and participate in some of the activities carried out by the expert, either in person or through the party consultants:

c) communicate, interact and monitor the activities of the court appointed experts;

d) submit to the expert comments and requests for further investigations, as well as suggestions for alternative approaches;

e) dispute the expert findings before the court;

f) submit to the court separate (oral or written) findings, when there is persistent disagreement on a matter at issue. Depending on domestic arrangements, such separate findings might have to be considered and commented upon by the court in the final judgment.

In practice, parties in both civil and criminal proceedings will almost always appoint their own party-consultant. **The status of party consultant is however different from the status of the expert appointed by the court.** By way of illustration, the German courts have repeatedly held that an opinion of such an expert does not have the same value as the opinion of a court expert (TIMMERBEIL, p. 177). This is also true in the practice of Italian and French litigation. Continental courts of law very often doubt the reliability of party consultants precisely because they are hired by the parties and have discussed the case with counsel. Occasionally, case law even suggest that the opinion of a party consultant is to be considered only as an "assertion" of a party, rather than evidence (see the Hugh Court judgments quoted by TIMMERBEIL, 178, footnote 92). This approach, however, seems to conflict with the **case law of the European Court of Human Rights, according to which all expert witnesses must be treated equally, irrespective of the party calling them** (see below)**.**

It is crucial to underline that **a substantial violation of the aforementioned rights is a ground for the nullification of the expert opinion**.

For example, under Italian criminal procedure, the official expert is obliged to promptly inform all parties of the **venue and the date in which operations will begin** (§229 Italian code of criminal procedure). Failure to do so results in the nullification of the expertise.

Beyond domestic rules of evidence and procedure, readers must be aware that protection of adversarial arrangements in favour of parties in case of an expertise now stems directly from the case-law of the European Court of Human Rights, **which has repeatedly held that the arrangements for expert opinions are an essential element of a fair trial** according to Article 6 of the European Convention on Human Rights.

More specifically, in the case *Mantovanelli v. France* (1997) the Court ruled that:

> "the principle of **equality of arms** (within the wider concept of a fair trial, including the adversarial character of the proceedings, and an opportunity to contest the evidence of the other side) must also apply in the case of a report on technical matters".

In *Mantovanelli*, the court appointed a medical expert in the course of proceedings brought by applicants in relation to the death of their daughter in hospital. **The applicants complained**, among other things, that they

> *a*) had not been given **an opportunity to give instructions** to the expert
>
> *b*) nor them or their counsel **had been informed of the dates of the interviews conducted by the expert** in the hospital and

*c)*and **they had not been given an opportunity to cross-examine the expert** when he gave evidence at trial.

The European Court took the view that domestic proceedings were unfair and there was a violation of Article 6 of the European Convention on Human Rights

CHAPTER 4

OPINION SUBMITTED (AND ITS USE IN EVIDENCE)

This chapter focuses on the use in evidence of expert opinions. It covers aspects such as the admissibility and evaluation of the expert opinion, control over the timeframe for the submission of the opinion, the formal requirements for and scope of the report, access to the opinion, and the follow-up to an opinion including counter-expertise.

1. Introduction: Admissibility v. Evaluation of an Expert Opinion

Discussion over the use in evidence of expert opinions may be approached in a variety of ways.

Firstly, readers must be aware that **in some systems the written report of an expert counts as evidence in the proceeding, while in others evidence is in principle limited to the oral testimony of experts before the court (or jury)**. This difference will be discussed at length later in this chapter.

Secondly, in countries that employ professional judges for adjudication in criminal and civil litigation, the focus inevitably goes to the **reasons to be provided by the courts in the final judgment in case of an expert opinion**. In other words, the key legal issue is the **evaluation** of the expert opinion (whether given orally or in written form) in the final judgment. In Italy, France, and Germany, the theory is that although courts have the discretion to disregard the findings of a court appointed expert, an expert opinion **may not be simply "ignored" in the final judgment**. More importantly, courts of law in the Continent of Europe are always expected to fully justify their reasoning on the scientific matter in issue by explaining to what extent, and why, reliance has been placed on any given expert opinion. In these jurisdictions, relatively little attention is paid to the manner in which the expert is examined at trial, although the tendency is that experts be examined under the same rules that apply to witnesses. Further, in such systems **no question of admissibility arises once the expert has been appointed** to perform his/her missions, since the decision on admissibility precedes the execution of the mission and the drafting of the expert report.

Instead, in Countries in which the final decision on the case takes the form of an *unreasoned* verdict by lay people (i.e. jurors) focus is primarily on the **way in which the evidence is offered to the court and jury**. More specifically, in the U.S.A. a great deal of attention is paid to the **techniques and strategies for the deposition** (during pre-trial discovery) **and the direct and cross examination of expert witnesses** (at trial). In addition, one should not forget that following pre-trial discovery (and the taking of an expert deposition) parties may well **challenge the**

admissibility of the expert whenever there are reasons to believe that he/she may bring "junk science" before the jury (under the criteria set forth in the *Daubert* case, see below). In the U.S.A., thus, the issue of **admissibility** of an expert opinion is typically resolved *after* the expert has executed his/her mission, not *before*. This may be easily understood if one considers that experts are instructed to execute the mission directly by the parties, with no prior judicial involvement.

2. Judicial Supervision on Admissibility of Expert Evidence in the U.S.A.

As suggested above, U.S. law has been developed towards a system of **judicial supervision over the admissibility of expert evidence**. This is to balance the fact that experts may be freely appointed by the parties to the proceeding. The underlying idea is that only reliable expert opinions should go to the jury, as jurors may often be unable to distinguish between "good" and "bad" science.

The **criteria governing the admissibility of evidence was set forth in the landmark case *Daubert v. Merrell Dow Pharmaceuticals***, 509 U.S. 579 (1993), for which some discussion is provided in the present section.

Parties to the proceeding may submit a "Daubert motion" in the pre-trial phase, typically after the expert has executed the mission and his/her report has been subject to discovery. In *Daubert* the U.S. Supreme Court **charged judges with the responsibility of acting as "gatekeepers" to exclude unreliable expert testimony**, and the Supreme Court in *Kumho* clarified that this gatekeeper function applies to all expert testimony, not just testimony based in science.

At a *Daubert* hearing, the proponent of the expert opinion must show that the expert's underlying reasoning or methodology and its application to the facts are scientifically valid.

In ruling on **admissibility**, the court considers a flexible list of factors, including (see also FRE 702, amended after *Daubert*)

1) whether the theory can be or has been tested,
2) whether the theory has been subjected to peer review or publication,
3) the theory's known or potential rate of error and whether there are standards that control its operation, and
4) the degree to which the relevant scientific community has accepted the theory.

Courts both before and after *Daubert* have found other factors relevant in determining whether expert testimony is sufficiently reliable to be considered by the trier of fact. These factors include:

1) whether experts are "proposing to testify about matters growing naturally and directly out of research they have conducted independent of the litigation, or whether they have developed their opinions expressly for purposes of testifying". Daubert v. Merrell Dow Pharmaceuticals, Inc., 43 F.3d 1311, 1317 (9th Cir. 1995).

2) whether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion. See *General Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997) (noting that in some cases a court "may conclude that there is simply too great an analytical gap between the data and the opinion proffered").

3) whether the expert has adequately accounted for obvious alternative explanations. See *Claar v. Burlington N.R.R.*, 29 F.3d 499 (9th Cir. 1994) (testimony excluded where the expert failed to consider other obvious causes for the plaintiff's condition). Compare *Ambrosini v. Labarraque*, 101 F.3d 129 (D.C.Cir. 1996) (the possibility of some uneliminated causes presents a question of weight, so long as the most obvious causes have been considered and reasonably ruled out by the expert).

(4) Whether the expert "is being as careful as he would be in his regular professional work outside his paid litigation consulting". *Sheehan v. Daily Racing Form, Inc.*, 104 F.3d 940, 942 (7th Cir. 1997). See *Kumho Tire Co. v. Carmichael*, 119 S.Ct. 1167, 1176 (1999)

5) Whether the field of expertise claimed by the expert is known to reach reliable results for the type of opinion the expert would give. See *Kumho Tire Co. v. Carmichael*, 119 S.Ct. 1167, 1175 (1999) (Daubert's general acceptance factor does not "help show that an expert's testimony is reliable where the discipline itself lacks reliability, as, for example, do theories grounded in any so-called generally accepted principles of astrology or necromancy"); *Moore v. Ashland Chemical, Inc.*, 151 F.3d 269 (5th Cir. 1998) (en banc) (clinical doctor was properly precluded from testifying to the toxicological cause of the plaintiff's respiratory problem, where the opinion was not sufficiently grounded in scientific methodology); *Sterling v. Velsicol Chem. Corp.*, 855 F.2d 1188 (6th Cir. 1988) (rejecting testimony based on "clinical ecology" as unfounded and unreliable).

3. Evaluation of Expert Evidence in the Continent of Europe

As suggested earlier in this chapter (cf. section 1), in the Continent of Europe the crucial issue appears to be that of determining **whether courts of law are bound by the opinion submitted by the court appointed experts**.

The answer is in the negative, since academic jurisprudence and case law across Europe agree that **courts have the right to disregard the findings of an unconvincing expert**, in line with the Latin tradition according to which the court remains the *peritus peritorum* (literally: the "expert of the experts", which means that the court is the "ultimate expert" in the case).

In broad terms, courts of law in the Continent of Europe may or may not accept the conclusions reached by an officially appointed expert. Nevertheless, more specifically, in Italy on several occasions the Supreme Court of Cassation held that courts must explain in detail the reasons why **no reliance** has been placed on the expert opinion. Failure to provide sufficient reasons in the judgment, is commonly considered a ground of appeal (Italian Supreme Court of Cassation, judgement 16 June 2001, No. 8165). The same is true in Germany (cf. Federal Supreme Court, Judgment of 9 May 1989, referenced in PINCHON, p. 37). Similarly, it is a well-settled principle of French law (TAYLOR, 209) that a judge is not bound by any opinions of the expert. In practice, however, it is difficult for a French court to contradict an expert in that expert's area of expertise, without relying on the opinions of other experts, or party consultants. On this point, **the French Court of Cassation has repeatedly expressed the view that a judge is not required to indicate reasons for *accepting* an expert's opinion but is instead required to provide a detailed explanation for the *refusal* to accept the expert findings** (among the authorities see Court of Cassation, III Civil Section, judgment of 25 March 1971, referenced in PINCHON, p. 342, footnote No. 755).

Conversely, it would be inappropriate for a court of law to simply "cut and paste" the expert opinion by reference in the final judgment. In each and every case, courts must offer their legal assessment of the scientific findings introduced by the expert. In no case, a court judgment could consist purely of a reference to an expert opinion.

4. Control over the Timeframe for the Submission of the Opinion

The question to be answered here is which actions may be taken by courts or parties to ensure that the experts execute the mission in line with the proposed time-frame.

In cases of **court appointment**, the expert serves in principle as an **auxiliary** to the courts and he/she is thus under an official "*public*" obligation to perform the mission within a given time frame. As a consequence, any delay in the submission of the report is sanctioned under the law as contrary to the interests of justice. In all jurisdictions under examination, however, the law largely allows extensions to the delay upon request of the expert and some delays in the submission of judicial expertise are fairly common. By way of illustration, in Italian criminal proceedings courts may grant multiple extensions (of 30 days each) upon the request of the expert, pursuant to §227 para 4. In French civil litigation, it must be noted that **delay**

in the submission of the expertise is not mentioned among the grounds that may lead to a nullification of the expertise (§239 French code of civil procedure).

Typically, in Italy, France and Germany the civil and criminal courts will set the deadline for the submission of the opinion or execution of the mission at the time in which the expert is appointed/sworn in. Often, such deadline is subject to an express enquiry to the expert, who may legitimately refuse to serve, should he/she come to the conclusion that it will be impossible to report within the proposed schedule.

Excessive delays may trigger litigation before the European Court of Human Rights, for alleged violation of the reasonable time requirements of Article 6 of the European Convention. A leading case in this respect is *Martins Moreira v. Portugal* (1991), in which the Court held a two-year delay in the exercise of the expert mission – allegedly caused by the **failure to of parties to remunerate** the court appointed expert - constituted a breach of a fair trial, and the "Respondent State is under a duty to provide experts with appropriate means …so to enable experts to comply with Article 6".

For more information concerning sanctions for undue delay, see below, chapter 6.

In case of **experts appointed by the parties in the U.S. system**, the time frame for the mission is determined in the retainer contract/agreement signed between the expert and the attorney/parties to the proceeding (a sample agreement is provided, for ease of reference in chapter 5). In practice, instances of delay in the execution of the mission are a "*private*" matter to be resolved between the attorney and the expert and they will almost never trigger litigation or sanctions other than those prescribed in the retainer contract.

5. Oral Evidence from Experts

In all jurisdictions under examination it is common to find experts that come and give oral testimony before the courts, or jury. This being said, major differences must be noted.

In some systems, this oral testimony is regarded in principle by the law as the *only type of evidence allowed* in the proceedings, while in other systems this oral evidence may be complemented by the written report of the expert.

In criminal and civil trials in the United States of America, by way of illustration, the general principle is that **only the oral statements of experts would reach the jurors and assist them in making a decision. Needless to say,** in the U.S.A. the very concept of "evidence" is restricted to oral statements made in public before the jury. While jurors have no automatic access to the written report of an expert, such a report may well be used to refresh the expert memory or impeach him/her during the

oral examination. The expert needs permission to recite the written report to the jurors, and such report is not regarded by the law as "evidence". This general framework – which corresponds to the oral and adversarial nature of U.S. litigation - suffers nonetheless significant exceptions, since the Federal rules of evidence largely allow the formal introduction of portions of the written report *into evidence*. This occurs, for instance, under the terms of FRE 703.

A great deal of literature may be found in the U.S. system on the specific questions that may be posed to expert during direct and cross examination (*i.e. hypothetical questions*) and the documents, publications, literature that an expert witness is allowed to quote and consult during the examination (see FRE 702). Also, handbooks may be found in the U.S. to describe the most effective manners through which an expert witness should be examined before the jury, including "to-do" and "not-to-do" tips and suggestions to attorneys.

On the other side of the spectrum are continental civil proceedings, in which the **oral testimony of an expert purely functions as an optional supplement to his/her written report**. Rules of civil procedure in Italy, France and Germany are in principle satisfied with the submission of the written report, and oral testimony is required sparingly, only with the purpose of clarifying specific ambiguities in the report. In France, the foundation of this rule may be found in §245, §283 of the Code of civil procedure. In Germany, experts in civil proceedings may be required to appear for an oral examination in the rather narrow cases under §355, §397 ZPO.

In this perspective, Italian criminal proceedings fall somewhere in the middle. There –under the reformed 1988 Code of criminal procedure, inspired by the adversarial system– experts **must come to court and submit to direct and cross examination by parties**. Under direct and cross-examination, experts are allowed by statute to consult notes that they have produced during the execution of the mission or publications, even if the author of such publication is not the expert himself (§501 para 2 Italian code of criminal procedure). **In the books, Italian criminal procedure does not require the expert to produce a written report.** The expert may simply come to court and answer the questions that were addressed to him/her by the court at the time of the appointment. In this case, the oral testimony is the only evidence as to the matter in question. In practice, however, **courts may authorize experts to draft a written report under the terms of §227 para 5 of the Code of criminal procedure, and this almost always happens**. Such written report is acquired to the "dossier" of the proceeding and **it counts as evidence alongside with the oral statements given by the expert**. In essence, this means that Italian criminal courts may well – and in fact almost always do – base their decision upon both the oral statements and the written report (which is extensively referenced in the final judgment).

6. Written Reports of Experts

As suggested in the prior chapter, experts typically draft a written **report** during the execution of the mission.

I was unable to find major specification for formal requirements of expert reports in the domestic laws of Italy, France and Germany. In fact, there are **no specific statutory requirements as to the style or form of the written report** (TAYLOR, 207), although custom dictates that it contain certain information. The preamble usually contains names and addresses of all involved with the operation of the expertise and a copy of the court's directions/instructions to the expert. Records of the various meetings of the parties, together with a record of their attendance, is included, as well as copies of their requests and observations throughout the course of the exercise. Subsequent sections of the report provide a detailed account of the actual operations of the expertise. Later, a discussion of the results with answers to all questions presented during the procedure. Reasons must be given if specific questions in the mandate were not answered. In brief, experts are free to submit and draft the report in the form that they consider appropriate to enlighten the court over the course of their mission, the activities carried out (including specifications of dates and venues) and the scientific basis for their findings. **Most often, the report will be drafted in line with the practice of any given profession within the specific jurisdiction** (written reports of experts in French law are discussed extensively in PINCHON, 334).

The expert report must address the **questions asked by the court, or parties, over the scientific matter in question**. Depending on the rules of evidence in each jurisdiction, experts may then be required to give **oral evidence in court**, should the case eventually move to trial (see above in this chapter, section 5).

While in the United States the written report of an expert witness is not automatically "evidence" in a trial, this does not mean that it does not carry importance in the practice of civil and criminal litigation. Firstly, written reports may well be introduced into evidence, under certain circumstances specified in the Federal Rules of Evidence. Secondly, as explained in chapter 2, the **Federal Rules of Civil and Criminal Procedure make the written report of all experts appointed to provide testimony in the case discoverable**. Typically, counsel for the opposing party will meticulously read the report and extensively question the expert on the findings offered therein. Its (poor) quality might even lead opposing counsel to move for the exclusion of the expert via a *Daubert* motion.

For the purpose of discovery, in Federal courts an expert report must contain:

(i) a complete statement of all opinions the witness will express and the basis and reasons for them;

(ii) the data or other information considered by the witness in forming them;

(iii) any exhibits that will be used to summarize or support them;

(iv) the witness's qualifications, including a list of all publications authored in the previous 10 years;

(v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and

(vi) a statement of the compensation to be paid for the study and testimony in the case.

A crucial aspect, which is often overlooked, is that domestic legal arrangements should ensure that the **written report of an expert does not serve as a means to circumvent the related exclusionary rules of evidence.** Very often, in fact, during the execution of the mission, experts may have access to information that is inadmissible evidence in the proceeding. A typical example is that of a **psychiatrist who collects statements from the defendant in a criminal proceeding for reasons of an assessment of insanity**. Let us assume that during the interview the defendant confesses to the crime. In theory, such a confession – which has not been collected with the guarantees established by the law for the questioning of suspects (assistance of counsel, warnings on right to silence, etc.) – may only serve the purpose of assisting the expert in forming an opining on whether the defendant is insane, or not. **The confession may not be used as evidence that the defendant is guilty**. This is precisely why in the U.S.A. the related portions of the written report (i.e. the portions that describe the Q&As between the psychiatric and the defendant) would not be disclosed to the jury. In Italy, similarly, the rule is that "all statements collected by experts in the execution of their mission may only be used for the establishment of the expert opinion (§228 para 3 Italian code of criminal procedure). Nonetheless, the very fact that inadmissible evidence may be referenced in the written report – which is available to the courts of countries in the continent of Europe - may significantly affect the overall fairness of the proceeding.

7. Access to the Opinion

This sections describes under what conditions access to the expert opinion is given to the parties and /or the general public.

The U.S.A. and the Continent of Europe will be considered in turn.

In the United States of America, the idea is that during the pre-trial phase of discovery, parties must disclose to the opposing party all witnesses (including experts) that they intend to call to testify. In practice, **the phase of discovery is designed to ensure that the opposing party has a full and comprehensive knowledge of the expert report, with a view to the collection of the expert deposition**. No specific provision generally allows the disclosure of expert opinions to the general public during the pre-trial phase, in both civil and criminal proceedings. Typically, the U.S. general public will have knowledge of the expert opinion at the time of the trial when the expert is required to come to court and testify orally, before the jury.

Let us now move to the law in the Continent of Europe.

In **France, experts must submit the report to *both* the court secretariat** (§282 Code of civil procedure) **and the parties** (§173 Code of civil procedure). The submission of the report is a rather formal moment since at that point the report is considered "final" (i.e. no amendments can be made, unless the judge requests modifications) and the expert is discouraged from entertaining further contacts, relations with the parties.

In Italian civil proceedings, the rule is that once the expert has produced a written opinion, such report will be submitted officially to the court secretariat (*cancelleria del tribunale*) and parties will be entitled to get a copy of the report free of charge. In principle, only the courts and parties have a right to access the full opinion of the expert (this is also the rule in French civil proceedings, see extensively, PINCHON, p. 340-341). In Italian criminal proceedings, however, the expert appointed by the court is not required to draft a written report. He/she could simply come to court and testify orally about his/her scientific opinion. Since criminal trials are public, the opinion will at that point be known to the general public.

8. The Follow-up to an Opinion Including Counter-expertise

This section investigates what follow up procedures – if any - are established by national laws, especially to allow counter expertise.

For the purpose of this section, the term "counter-expertise" refers to situations in which an **additional expert** is appointed by the court when it is unsatisfied due to persisting ambiguities over the scientific matter at issue. The term "counter expert" is not to be confused with "consultants" (in Italy, France and Germany) which are routinely appointed by parties during the course of the mission of a court appointed expert.

Occasionally, courts of law in the Continent of Europe may find that the **court appointed expert** has not cast light over the scientific matter at issue. This may be

because the opinion is of poor quality or simply the expert has not been able to answer all the questions assigned by the courts. Under the law of Italy, France and Germany, nothing prevents courts from appointing an **additional expert** in such cases. The same applies to the United States, where courts might resort to **court appointed experts** when the battle of party experts has cast more doubts then clarity.

CHAPTER 5

REMUNERATION

This section covers aspects such as the legal and regulatory framework for the remuneration of expert witnesses, the modalities of the remuneration, the debtor of the remuneration and the handling of conflicts around the remuneration of the expert witnesses.

1. Introduction & Basic Principles

In all jurisdictions under investigation it is a settled principle of law that **experts are entitled to fair remuneration for providing a court of law** with an opinion. The remuneration is therefore not only a compensation for the expenses incurred by the expert, but a real salary (or "fee") for the related activities. As a matter of principle, an expert is **never justified in charging excessive fees** so as to capitalize on the budget of courts or parties, or so as to discourage requests for opinion. At the same time, an expert cannot be expected to lose money or suffer financially as a result of participation in the litigation process.

This being said, a preliminary remark is needed to distinguish the U.S.A. and the Continent of Europe with regard to remuneration.

As suggested earlier in this report, the system of **contradictory expert witnesses** implies that **parties negotiate fees and remunerate their own experts**. In broad terms, expert witnesses negotiate their fees directly with the parties, and , more specifically, with the attorneys. This is indeed the practice in the United States, where court appointed experts are relatively rare (see above, chapter 2). Yet, a full account will be given below with regard to the **remuneration of court appointed experts**, which has its own peculiarities under FRE 706.

By contrast, in the Continent of Europe the central issue is the calculation of the remuneration of the officially appointed expert, which is rather rigidly governed by statutory provisions or regulations. This is not to forget, nevertheless, that also in European jurisdictions "party consultants" - i.e. experts appointed by the parties in case of an official expertise - are generally paid by the parties, subject to the conditions and specifications discussed later in this section.

2. Legal and Regulatory Framework for Remuneration

In Germany and Italy, a dedicated statute governs in detail the remuneration of experts (as well as other court auxiliaries such as interpreters, translators, voluntary judges, etc…) in civil, criminal and administrative proceedings.

In Germany, the Act in question is termed JVEG (*Act on the remuneration of experts, interpreters, interpreters, translators, and the compensation of volunteer judges, volunteer judges, witnesses and third parties*) and entered into force in 2004. In Italy, the matter is governed by Decree 115/2002 (D.P.R. 30 May 2002, No. 115) which has revolutionized the matter of remuneration of court auxiliaries in the Country.

By contrast, in France the issue of expert expenses is dealt with directly in the codes. In administrative matters for instance, one should look at §R621-11 of the Code de Justice Administrative according to which the experts have a right to receive a compensation, alongside with expenses and costs related to their missions. In France, given the absence of statutory charts, expert witness fees are in principle based upon the fees/rates determined by the professional order to which the expert belongs. In practice, fees charged for litigation-related services in France are **roughly equivalent to fees charged in the expert's practice for professional services** (this was confirmed by a number of French lawyers that I interviewed while drafting the present report, including Mr. Mouligneaux, from Beausoleil)**.**

The disadvantage of statutory regulated fees (or fees calculated on the basis of professional tariffs) is that the **top scientists**/professionals in certain fields of science may be alienated from taking up the role of court expert. This is because the fee charged in cases of legal expertise would generally be far less lucrative than the fee that a top scientist would be able to charge in the professional market (i.e. in case of medical doctors, etc.).

In the United States, as one may easily expect in the light of the **system of contradictory expert witnesses** (see above in chapter 1) there is no statutory or regulatory framework for expert witness fees.

In broad terms, expert witnesses negotiate their fees directly with the parties, and, more specifically, with the attorneys and fees are mentioned in the retainer agreements or equivalents. In theory, this system is far more flexible than the one applied in the Continent of Europe. This is not to say, however, that an expert witness would be able to secure fees beyond the custom rate for service rendered in his/her professional routine. In fact, strategic reasons suggest to the parties to offer fees that are roughly **aligned to the professional fees charged by the individual concerned in his/her usual professional activity**. **Any sum paid by the party to an expert witness is subject to discovery** (pursuant to FRCivP 26(b) discovery in case of an expert witness must include "a statement of the compensation to be paid for the study and testimony in the case"). **The party that pays excessive fees to an expert would run the risk to see that information exposed to the jury during the expert cross-examination**. Any payment that stands out as "inappropriate" or "excessive" - albeit not illegal - may indeed play a crucial role in undermining the reliability of the expert in the eyes of the jurors.

Further, it has long been established that U.S. expert witnesses **can not legally work for contingency fees** (Disciplinary Rule D.R. 7-109(c) of the Lawyers' Code of Professional Responsibility which, in one form or another, has been adopted in virtually every State, states that it is *unethical* for a U.S. lawyer to employ an expert witness on a contingent fee basis). Virtually all guidelines issued in the U.S: by professional organizations specify that it is unethical for an expert engaged in the role of expert witness to tie the level of compensation in a particular case to the outcome of that case (see among many other, the guidelines of the American Academy of Neurology, issued in 2005).

Statutory provisions, instead, govern the remuneration of court appointed experts. FRE 706 rules that:

> "Expert witnesses so appointed are entitled to reasonable compensation in whatever sum the court may allow. The compensation thus fixed is payable from funds which may be provided by law in criminal cases and civil actions and proceedings involving just compensation under the fifth amendment. In other civil actions and proceedings the compensation shall be paid by the parties in such proportion and at such time as the court directs, and thereafter charged in like manner as other costs"

3. The Modalities of Remuneration and its Calculation

Modalities of the remuneration are country-specific. This section offers a brief overview of the most distinctive rules that may be of interest to the Turkish authorities.

Under the extremely detailed JVEG Act in **Germany**, experts receive a compensation which include the following components:

a) a fee for their services (§9-11 JVEG);
b) traveling expenses (§ 5 JVEG);
c) compensation for expenses (§6 JVEG);
d) substitute for other and for special expenses (§ 7 and 12 JVEG).

The remuneration is calculated in **hourly rates** (which go from 50 to 85€) depending on the type of expertise. Further special allowances may be paid to the expert under the terms of the JVEG Act if certain specified conditions apply (§13 JVEG).

In Italy, the matter is governed by Statute 115/2002 (D.P:R. 30 May 2002, n. 115) which has revolutionized the matter of remuneration of court auxiliaries in the Country. The guiding principle is that experts are entitled to claim:

a) fees;
b) expenses related to the mission.

With regard to the expert fees, the idea is that they are not a function of market prices and/or individual negotiations between the court and the expert. Instead, **fees must be to some extent linked to "ethical" standards established *in abstracto* by the law. This translates in charts** updated yearly by the Ministry of Justice, in consultation with the Ministry of Economics (§50).

Within the rather strict limits set by the aforementioned charts, the court is entitled to set the remuneration it considers appropriate in the case in accordance with three criteria (§51):

a) the difficulty of the mission;
b) the completeness of the expert opinion;
c) the quality of the whole performance;

Experts may be compensated with fees **in excess of the amounts determined by the charts**:

a) in criminal cases, when the expertise is required as a matter of urgency;
b) when unforeseeable circumstances have occurred during the expert mission;
c) in very complex situations, in which the expert opinion is crucial for the decision and deals with a very specialized field of knowledge (in this particular case, fees may even be doubled) .

In practice, fees for experts are calculated according to three different criteria, depending on the type of mission for which the expert has been required.

a) a fixed amount pre-determined under the law;
b) daily rates;
c) a mix of the above.

Since the law establishes exactly how and when courts must apply each of the criteria mentioned above, courts enjoy no discretion in this respect and the determination of fees is rather rigidly governed by the law.

3.1 Billing of expert fees

As per the **practicalities concerning the billing/invoice** for the mission, rules are similar in all Countries under investigation.

When the expert is appointed by the court, it is for the court to order payment to one or all parties to the proceedings (i.e., among others §269 French Civil Code).

The expert bills/invoices are sent to the court (in cases of court appointed experts) or to the parties (in case of party-appointed experts). In practice, however, experts in Italy and France often send their bills at once to the court *and* the parties.

In recent years, attempts were made by the countries of Continental Europe to better monitor expenditures for expert opinions since such costs make up a significant portion of the budget of the administration of justice, especially with regard to criminal cases and cases for which it is difficult, or impossible, to eventually secure payments from the party that loses the litigation. This problem does not apply to the United States, since court appointed experts are rather infrequent there.

In France, budget constraints as well as fairness to the parties translate in the obligation for judges to require from the expert an **early estimation of the total costs of the mission** (PINCHON, 351). Deviations from the early account require *ad hoc* authorization under the terms of §280 para. 2 of the French Code of Civil procedure Similarly, in Italy, a 2006 directive (*circolare*) of the Italian Ministry of Justice has explicitly reminded courts and judges to abide to the strict regulations established by the law in the determination of fees, alleging budget constraints and the difficulty in recovering payments that are advanced by the State.

3.2. Advance payments to the experts

Advance payments (§280 French code of civil procedure) to experts are ordered by domestic courts - in case of court appointed experts - as a **matter of routine** in all Countries under scrutiny.

In Italy, the typical amounts of advances for experts are in the region of 1000-1500 euros (I was able to investigate this matter with an informal survey of more than 45 lawyers and experts in the northern Italian Regions of Emilia Romagna and Lombardia). Advances are negotiated at the hearing in which the expert is formally appointed and takes the related oath (see above, chapter 3) and parties are usually instructed by their lawyers to proceed and pay the agreed advances promptly to the experts.

The rule is that advances are paid either by the party that required the expert opinion, or by both parties, in the proportion that the court consider appropriate.

This rule, however, suffers significant exceptions, especially when there is a *prima facie* case against the resistant party or when the moving party is indigent. An example of “inversions” of this sort is the *Indemnité provisionelle*, a practice of the Paris Courts of first instance (cf. PINCHON, 352).

4. Debtor of Remuneration

4.1. U.S. Law: expert witnesses appointed by the parties

In the U.S.A., in the light of the system of contradictory expert witnesses, the general rule is that **parties in principle remunerate their own expert witnesses**. For convenience readers can find in the next page a sample agreement between an expert witness and an attorney in the United States.

It must be noted, however, that FRCivP 26(b)(4)(C) requires that "**the party deposing an expert witness pay the reasonable fees the expert incurs in attending a deposition unless manifest injustice will result**". In complex, multiparty litigation involving multiple experts, these fees can run into significant amounts - costs that normally must be borne by the party who took the discovery. In other words, once the name, opinion and activities of the expert have been disclosed by the opposing party, **such party is entitled to require the deposition of the expert and must pay for his or her reasonable fees incurred in attending the deposition**. This is an application of the general principle according to which the party seeking "discovery bears the costs associated with the discovery".

If the case is eventually settled, expert witnesses fees may or may not be part of the settlement agreement between the parties. Typically, each party will pay its expert, and no claim would be made to recover costs from the opposing party.

CONSULTANT AGREEMENT [NAME OF EXPERT WITNESS] – (U.S. FEDRAL SYSTEM)

Initial Case Review and Consultation

There is an initial, nonrefundable case-opening, review, and consultation fee of [an amount equal to 10 times the professional's hourly rate] to be paid in advance of opening work on the case.

If work in the [city or town in which expert witness practices] area (i.e., the area within 20 miles of [location of expert witness's office]) during this phase (i.e., before I am retained or disclosed as an expert witness) exceeds 10 hours, an advance of [an amount equal to 10 times the professional's hourly rate] is due immediately; each additional hour (beyond the initial 10) will be billed at the rate of [professional's hourly rate] per hour.

Each time the advance is depleted, a subsequent advance of [an amount equal to 10 times the clinician's hourly rate] is due immediately, against which each additional hour will be billed at the rate of [hourly rate] per hour. Unlike the initial case-opening, review, and consultation fee of [an amount equal to 10 times the expert witness's hourly rate], which is nonrefundable, the unused portion of any of these subsequent [an amount equal to 10 times the expert witness's hourly rate] advances (during this period prior to naming or endorsing me as an expert witness) will be returned should my services no longer be needed.

Disclosure as an Expert Witness

If, on the basis of the initial review and consultation, you decide to disclose me as an expert witness in the case, an additional nonrefundable payment of [an amount equal to 10 times the expert witness's hourly rate] must be received by me in advance of my being named as an expert witness.

If work in the [city or town] area (i.e., the area within 20 miles of [office]) during this phase exceeds 10 hours, an advance of [an amount equal to 10 times the professional's hourly rate] is due immediately; each additional hour (beyond the initial 10) will be billed at the rate of [hourly rate] per hour.

Each time the advance is depleted, a subsequent advance (for work to be done within [city or town]) of [an amount equal to 10 times the expert witness's hourly rate] is due immediately, against which each additional hour will be billed at the rate of [hourly rate] per hour.

Unlike the [an amount equal to 10 times the professional's hourly rate] fee for case opening and the [an amount equal to 10 times the professional's hourly rate] fee for endorsement as expert witness-both of which are nonrefundable-the unused portion of any of these subsequent [an amount equal to 10 times the professional's hourly rate] advances (during this period prior to naming or endorsing me as an expert witness) will be returned should my services no longer be needed.

It is understood that the opposing attorney(s) will pay my hourly fee for the deposition itself at the time that I am deposed. [As noted in chapter 5, the party or parties responsible for paying an expert witness for time spent in deposition varies from jurisdiction to jurisdiction.]

Work Conducted Outside the [City or Town] Area

For any travel out of [city or town] area, the charge is [eight times the hourly rate] per 24-hour period (or fraction thereof), plus expenses (transportation as discussed, food, lodging, and delivery of documents via such carriers as …..), to be received by me at least 1 week prior to the scheduled departure from the [city or town] area.

If I do not receive any of the payments called for hereunder exactly when due, I shall stop all work and vacate all appointments, in which event you agree to assume sole responsibility for any and all damages or expenses that may result to you or your client(s).

In the event of any litigation arising under the terms of this agreement, the prevailing party shall recover their reasonable attorneys' fees.

If you agree to these terms, please sign below and return a signed copy to me along with the case-opening fee.

____

Attorney's Name Printed or Typed

____

Attorney's Signature

____

Date

4.2. U.S. Law: court appointed experts

In the case of a **court appointed expert**, as explained above, in two circumstances - land condemnation cases and criminal cases - Rule 706 and related statutes authorize payment of the appointed expert from **public funds**.

In **land condemnation cases**, all costs, including fees for an appointed expert to testify regarding compensation for the taking of property, are assessed against the government, not the property owner. In such cases, the fee is paid by the **Department of Justice** with little difficulty. Obtaining payment for experts in **criminal cases** follows a similar process. Again, the rule and related statutes permit payment of the experts' fees from public funds. The Criminal Justice Act authorizes payment of experts' expenses when such assistance is needed for effective representation of indigent individuals in federal criminal proceedings. In criminal cases in which the United States is a party, the Comptroller General has ruled that the source of payment is to be the **Department of Justice**, not the Administrative Office of the U.S. Courts.

In the most common litigation context, nonetheless, the court appoints an expert with the expectation that the expert will offer testimony at a trial or hearing or produce a pre-trial report that will facilitate settlement. Except for criminal and land condemnation cases mentioned above, under Rule 706(b) "**the compensation shall be paid by the parties in such proportion and at such time as the court directs, and thereafter charged in like manner as other costs**."

The flexibility of the rule permits the court to rely on the parties to compensate the expert when service is rendered rather than waiting until the conclusion of the litigation. The court may order the advance payment of a reasonable fee for a court-appointed expert and defer the final decision on costs assessment until the outcome of the litigation is known. **The court may allocate the fees among the parties as it finds appropriate both as an interim measure and in the final award**. One court has held that the "plain language of Rule 706(b)... permits a district court to order one party or both to advance fees and expenses for experts that it appoints." (*United States Marshals Serv. v. Means*, 741 F.2d 1053, 1058 (8th Cir. 1984))

In brief, the court has discretion to order a single party to prepay the full cost of the appointment. Rule 706(b) also provides that, at the conclusion of the litigation, the expert's "compensation shall be... charged in like manner as other costs." This means that "costs... shall be allowed as of course to the prevailing party unless the court otherwise directs."

Courts sometimes have apportioned fees among the parties, in some cases simply splitting the costs equally and in other cases basing the apportionment on the outcome of the litigation. Of course, **if the parties settle short of a resolution of**

the merits of the dispute, allocation of the expert's fees may be part of such a settlement agreement.

Most judges require the parties to split the expert's fee, with the party prevailing at trial being reimbursed for its portion. Often the parties arrive at this arrangement without judicial involvement. In other instances, especially those in which the parties are reluctant to endorse the court's appointment of an expert, the judge may issue an order that requires the parties to pay a fixed amount to cover the expert's fees. In several cases in which an appointed expert served for a lengthy period, the court required the parties to make periodic payments into an account from which the court then compensated the expert.

In the mentality of U.S. legal practitioners, payment of court-appointed experts presents an awkward problem for federal judges. As explained, although judges appoint the experts, judges usually must turn to the parties for compensation. Furthermore, because an expert may serve long before the case is resolved, a means must be found to provide prompt payment while retaining the option of reallocating the expenses among the parties based on the resolution of the issues. Parties may resist compensating experts they did not retain and who offer testimony that is damaging to their interests. If the parties balk at payment, the judge must either enforce payment by means of a formal order and a hearing, thereby disrupting the litigation and increasing the level of acrimony between the parties, or postpone payment, thereby leaving the expert uncompensated for an indefinite period.

Interviews with federal judges (reported in CECIL–WILLGING, *Court-Appointed Experts*) suggest that such problems in providing compensation can thwart the appointment of an expert. Judges expressed concerns regarding payment. Reliance on the parties for payment of fees was cited by several judges as the principal reason for restricting appointment of experts to cases in which the parties consent to an appointment. As one judge who had never appointed an expert stated, the lawyers find the process "hard to justify to their clients when the client is paying for expert testimony already," particularly when the court-appointed expert may "hurt the client's case, making the client even angrier."

When asked what changes in the rule would make court-appointed experts more useful, the most common suggestion from judges was for clarification of the means of compensating the expert. While appointment of an expert poses many practical problems, providing a mechanism ensuring the prompt compensation for appointed experts appears to be one of the more serious ones. Rule 706, supplemented by statutory authority and case law, grants judges broad discretion in allocating the costs of appointed experts among the parties but allows little opportunity to turn elsewhere for compensation. The following subsections address four different circumstances that affect the manner of compensation: special instances of land condemnation actions and criminal cases in which the rule permits the expert to be compensated

from public funds; matters involving general civil litigation (in which the court must rely on the parties for compensation); general civil litigation when one of the defendants is indigent; and occasions when the court wishes to employ a technical advisor as opposed to a testifying expert.

Rule 706(b) states that court-appointed experts "*are entitled to reasonable compensation in whatever sum the court may allow*." Judicial participation in the payment process varied greatly. Some judges permitted the expert to bill the parties directly; other judges had the expert submit the bill directly to the judge with copies to the parties and required the parties to pay a proportional amount unless they objected to the bill.

Occasionally one of the parties will simply refuse to pay. When this occurs the judge will generally hold a hearing and, when necessary, demand that the payment be made. In several instances the court had to impose injunctive relief as a means of ensuring that the payment was made. In discussing these instances the judges repeatedly indicated their great uneasiness at the prospect of incurring the services of an expert and then being unable to pay for those services in a timely manner. **Concerns about securing payment moved several judges to employ a court-appointed expert only with the consent of the parties**.

As a practical matter, the indigent status of one or more of the parties restricts the ability of a court to allocate the expense of the expert among the parties. The court has the authority to order the non indigent party to advance the entire cost of the expert. However, the judges indicated a great reluctance to employ such experts when the expense cannot be shared.

These few instances suggest the difficulties that may be encountered when added expert assistance is required and one or more of the parties are indigent. Although Rule 706 supports the imposition of the expenses on the non-indigent party, judges seem willing to impose one-sided expenses only when the indigent party's claim shows some merit, or when the non indigent party has agreed to assume the cost of the expert. The difficulties in providing payment in such circumstances suggest that the few instances recounted above may be far overshadowed by instances in which no appointment was made because of an inability to find a means of fairly compensating an appointed expert.

4.3. Continental Europe: a common approach

In civil and administrative proceedings in Italy, France and Germany the law in the books is that the **costs of an expert opinion are suffered in principle by the party that loses the litigation**.

Nonetheless, matters are significantly more complicated in practice.

In Italy and France, for example, it is a common practice of civil courts to **split the costs of the action** between the parties, even if one of them has succeeded entirely in the litigation. In Italy, this practice finds its legitimacy under §92 of the Code of civil procedure, according to which the court may split the costs of the action for "serious and exceptional reasons". These criteria are often abused by Italian civil courts today. The practice of "splitting costs" has developed as an attempt to avoid overburdening of the losing party but it may be criticized as it obviously fails to discourage frivolous litigation.

The court order concerning payments to experts /costs of the action is generally mandatory and the parties are compelled to pay swiftly in order to avoid an execution.

Special provisions apply to ensure legal aid to indigent parties. Legal aid is termed *aide juridictionelle* in France and is governed by a Statute dated 10 July 1991. In Italy, legal aid is termed *gratuito patrocinio* and is governed by Act 30 July 1990, No. 217 (in criminal proceedings) and Royal Decree 30 December 1923, No 3282 (for civil proceedings). In such cases, **costs of the expertise are in principle advanced and suffered by the State**, who may then charge such costs to the non-indigent party that loses the litigation (although Italy and France only rarely seek reimbursement for such expenses in practice). Also in Germany, a system of judicial assistance is established to ensure that the rights of all parties to the proceedings are fully respected (§114, ZPO).

5. Conflicts around the Remuneration of the Expert

A comparative analysis seems to suggest that there is **very limited litigation** concerning the remuneration of expert witnesses in both Europe and the United States. This may be the consequence of:

- detailed and **structured agreement between parties and their expert witnesses** in the United States (See sample agreement, reported above in this chapter)

- the frequent use of **advance payments** in the Continent of Europe. Such advances, in fact, normally ensure that the activities of the expert be for the most part covered upfront. In Germany, an expert may even refuse to begin his/her mission when parties fail to provide him/her with the advance set by the court.

- a general "attitude" of European and American lawyers to avoid controversy with experts and party consultants, with a view to future appointment in legal proceedings.

This being said, a few additional remarks are needed to distinguish the legal framework of the jurisdictions under examination.

In France, the court decision on expert fees may be subject to appeal by virtue of §724 of the Code of civil procedure. In brief, parties may file an appeal within **a month** from the decision that determined the expert fees. In both first instance and appellate civil proceedings, authority to rule on appeal on matters of expert fees is the First President of the related Court of Appeal.

In Italy, the court order (*ordinanza*) concerning expert fees is subject to appeal in both criminal and civil proceedings. In essence, the parties and the expert are entitled to file an appeal against the court decision concerning expert fees. The appeal is termed "*reclamo*" and its scope is rather limited, as arguments will cover only issues related to the calculations of the expert fee and expenses. The *reclamo* must be filed with the court that issued the order within **20 days**. For obvious reasons of impartiality, however, the court will sit with a single judge, different from the one who has decided the related case. This decision may be appealed on the ground of legitimacy before the Supreme Court of Cassation based in Rome. The decision on the expert fees is immediately mandatory, and parties are compelled to pay the fees in order to avoid an execution. Similar rules apply in Germany (PINCHON, 44).

CHAPTER 6

LIABILITY

This section covers aspects such as the general liability framework for experts, facts triggering their liability, and possible sanctions against experts.

1. The general liability framework for experts

This section describes in broad terms the legal risks for expert witnesses and the general liability framework in the countries under examination.

The obvious point of departure is that the **expert appointed in relation to legal proceedings is required to provide impartial, independent and unbiased evidence**. Since an expertise is required precisely when a scientific or technical issue falls beyond the province of the court, the expert's overriding duty is to assist the court (or jury) in casting light over the scientific/technical issue in question.

Even in the systems of contradictory expert witnesses (U.K. and the U.S:A.) legal scholarship suggests that **this duty overrides any obligation to the person/party from whom the expert has received instructions or by whom he/she may be paid**. As suggested earlier, expert evidence is to be given in the form of a report or oral testimony within the delay specified by the court (or parties).

In brief, the mission of an expert witness generates significant responsibilities on his/her part and thus a system of guarantees is established within each Country to monitor - and, if necessary, sanction - the conduct of an expert who may:

a) cause **damages** to any party to the proceeding;
b) **engage in criminal conduct**;
c) **fail to abide to ethical standards in the execution of the mission and/or the submission of evidence (either orally or in a written report) to the court**.

Although a number of issues are treated in a rather similar manner in all the Countries under investigation, the following sections will also highlight a number of national peculiarities, which often reflect a more general approach towards the punishment of expert misconduct.

2. Conducts Liability for Experts

The best way to approach the issue of liability (and related risks) of experts is to distinguish different types of conducts that may trigger civil, criminal and disciplinary sanctions against the individuals concerned.

Readers should bear in mind that most of the conduct mentioned below may trigger a combination of legal and disciplinary sanctions against experts, depending on domestic arrangements in the law.

It must also be noted that among the available sanctions for criminal conduct and malpractice, **disciplinary sanctions are particularly effective in the area of expert opinion law**, as experts in all jurisdictions under examination appear to be extremely concerned for the serious consequences that instances of malpractice may have in the future exercise of their profession.

2.1. Damages to the parties to the proceedings

The general principles of civil law and award of damages apply to the conduct of an expert that causes damages to any party to the proceedings. **Experts are not exempted from civil liability** and actions may by taken against them by parties who claim to have suffered damages, either as a result of the execution of the expert mission or the submission of expert evidence to the courts or jury.

Readers should investigate this matter by reference to the civil law of each jurisdiction under investigation.

2.2. Refusal to serve

This conduct only applies to court appointed experts.

In the Continent of Europe, the basic rule is that **subjects who are enlisted are under an obligation to serve as experts** (since they are regarded as court auxiliaries, rather than witnesses), unless a ground for legitimate refusal applies (see above, chapter 2).

In Italy, by way of illustration, if an expert fails to comply with the court appointment, he/she is subject to criminal prosecution under §366 Italian Criminal code (*Rifiuto di atti legalmente dovuti* tr: Refusal to perform acts that are legally due). Such offence carries up to six-month imprisonment and a fine of € 30 to € 516. In such cases, the expert may also be subject to disciplinary sanctions.

In France, refusal to serve without good cause is considered **serious professional misconduct** and may be a ground for permanent removal from the expert witness list (although this sanction is seldom applied in practice according to TAYLOR, 196).

2.3. Abuse of title of "Expert"

In France, the **abuse of the title of "Expert"** (see above, chapter 2) is punishable under the terms of §433-17 of the Criminal code (this provision was amended in 2009). Abuse typically consists in the publishing of the false title on business cards, resumes, or professional correspondence. For ease of reference, the text of this provision is reported below in French (and English translation).

> *L'usage, sans droit, d'un titre attaché à une profession réglementée par l'autorité publique ou d'un diplôme officiel ou d'une qualité dont les conditions d'attribution sont fixées par l'autorité publique est puni d'un an d'emprisonnement et de 15000 euros d'amende.*
>
> *Les personnes physiques ou morales coupables du délit prévu à la présente section encourent également la peine complémentaire suivante : interdiction de l'activité de prestataire de formation professionnelle continue au sens de l'article L. 6313-1 du code du travail pour une durée de cinq ans.*
>
> (English tr: "The use, without any right, of a title attached to a profession regulated by the public authority or a formal degree or quality with award conditions fixed by public authority is punished by one-year imprisonment and 15.000€ fine. Natural or legal persons convicted of an offense under this section also incur in the additional penalty of the prohibition of exercising the professional activity concerned for a period of five years").

2.4. False opinion

In all jurisdictions under examination, a serious criminal conduct is that of an expert who knowingly provides the court with **false statements** concerning matters related to:

a) his/her qualification;
b) grounds for incompatibility and conflicts of interest, if applicable;
c) the activities performed during the mission.
d) the findings mentioned in the opinion.

Under *a*), the typical example is that of an expert who **falsely declares to be a member of a certain professional organization**. Such a conduct triggers criminal liability in all jurisdictions under scrutiny.

Under *b*) the typical example is that of an expert who **fails to disclose the reasons according to which, under domestic law, he/she is incompatible to serve as an expert in a given case** (i.e. for grounds of friendship, prior business relation with

one of the parties, etc…). Reasons under *b*) apply specifically to Continental European countries and court appointed experts.

Under *c*), the typical example is that of an expert who **lies about the activities performed during the mission** (i.e. an expert who declares that he has interviewed the defendant, or carried out a medical examination, when in fact he/she has not).

Under *d*) the typical example is that of an expert who **hides the truth or falsely declares the existence/absence of a given fact** (i.e. an expert who falsely declares that the bullet has not entered the skull of a living person, in spite of the scientific findings to the contrary) or manipulate science against the interest of justice.

Let us now turn to the specific liability framework per jurisdiction with regard to the above mentioned conducts

In Italy, the court appointed expert who knowingly submits false statements to the court in the cases under *b*), *c*) and *d*) described above **may be liable for the offence of "false expertise"** (by virtue of §373 Italian Criminal code), which carries imprisonment from two to six years. Conviction for this offence triggers automatic suspension from the exercise of the profession for the corresponding period of time.

A much more serious offence, termed "**fraud in legal proceedings**" (*frode processuale*, §374 of the Italian Criminal code), punishes experts who fraudulently alter in any way objects, places or individuals during the execution of their mission with the purpose of misleading the court. This offence carries imprisonment from 6 months to 3 years.

Even heavier criminal sanctions are applied in France in case of a false expertise, as §434-20 of the domestic Criminal code carries 5-year imprisonment and a 75.000€ fine.

In the United States of America **expert witnesses have always been subject to prosecution for perjury for false testimony.** In the U.S., perjury may be defined as the crime of

> intentionally lying after being duly sworn (to tell the truth) by a notary public, court clerk or other official. This false statement may be made in **testimony in court**, administrative hearings, **depositions**, answers to interrogatories, as well as by signing or acknowledging a written legal document (such as affidavit, declaration under penalty of perjury, deed, license application, tax return) known to contain false information.

Under U.S. Federal law, any person who is found guilty of perjury shall be punishable through a fine or imprisonment for no more than five-years, pursuant to 18 U.S.C. 1621.

2.5. Delay in the execution of mission

Ideally, the execution of an expert mission should not excessively delay the litigation process. Nevertheless, in the practice of legal proceedings in the Continent of Europe, it is rather common for court appointed experts to apply for extensions in the delay for submission of the report. Applications are often granted by the courts.

In Italy, in case of unjustified delay in both criminal and civil proceedings the expert is subject to an administrative fine which operates as a **progressive reduction of the expert remuneration** (such reduction is proportionate to the specific delay pursuant to §52, Statute 115 of 2002). In the most serious cases, the expert may be replaced by the court. In Germany, a fine is prescribed by the law for experts that submit a late opinion under the terms of §411 para. 2 ZPO.

2.6. Misconduct in relation to remuneration/corruption

In the Continent of Europe, remuneration to court appointed experts is rather strictly governed by statutory frameworks, as explained in chapter 5. As a consequence, **court appointed experts may not receive any additional remuneration, service, grants or payment – in any form - by the parties**, beyond the amount that is set by the courts according to the statutory framework mentioned above.

Any additional payment to an officially appointed expert is regarded by the law as a **symptom of corruption** and those who pay the expert are sanctioned under criminal law (In Italy, the offence is termed "*subornazione*" and is governed by §377 of the Italian Criminal code while in France it is termed *subornation d'expert* and is governed by §434-21 of the Criminal code). As a consequence, it is obviously illegal for the parties to pay an officially appointed expert any additional amount of money (see also §248 French Code of civil procedure, §85(L) Statute 215/2002).

In France, **an expert witness who receives additional funds outside of court instructions is subject to punishment under the terms of §434-9 of the French Criminal code (which carries 10 years imprisonment and a fine of 150 000€).** In Germany and Italy, the rules governing corruption of public officials apply.

Further, the expert who receives compensation, money or any other remuneration from the parties to the proceeding is in serious breach of his/her professional Code of conduct.

2.7. Negligence in the execution of mission, submission of evidence

Another major area of concern arises from the case of an expert who does not provide false information but instead **acts outside the custom of his/her profession in the execution of a mission** (i.e. experts who support arguments with outdated literature, experts who fail to carry out mission in strict accordance with relevant scientific protocols, procedures, or standards). This conduct is typically subject to scrutiny by the **professional organization to which the expert belongs** to, rather than the court, although it is the duty of the court to report such instances to the relevant body for further action against the expert.

Readers must be aware that this is a crucial aspect of the law "in action" concerning expert opinions. In the books, in fact, all the countries sanction the conduct of malpractice. However, only in jurisdictions that take the issue of negligence seriously, experts run significant professional risks not only when they act with intent against the interests of justice, but also **when their opinions are the result of scientific incompetence**. When such misleading - albeit not *intentionally* misleading - opinions are offered to courts and jury the quality of giving justice significantly decreases, as well as the public confidence in justice.

This is why effort should be made by domestic laws to ensure that professional organizations effectively monitor the ethical standards applied by experts in legal proceedings. This obviously creates problems as courts of domestic law are not in the position to directly apply disciplinary sanctions, since this is the province of professional bodies whose independence is also a value protected in the law.

It is universally understood that, in the practice of their professions, **experts that submit their evidence to a court of law should refrain from unethical practices, but what is "unethical" is often difficult to determine.** By what standard is the ethical nature of one's conduct to be measured? This topic requires some elaboration.

The primary source of information of what is considered unacceptable professional behaviour is the **Code of ethics** of the professional association to which one belongs. Most membership groups maintain a code of ethics. Since many scientists belong to more than one society, the person's conduct may be governed by **several different codes of ethics that may not necessarily look similar**. All of them, however, make engaging in ethical conduct a requirement of belonging to the association and provide sanctions for violating the professional standards of conduct.

In addition to defining unprofessional conduct, codes of ethics also typically contain **procedural mechanisms whereby purported unethical conduct is to be investigated and, if appropriate, sanctioned**. Typically, such sanctions vary from a mere reprimand to expulsion from membership in the organization. This may, at times, be accompanied with loss of license, accreditation, or board certification.

Since the law in all Countries under examination tends to view membership in a professional association as a valuable property right, the mechanisms whereby a person is stripped of that right must comport with procedural safeguards against abusive and otherwise improper exercise of the power to sanction. There is a great variety of mechanisms under domestic laws, and it is not the purpose of this report to analyse the manner in which professional organisations assess the unethical conduct of members.

Nevertheless, this section offers a brief overview of what conduct may be regarded unethical.

In addition to the sanctions that can be imposed by a professional society upon its own members, there is also a "natural law" of ethical conduct as well. Violating these prohibitions against unethical conduct, usually involving professional conduct that includes deception, fraud, overreaching, perjury, or behaviour merely considered to be dishonest or inequitable, whereby either the public or society, in general, is injured – as by engaging in "negligent" professional conduct – may expose a scientist to civil legal sequelae in damage actions as well as potential criminal liability for perjury or fraud. These are sanctions that professional societies cannot impose. Even the expert witness who does not belong to an organization that has a mandatory code of conduct may be subject to such legal actions. Potential liability of this sort falls within the area of "professional malpractice" for either intentional or unintentional (negligent) conduct as defined by applicable law.

A significant problem concerning ethical sanction is that **while general ethical principles may be listed in codes, the manner in which ethics codes have been applied in illustrative cases may remain obscure to the membership**. In general, the professional codes of conduct devote much more space to outlining the procedure to be followed when an accusation of questionable ethics has been made, than to the definition of ethics itself. Perhaps that is understandable because notions of fair play and clear advance notice of what conduct is complained of, require provisions that outline the process of *enforcing* codes in more elaborate terms. The notions of "due process", "diligence", "care" that pervade the forensic sciences, because of its close connection to civil and criminal litigation, of necessity require it to exemplify fairness in the application of its rules of conduct to its members.

The definition of what constitutes unacceptable expert behaviour is stated, in some ethics codes, only in general terms. Other codes go into great detail about the type of conduct that it requires of its members.

Perhaps the majority of codes of conduct define ethics in terms of prohibitions.

An example of the broad general approach is that of the American Academy of Forensic Sciences (AAFS), which is described below as an example of code of conduct based upon "general" prohibitions:

> *a*) Every member . . . shall refrain from exercising professional or personal conduct adverse to the best interests and purposes of the Academy. The objectives stated in the Preamble to these By-Laws include: promoting education for and research in the forensic sciences, encourage the study, improving the practice, elevating the standards and advancing the cause of the forensic sciences;
>
> *b*) No member or affiliate... shall materially misrepresent his or her education, training, experience, area of expertise, or membership status within the Academy;
>
> *c*) No member or affiliate... shall materially misrepresent data or scientific principles upon which his or her conclusion or professional opinion is based;
>
> *d*) No member or affiliate... shall issue public statements that appear to represent the position of the Academy without specific authority first obtained from the Board of Directors".

An example of a code of professional conduct that is more explicit in terms of prohibited professional behaviour is the American Board of Criminalistics (ABC) Rules of Professional Conduct which, in Article IV.5.d of the bylaws, enumerate 18 specific mandatory rules of behaviour that its members "shall" obey. Unlike the AAFS code, it enjoins members to report to its Board any violation of the rules by another applicant. The ABC rules place a great emphasis on impartiality and integrity when dealing with evidence, and prohibit members from using "techniques and methods that are known to be inaccurate and/or unreliable".

Considering that users of a technique will invariably advocate its reliability, there may, nevertheless, be an important segment within a profession that frowns upon use of some methods of analysis, which they consider to lack reliability. One wonders how controversies on those issues can ever be effectively resolved.

Rather than defining the prohibited conduct, the approach within some professions is to define appropriate professional conduct in terms of the **aspirations** toward which its members should strive.

Some groups eschew categorizing any specific instances of unprofessional conduct or the categorization of "standards" of behaviour. An example of such a group is the American Psychological Association (APA), which describes the "Ethical Principles

of Psychologists and Code of Conduct" into five rather wordy aspirations, wherein a full paragraph of text each is devoted to Beneficence and Nonmaleficence; Fidelity and Responsibility; Integrity; Justice: and Respect for People's Rights and Dignity.

The APA code then elaborates on these aspirations in more than a dozen pages of ethical standards stated in broad, generalized concepts. While flexibility in terms of expected professional aspirations are the norm in the behavioural sciences, similar approaches are taken also in some organizations that deal with the physical or comparative sciences.

The International Association for Identification (IAI) Code of Ethics is not worded in terms of prohibited conduct but is, instead, worded in the form of a **personal pledge of good behaviour** that its members publicly affirm. Its true "code" of prohibited conduct then follows as "Standards of Professional Conduct". Similarly, the code of ethics of the Northwest Association of Forensic Scientists lists a series of ethical considerations relating to five different categories: those relating to the scientific method, to opinions and conclusions, to aspects of court presentation, to the general practice of forensics, and to the profession. The importance of a thorough familiarity with a profession's ethics rules is particularly crucial because potential legal sequelae may follow from proven unethical conduct.

When legal actions for damages are brought against forensic scientists based on either negligent or wilful conduct, or when a prosecution for criminal conduct is initiated, whether the activity that is the subject of the complaint is considered "ethical" or in accord with "professional standards" may well be taken by courts as depending on what conduct the applicable professional society expects of its members.

2.7.1. Common examples of negligence

This section touches upon some common situations that may involve negligence on the part of the expert. While clear authority for each fact setting may be difficult to provide, the experience of persons serving on ethics committees may serve as a guide.

A first type, and perhaps the most frequent complaint lodged against experts is in regard to **inaccuracies (nor necessarily falsities) in the way they represent their training, education, and experience**. Misrepresentation of this sort may occur in statements made in a public forum (in speeches, on websites, or in correspondence), or in drafting curriculum vitae that are disseminated to potential clients and courts. If the inaccuracies simply amount to exaggeration that can be justified as "puffing," the perceived inaccuracy will not necessarily be considered an unethical practice. More often, the assertions are made in support of establishing the expert's competence and qualifications in depositions or in court testimony. If the misrepresentation is deemed significant and occurs at a time the expert is giving sworn information to a court, whether in a deposition or testimony, the expert may also be subject to criminal

prosecution for perjury, or in damages in a civil suit by parties injured or aggrieved as a result of wilful misstatement of one's background and experience. Examples of misstatements that are normally considered material and significant would be to assert having received credentials (diplomas, academic degrees, board certifications, and honours), which were not, in fact, obtained. In this same category, fall claims of membership or of a category of membership status for which the expert has not been qualified.

A second category of ethical complaints, and one that is more fraught with enforcement difficulties, **encompasses assertions that a person was incompetent when he engaged in a certain examination**. In many disciplines, it may be disputed whether a particular methodology leads to reliable or repeatable results. When a method is fairly novel, there exists a danger in prematurely using an unproven method as the basis for expert opinions in court. Influential people in a discipline may assert that the method was not properly validated and that, consequently, reliance on test results produced by such methods is evidence of incompetence. Because of the difficulty of defining "competency," some associations refrain from entertaining complaints based on incompetence altogether, especially if the organization has fairly rigorous standards for admission to membership and the person complained of has met these criteria. Lack of established reliability or inability to establish method validation has become a more frequently litigated issue in courts as a result of court decisions and other legal provisions, which place restrictions on opinion testimony based on unreliable processes or technologies.

A third category of potential problems has to do with **misrepresentation of data examined, results obtained, in the light of outdated scientific criteria applied by the expert in the execution of mission.**

Finally, there exists a category of potential ethical conflicts that do not fall within the above categories, such as those arising from **conflicts of interest or violation of confidentiality rules**. Alleged unethical conduct in these areas often depends on existing domestic law on conflicts of interest and confidentiality in the jurisdiction where the conduct arose.

2.8. Breach of confidentiality

In broad terms, the **expert appointed for legal purposes must respect professional privileges**, and this may include an obligation of **confidentiality** with regard to the execution of the mission. Obviously, when trials are public and experts are required to submit their opinion to the court or jury, the opinion will eventually become public, as it is normally the case in criminal proceedings across all the jurisdictions of the Western World. As suggested earlier, however, many cases may not eventually go to trial, and a question arise as to whether the expert is bound to confidentiality in such cases (typically, in civil proceedings).

In the United States the expert witness is in a contractual relationship with their client, and **is required to maintain privacy and will not divulge any information relating to the dispute or the affairs of their client to the media or others not involved in the process without first obtaining specific permissions to do so**. If necessary, the expert should be prepared to sign a confidentiality agreement or a specific statement of confidentiality to the proceedings.

In the Continent of Europe, similarly, the law usually prohibits an expert from revealing any privileged information obtained in the course of his/her investigations (see, by way of illustration §244 para. 2 of the French Code of civil procedure). In France and Italy, rules of privilege and professional ethics forbid an expert from giving interviews about his/her mission.

3. Sanctions against Experts

As mentioned above, sanctions against an expert may involve a combination of **civil reparation, criminal punishment and disciplinary sanctions**. As per civil reparation and criminal sanctions, readers may refer to the earlier sections in this chapter.

In France, an additional – and rather important sanction – is the permanent removal of an expert from the expert witness list, kept by the Court of Appeal and Court of Cassation (on this matter see extensively PINCHON, 375)

With regard to disciplinary sanctions, ethics codes in all Countries provide for a gamut of potential consequences that befall a member found to have violated its ethical provisions.

The sanctions range from measures that may be seen by the public as a simple "slap on the wrist," such as a **reprimand** (whether oral or in writing), to the more serious ones, which encompass **public censure**, **suspension of membership for a stated period of time**, or **disenfranchisement** ("*radiation*", in French or "*radiazione*", in Italian).

Where applicable, the most severe sentence of disenfranchisement may also be accompanied by a revocation of credentials or professional certifications.

Severe sentences against professionals such as membership suspension or expulsion can only be imposed if a **procedural code exists which affords due process to the accused member**. Due process typically requires notice of the specific charges brought, presentation of evidence at a hearing at which the accused is permitted to attend, confront the charges against him, and present evidence to rebut them. It also typically requires the complaining association to carry the burden of proving that the

violation occurred, though the quantum of proof is by no means uniform. In some codes, the quantum of required proof of unprofessional conduct must be "beyond a reasonable doubt," though, more typically, ethics provisions require that unprofessional conduct be established by either the greater weight of the evidence or, at most, by clear and convincing evidence. Some ethics codes permit the member against whom the complaint is filed to be assisted by legal counsel at the hearing. Some codes also make provisions for a right to appeal an ethics board decision to the entire membership of the organization.

CHAPTER 7

LESSONS AND OPTIONS FOR ACTION

The objective of this study is to provide descriptions and analyses of approaches to the use of expert opinions in civil, criminal, and administrative court proceedings to inform the policy debate in Turkey. Based on these analyses, it is possible to formulate a number of lessons to be learned from the way France, Germany, Italy and the United States approach this issue.

Empirical research on the specific issues around expert witnesses in Turkey is yet to be carried out. Its findings will allow translating the lessons and options for action into the specific context in Turkey. However, according to the Judicial Reform Strategy and Action plan, the current understanding of the Ministry of Justice is that the scale at which expert opinions are used in Turkey suggests that judges crumbling under a heavy workload delegate decision making to experts beyond the realm of missions carried out by experts in other countries. This is seen as a potential cause for delay, increased cost of proceedings, and weak quality of decisions. The following lessons and options for action take this into consideration.

Lessons to be learned

- Rules on expert opinions in legal proceedings are significantly influenced by the legal tradition of a

Based on the analysis in the previous chapters and the lessons above, it is possible to formulate some options for action.

Legislative framework

The smooth functioning of the justice service delivery chain requires a sound legislative framework. Improving this framework falls within the realm of the legislative branch as well as the Ministry of Justice who plays an important role in the drafting process.

1. Option for action: Undertake an empirical analysis of the issues around the use of expert opinions in the courts when planning revisions of the legal framework.

An empirical analysis can help the basis for a well grounded assessment of the rules of administrative, civil, and criminal procedure to check and confirm or reject concerns. Such an analysis and comparative practice and experience can then provide inspiration for the development of suitable solutions.
By contrast, the import of wholesale solutions from abroad to Turkey would likely to fail without a thorough empirical analysis of the current situation in Turkey.

Experience from Mexico and Argentina, for example, shows that so-called "common knowledge" about problems and their solutions can often be misinformed and that empirical data are a more solid basis for identifying the real issues as well as effective solutions.[1]

2. Option for action: Strengthen the expert witness system in line with Turkey's legal tradition as a civil law country.

Rules on expert opinions in legal proceedings are significantly influenced by the legal tradition of a given jurisdiction. Turkey has a civil law approach to administrative, civil and criminal procedure in general and to expert opinions in particular. Experience with law reform in Europe and Central Asia highlights the major challenges and unpredictable outcomes of transplanted solutions from different legal systems.[2] Inspiration from other systems can be useful, but requires especially careful analysis of facts and possible implications.

3. Option for action: Improve clarity of the legal framework by specifying that expert opinions are about questions of fact and cannot be about questions of law.

In all systems under study, civil law and common law systems alike, the scope of the mission of an expert is limited to questions of fact. Experts cannot be used to answer questions of law. If the practice in Turkey is indeed different, a first step to address this is to see whether the law provides sufficient clarity about the scope of the expert mission and, if necessary, improve the law.

4. Option for action: Enable judges to supervise the activities of the expert effectively to ensure timely execution of the mission, for example by introducing mechanisms allowing and encouraging them to impose financial and other sanctions on experts in non-compliance with timeliness or professional standards.

Since the court supervises the activities of the expert, judges need appropriate tools to manage the way the experts carry out their mission. Otherwise, they will not be able to monitor the timeliness and quality of the delivery. The law should provide the possibility of sanctions for experts who are in non-compliance. In Germany and Italy, for example, in case of unjustified delay the expert is subject to a fine.

Cooperation between Judiciary and Ministry of Justice

[1] World Bank *Reforming Courts: the Role of Empirical Research* (2002). Available at http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/premnote65.pdf.

[2] Wade Channel *Lessons not learned about legal reform* in: Thomas Carothers (ed.) *Promoting the Rule of Law Abroad*, Carnegie Endowment: Washington, DC 2006.

The existence of a sound legal framework for the use of experts in administrative, civil and criminal proceedings is a necessary condition for the smooth functioning of the judicial service delivery chain, but it is not a sufficient condition. Judges themselves have to be fully aware of the issues and be on board to solve them.

5. Option for action: The Judiciary and the Ministry of Justice can constructively discuss differing perspectives and objectives, build consensus, and reach evidence-based decisions through the systematic use of empirical research. Such consensus building, while challenging, is essential for the effectiveness of the judicial system to reconcile and manage the intrinsic structural tension between the Judiciary focusing on its independence and the Ministry of Justice emphasizing the Judiciary's accountability to the public for its performance.

Judges take pride in their independence. Identifying the judiciary's focus on independence as a problem carries the risks of generating resistance to change. Empirical research carried out based on a methodology that is agreed among the judiciary and the Ministry of Justice can provide a sound and objective basis for change.

In the Netherlands, for example, far reaching improvements to the way court performance is managed were possible because the Judiciary did not opt to reject improvement initiatives. It addressed concerns based on judicial independence by actually taking the lead in the change process and developed mechanisms for performance accountability itself.[3]

Judges are key players when it comes to the use of experts in court proceedings. The successful implementation of any solution will depend on their active cooperation. Experiences from abroad can help in the process of identifying solutions, but imposing solutions on the judges is likely to fail. They are the ones who will or will not translate them into daily practice. Consensus building is therefore important to bring them on board.

Provide an Enabling Operating Environment

6. Options for action: When changes are made to the legislative framework or the workflow of judges and support staff, they may need to receive appropriate training to be able to implement solutions effectively.

[3] Klaus Decker, Christian Möhlen & David Varela *Improving the Performance of Justice Institutions: Recent Experiences from Selected OECD Countries Relevant for Latin America*, World Bank: Washington DC, 2010.

Justice Reform projects worldwide generally have components providing for judicial training to make sure that implementation is grounded in adequate knowledge about how the improved system is supposed to work.[4] Training is commonly used to familiarize judges with new areas of law or changes introduced by new legislation. It is also used, for example, to ensure judges and staff are able to use a newly introduced IT based case management system.

In addition to lawmakers and judges, the Ministry of Justice plays an important role to ensure that the operating environment for judges and experts is appropriate.

7. Options for action: It is important for the Ministry of Justice to allocate adequate resources to provide an operating environment in which judges can implement the improved expert witness system as intended. If the empirical research identifies constraints that exacerbate the challenges around the use of experts, these constraints should be addressed. If excessive workload, for example, is a contributing factor, the potential of reallocating work, of preventing cases from getting into the system by introducing filtering mechanisms such as alternative dispute resolution, or of increasing the number of judges should be explored to find a sustainable solution.

The current analysis by the Ministry of Justice suggests that one of the underlying reasons for judges to make use of experts is the fact that they are crumbling under a heavy workload and use this as a way of delegating work. It is important that the empirical analysis include aspects such as this one to have clarity about the incentive structure for judges to behave the way they do. It is the responsibility of the Ministry of Justice to providing a supportive operating environment by allocating appropriate financial, human and material resources and managing them in a way that constraints do not translate into dysfunctions.

Seek Outside Support

8. Options for action: The Ministry of Justice could seek the active cooperation of professional organizations to improve the external accountability of experts to ensure they act according to the rules. The possibility of disciplinary sanctions by such institutions has turned out to be useful in other countries as well.

The study has identified mechanisms that are conducive to holding experts accountable for the delivery of their services. The existence of appropriate tools for judges to manage experts in the process has already been mentioned. However, the

[4] Linn Hammergren *Envisioning Reform: Improving Judicial Performance in Latin America*, Pennsylvania State University: University Park, 2007.

existence of disciplinary and other sanctions for experts who transgress the scope of their competencies may be useful. The Ministry of Justice may therefore look into cooperation with professional organizations in this respect, develop or improve codes of ethics for experts, and set up an effective system to ensure compliance with these standards. France, for example, has taken active steps to remove such experts from the official lists, and in call civil law countries under study professional organizations to which the experts belong play an important role in monitoring expert behavior through the enforcement of professional codes of ethics.

APPENDIX A

LITERATURE ON EXPERT EVIDENCE & EXPERT WITNESSES

This appendix lists selected literature on expert opinion and expert witnesses in comparative scholarship and in the jurisdictions under examination.

The selection was made with specific regard to recent studies on the matter.

Readers should be aware that some of the books and articles mentioned below include not only the analysis of domestic rules of evidence, but also comparative remarks on the role and function of expert witnesses.

COMPARATIVE SCHOLARSHIP ON EXPERT OPINION AND EXPERT WITNESSES

M. Delmas Marty–J Spencer, *European Criminal Procedures*, Cambridge, 2006, 632-635

N. Fritz, *Der technische Sachverständige im Prozess - The technical expert in procedure: national reports and general report - VIIth International Congress on Procedural law*, Heidelberg, 1984 (in German)

F. Pinchon, *L'expertise judiciaire en Europe, Etudes des systemes allemand, anglais, espagnol, francais et italien en matiere de procedure civile*, Paris, 2002

R.F. Taylor, *A Comparative Study of Expert Testimony in France and the United States: Philosophical Underpinnings, History, Practice, and Procedure*, in *Texas International Law Journal* , vol. 31, 1996, p. 182.

S. Timmerbeil, The *Role of Expert Witnesses in German and U.S. Civil Litigation*, in *Annual Survey Of International & Comparative Law*, Vol. 9, 2003, P. 163

UNITED STATES OF AMERICA

S. Babitsky, *The A-Z guide to expert witnessing.* Falmouth, 2006

E. Beecher-Monas, *Evaluating scientific evidence: an interdisciplinary framework for intellectual due process*, New York, 2007

J. S. Cecil – T.E. Willging, *Court-Appointed Experts*, in *Reference Manual on Scientific Evidence*, New York, 2000 528-572

J. M. Conley, *Scientific and expert evidence,* Austin, 2007

D.M. Dwyer, *The judicial assessment of expert evidence.* New York, 2008

N. Ebisike, *Offender profiling in the courtroom: the use and abuse of expert witness testimony,* Westport, 2008

P. D. Ellner, *The biomedical scientist as expert witness,* Washington, 2006

D. L. Faigman, *Modern scientific evidence,* Thomson/West, 2008

P. C. Giannelli, *Scientific evidence,* Newark, NJ, 2007

A.D. Gold, *Expert evidence in criminal law: the scientific approach,* Toronto, 2009

T. G. Gutheil, *Mastering forensic psychiatric practice: advanced strategy for the expert witness,* Washington, 2002

T. G. Gutheil, *The psychiatrist as expert witness,* Washington, 2009

M. Hamilton, *Expert testimony on domestic violence,* El Paso, 2009

C. T. Hutchinson, *Expert witnesses: business and economy cases,* Thomson/West, 2008

T. F. Kiely, *Forensic evidence: science and criminal law,* Boca Raton, 2006

C. Kuhne, *A litigation guide to expert witness,* Chicago, 2006

E. J. Imwinkelried, *The methods of attacking scientific evidence.* Newark, 2004

W. D. Lancaster and D. D. Capozzola, *Expert witnesses in civil trials: effective preparation and presentation,* Eagan, 2008

S. Lubet, *Expert testimony: a guide for expert witnesses and the lawyers who examine them,* Louisville, 2009

D. M. Malone, *Effective expert testimony,* South Bend, 2006

A. A. Moenssens, C. E. Henderson and S. G. Portwood, *Scientific evidence in civil and criminal cases,* New York, 2007

F. Prichard, *Experts in civil cases: an inside view*, New York, 2005

M. Redmayne, *Expert evidence and criminal justice,* New York, 2001

B. D. Sales, *Experts in court : reconciling law, science, and professional knowledge,* Washington DC, 2005

F.C. Smith, *A guide to forensic testimony: the art and practice of presenting testimony as an expert technical witness,* Boston, 2002

FRANCE

J. P. Baud, *Le procés de l'alchimie. Introduction à la légalité scientifique*, Strasbourg, 1983

D. Bourcier et M. De Bonis, *Les paradoxes de l'expertise; savoir ou juger?*, Le Plessis-Robinson, 1999

G. Bourgeois, P. Julien, M. Zavaro, *Le pratique de l'expertise judiciaire,* Paris, 1999

F. Chauvaud, *Experts et expertises judiciaire en France (1791-1944)*, Gerhico - Poitiers, 1999

F. Chauvaud, *Experts et expertise judiciaire. France, XIX et XX siècles*, Rennes, 2003

G. Dalbignat- Deharo, *Vérité scientifique et vérité judiciaire en droit privé*, Paris, 2004

M. A. Frison-Roche et D. Mazeaud, *L'expertise*, Paris, 1995

M. Genesteix, *L'expertise criminelle en France*, Paris, 1900

J. L., Le Toqueux, *Les expertise judiciaire civile set administratives*, Etude & statistiques justice, 1993

O. Leclerc, *Le juge et l'expert: contribution à l'étude des rapports entre le droit et la science*, Paris, 2005

M. Olivier, *De l'expertise civile et des experts*, Paris, 1995

J. P. Pastorel, *L'expertise dans le contentieux administratif*, Paris, 1994

F. Pinchon, *L'expertise judiciare en Europe*, Paris, 2002

J.Pradel, *Procédure pénale*, Paris, 2006, 178-180

L. Retail, *Principes et cadre juridique de l'expertise judiciaire*, Paris, 1951

P. Roqueplo, *Entre savoir et décision, l'expertise scientifique*, Paris, 1997

G. Rousseau et P. de Fontbressin, *L'expert et l'expertise judiciaire en France : théorie, pratique, formation*, Bruxelles, 2008

L. M. Villerbu, *Ethique et pratiques psychologiques dans l'expertise*, Paris, 1998

GERMANY

M. Danner, *Justizielle Risikoverteilung durch Richter und Sachverständige im Zivilprozess*, Berlin, 2001.

W. Döbereiner, *Sachverständigen-Haftung : mit Haftungsbegrenzung sowie Versicherung d. privaten u. gerichtl. Sachverständigen*, Berlin, 1979.

U. Eisenberg, *Beweisrecht der StPO: Spezialkommentar*, München, 2002

R. G. Von Hardenberg, *Das Privatgutachten im Zivilprozess, unter Berücksichtigung der Rechtslage im Strafprozess*, Erlangen, 2000.

E. Kurz-Beckhaus, *Wissenschaftliche Sachverständige im Lebensmittelrecht*, München, 1982

I. Rode, *Psychiatrische Sachverständige im Strafverfahren: subjektive Aspekte der Begutachtung*, München, 1994.

M. Stahl, *Zur Dritthaftung von Rechtsanwälten, Steuerberatern, Wirtschaftsprüfern und öffentlich bestellten und vereidigten Sachverständigen : zugleich ein Beitrag zur Lehre von den Schuldverhältnissen mit Schutzwirkung für dritte*, Frankfurt am Main, 1989

F. Toepel, *Grundstrukturen des Sachverständigenbeweises im Strafprozessrecht*, Tübingen, 2002

G. Zwiehoff, *Das Recht auf den Sachverständigen : Beiträge zum strafprozessualen Beweisrecht*, Baden-Baden, 2000

ITALY

L. Abazia, *La perizia psicologica in ambito civile e penale (storia, sviluppi e pratiche),* Milano, 2009

T. Addis, *Perizia e consulenza tecnica*, Mesagne, 2002

S. Aterno - P. Mazzotta - D. Caccavella, *La perizia e la consulenza tecnica (con un approfondimento in tema di perizie informatiche),* Padova, 2006

G. Barbera, *La consulenza tecnica (esempi pratici di estimo civile ed industriale*), Palermo, 2000

A. Botti, *La consulenza tecnica civile (guida alla redazione delle perizie giudiziarie : esempi di incarichi realmente svolti),* Roma, 2008

G. Brescia, *Il consulente tecnico e la perizia nel processo civile e penale(gli aspetti della procedura, la liquidazione dei compensi, la pratica professionale),* Santarcangelo di Romagna, 2006

F. Buffa, *La consulenza tecnica d'ufficio*, Lecce, 2000

E. Caracciolo La Grotteria, *La consulenza tecnica d'ufficio e il sindacato del giudice amministrativo*, Napoli, 2008

D. Compagnini, *Balistica forense e processo penale*, Milano, 1999

M. Conte, *La consulenza tecnica*, Milano, 2004

L. D'Ancora, *La consulenza tecnica d'ufficio in tema di risarcimento del danno alla persona in responsabilità civile (aspetti procedurali, deontologici e metodologici),* Napoli, 2003

T. D'Angelo, *I danni nelle costruzioni : le relazioni di perizia disposte dall'autorita giudiziaria (trattato teorico-pratico in tema di consulenze tecniche, manuale operativo con esempi commentati di perizie giudiziali)*, Palermo, 2005

F. De Santis, *Consulenza e perizia nel processo (modalità di collaborazione con il giudice nello svolgimento dell'incarico e nella redazione dell'elaborato peritale),* Roma, 2000

G. Di Carlo, *La consulenza tecnica nel processo civile*, Pescara, 2001

O. Dominioni, *La prova penale scientifica, gli strumenti scientifico-tecnici nuovi o controversi e di elevata specializzazione*, Milano, 2005

A. Dondi, *Processo civile e prova dell'esperto. Problemi di utilizzazione giudiziale del sapere scientifico,* Torino, 2000

F. Focardi, *La consulenza tecnica extraperitale delle parti private*, Padova, 2003

S. Fuselli, *Apparenze: accertamento giudiziale e prova scientifica*, Milano, 2008

R. E. Kostoris, *I consulenti tecnici nel processo penale*, Milano, 1993

S. Maffei, *Ipnosi, poligrafo, narcoanalisi, risonanza magnetica: sincerità e verità nel processo penale*, in *L'Indice penale*, 2006, pp. 734

G. Pistone, *La perizia e la consulenza tecnica (giudiziaria, giurisdizionale, amministrativa, privata : normativa, procedure, giurisprudenza, legislazione),* Santarcangelo di Romagna, 2008

P. Tonini, *La prova scientifica nel processo penale*, Milano, 2008

APPENDIX B

NATIONAL LAWS RELEVANT TO EXPERT OPINION AND EXPERT WITNESSES

(BASIC STATUTES & CASES)

UNITED STATES OF AMERICA

FEDERAL RULES OF EVIDENCE

ART VII (OPINIONS AND EXPERT TESTIMONY)

Rule 701. Opinion Testimony by Lay Witnesses

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702

Rule 702 *Testimony by Experts*

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Rule 703 *Bases of Opinion Testimony by Experts*

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.

Rule 704 (*Opinion on Ultimate Issue)*

(a) Except as provided in subdivision (b), testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.
(b) No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone.

Rule 705 (*Disclosure of Facts or Data Underlying Expert Opinion)*

The expert may testify in terms of opinion or inference and give reasons therefor without first testifying to the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

Rule 706 *(Court Appointed Experts)*

(a) Appointment.
The court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may appoint expert witnesses of its own

selection. An expert witness shall not be appointed by the court unless the witness consents to act. A witness so appointed shall be informed of the witness' duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of the witness' findings, if any; the witness' deposition may be taken by any party; and the witness may be called to testify by the court or any party. The witness shall be subject to cross-examination by each party, including a party calling the witness.
(b) Compensation.
Expert witnesses so appointed are entitled to reasonable compensation in whatever sum the court may allow. The compensation thus fixed is payable from funds which may be provided by law in criminal cases and civil actions and proceedings involving just compensation under the fifth amendment. In other civil actions and proceedings the compensation shall be paid by the parties in such proportion and at such time as the court directs, and thereafter charged in like manner as other costs.
(c) Disclosure of appointment.
In the exercise of its discretion, the court may authorize disclosure to the jury of the fact that the court appointed the expert witness.
(d) Parties' experts of own selection.
Nothing in this rule limits the parties in calling expert witnesses of their own selection.

FEDERAL RULES OF CIVIL PROCEDURE

Rule 26 (*Duty to Disclose; General Provisions Governing Discovery*)

(2) Disclosure of Expert Testimony.

(A) In General. In addition to the disclosures required by Rule 26(a)(1), a party must disclose to the other parties the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705.

(B) Written Report. Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report — prepared and signed by the witness — if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report must contain:

(i) a complete statement of all opinions the witness will express and the basis and reasons for them;

(ii) the data or other information considered by the witness in forming them;

(iii) any exhibits that will be used to summarize or support them;

(iv) the witness's qualifications, including a list of all publications authored in the previous 10 years;

(v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and

(vi) a statement of the compensation to be paid for the study and testimony in the case.

(C) Time to Disclose Expert Testimony. A party must make these disclosures at the times and in the sequence that the court orders. Absent a stipulation or a court order, the disclosures must be made:

(i) at least 90 days before the date set for trial or for the case to be ready for trial; or

(ii) if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under Rule 26(a)(2)(B), within 30 days after the other party's disclosure.

(D) Supplementing the Disclosure. The parties must supplement these disclosures when required under Rule 26(e).

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 16 (*Discovery and Inspection*)

(1) Information Subject to Disclosure

(G) Expert Witnesses

At the defendant's request, the government must give to the defendant a written summary of any testimony that the government intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence during its case-in-chief at trial. If the government requests discovery under subdivision (b)(1)(C)(ii) and the defendant complies, the government must, at the defendant's request, give to the defendant a written summary of testimony that the government intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence as evidence at trial on the issue of the defendant's mental condition. The summary provided under this subparagraph must describe the witness's opinions, the bases and reasons for those opinions, and the witness's qualifications.

U.S. SUPREME COURT CASES

Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993)

Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999)

General Electric Co. v. Joiner, 522 U.S. 136 (1997)

FRANCE

CIVIL PROCEEDINGS

CODE DE PROCEDURE CIVILE

Chapitre V : Mesures d'instruction exécutées par un technicien.

Section I : Dispositions communes.

§232
Le juge peut commettre toute personne de son choix pour l'éclairer par des constatations, par une consultation ou par une expertise sur une question de fait qui requiert les lumières d'un technicien.

§233
Le technicien, investi de ses pouvoirs par le juge en raison de sa qualification, doit remplir personnellement la mission qui lui est confiée.
Si le technicien désigné est une personne morale, son représentant légal soumet à l'agrément du juge le nom de la ou des personnes physiques qui assureront, au sein de celle-ci et en son nom l'exécution de la mesure.

§234
Les techniciens peuvent être récusés pour les mêmes causes que les juges. S'il s'agit d'une personne morale, la récusation peut viser tant la personne morale elle-même que la ou les personnes physiques agréées par le juge.
La partie qui entend récuser le technicien doit le faire devant le juge qui l'a commis ou devant le juge chargé du contrôle avant le début des opérations ou dès la révélation de la cause de la récusation.
Si le technicien s'estime récusable, il doit immédiatement le déclarer au juge qui l'a commis ou au juge chargé du contrôle.

§235
Si la récusation est admise, si le technicien refuse la mission, ou s'il existe un empêchement légitime, il est pourvu au remplacement du technicien par le juge qui l'a commis ou par le juge chargé du contrôle.
Le juge peut également, à la demande des parties ou d'office, remplacer le technicien qui manquerait à ses devoirs, après avoir provoqué ses explications.

§236
Le juge qui a commis le technicien ou le juge chargé du contrôle peut accroître ou restreindre la mission confiée au technicien.

§237
Le technicien commis doit accomplir sa mission avec conscience, objectivité et impartialité.

§238
Le technicien doit donner son avis sur les points pour l'examen desquels il a été commis.
Il ne peut répondre à d'autres questions, sauf accord écrit des parties.
Il ne doit jamais porter d'appréciations d'ordre juridique.

§239
Le technicien doit respecter les délais qui lui sont impartis.

§240
Le juge ne peut donner au technicien mission de concilier les parties.

§241
Le juge chargé du contrôle peut assister aux opérations du technicien.
Il peut provoquer ses explications et lui impartir des délais.

§242
Le technicien peut recueillir des informations orales ou écrites de toutes personnes, sauf à ce que soient précisés leurs nom, prénoms, demeure et profession ainsi que, s'il y a lieu, leur lien de parenté ou d'alliance avec les parties, de subordination à leur égard, de collaboration ou de communauté d'intérêts avec elles.
Lorsque le technicien commis ou les parties demandent que ces personnes soient entendues par le juge, celui-ci procède à leur audition s'il l'estime utile.

§243
Le technicien peut demander communication de tous documents aux parties et aux tiers, sauf au juge à l'ordonner en cas de difficulté.

§244
Le technicien doit faire connaître dans son avis toutes les informations qui apportent un éclaircissement sur les questions à examiner.
Il lui est interdit de révéler les autres informations dont il pourrait avoir connaissance à l'occasion de l'exécution de sa mission.
Il ne peut faire état que des informations légitimement recueillies.

§245
Le juge peut toujours inviter le technicien à compléter, préciser ou expliquer, soit par écrit, soit à l'audience, ses constatations ou ses conclusions.
Le technicien peut à tout moment demander au juge de l'entendre.
Le juge ne peut, sans avoir préalablement recueilli les observations du technicien commis, étendre la mission de celui-ci ou confier une mission complémentaire à un autre technicien.

§246
Le juge n'est pas lié par les constatations ou les conclusions du technicien.

§247
L'avis du technicien dont la divulgation porterait atteinte à l'intimité de la vie privée ou à tout autre intérêt légitime ne peut être utilisé en dehors de l'instance si ce n'est sur autorisation du juge ou avec le consentement de la partie intéressée.

§248
Il est interdit au technicien de recevoir directement d'une partie, sous quelque forme que ce soit, une rémunération même à titre de remboursement de débours, si ce n'est sur décision du juge.

Section II : Les constatations.

§249
Le juge peut charger la personne qu'il commet de procéder à des constatations.
Le constatant ne doit porter aucun avis sur les conséquences de fait ou de droit qui peuvent en résulter.

§250
Les constatations peuvent être prescrites à tout moment, y compris en conciliation ou au cours du délibéré. Dans ce dernier cas, les parties en sont avisées.
Les constatations sont consignées par écrit à moins que le juge n'en décide la présentation orale.

§251
Le juge qui prescrit des constatations fixe le délai dans lequel le constat sera déposé ou la date de l'audience à laquelle les constatations seront présentées oralement. Il désigne la ou les parties qui seront tenues de verser par provision au constatant une avance sur sa rémunération, dont il fixe le montant.

§252
Le constatant est avisé de sa mission par le secrétaire de la juridiction.

§253
Le constat est remis au secrétariat de la juridiction.
Il est dressé procès-verbal des constatations présentées oralement. La rédaction du procès-verbal peut toutefois être suppléée par une mention dans le jugement si l'affaire est immédiatement jugée en dernier ressort.
Sont joints au dossier de l'affaire les documents à l'appui des constatations.

§254
Lorsque les constatations ont été prescrites au cours du délibéré, le juge, à la suite de l'exécution de la mesure, ordonne la réouverture des débats si l'une des parties le demande ou s'il l'estime nécessaire.

§255
Le juge fixe, sur justification de l'accomplissement de la mission, la rémunération du constatant. Il peut lui délivrer un titre exécutoire.

Section III : La consultation.

§256
Lorsqu'une question purement technique ne requiert pas d'investigations complexes, le juge peut charger la personne qu'il commet de lui fournir une simple consultation.

§257
La consultation peut être prescrite à tout moment, y compris en conciliation ou au cours du délibéré. Dans ce dernier cas, les parties en sont avisées.
La consultation est présentée oralement à moins que le juge ne prescrive qu'elle soit consignée par écrit.

§258
Le juge qui prescrit une consultation fixe soit la date de l'audience à laquelle elle sera présentée oralement, soit le délai dans lequel elle sera déposée.
Il désigne la ou les parties qui seront tenues de verser, par provision au consultant une avance sur sa rémunération, dont il fixe le montant.

§259
Le consultant est avisé de sa mission par le secrétaire de la juridiction qui le convoque s'il y a lieu.

§260
Si la consultation est donnée oralement, il en est dressé procès-verbal. La rédaction du procès-verbal peut toutefois être suppléée par une mention dans le jugement si l'affaire est immédiatement jugée en dernier ressort.
Si la consultation est écrite, elle est remise au secrétariat de la juridiction.
Sont joints au dossier de l'affaire les documents à l'appui de la consultation.

§261

Lorsque la consultation a été prescrite au cours du délibéré, le juge, à la suite de l'exécution de la mesure, ordonne la réouverture des débats si l'une des parties le demande ou s'il l'estime nécessaire.

§262
Le juge fixe, sur justification de l'accomplissement de la mission, la rémunération du consultant. Il peut lui délivrer un titre exécutoire.

Section IV : L'expertise.

§263
L'expertise n'a lieu d'être ordonnée que dans le cas où des constatations ou une consultation ne pourraient suffire à éclairer le juge.

Sous-section I : La décision ordonnant l'expertise.

§264
Il n'est désigné qu'une seule personne à titre d'expert à moins que le juge n'estime nécessaire d'en nommer plusieurs.

§265
La décision qui ordonne l'expertise :
Expose les circonstances qui rendent nécessaire l'expertise et, s'il y a lieu, la nomination de plusieurs experts ;
Nomme l'expert ou les experts ;
Enonce les chefs de la mission de l'expert ;
Impartit le délai dans lequel l'expert devra donner son avis.

§266
La décision peut aussi fixer une date à laquelle l'expert et les parties se présenteront devant le juge qui l'a rendue ou devant le juge chargé du contrôle pour que soient précisés la mission et, s'il y a lieu, le calendrier des opérations.
Les documents utiles à l'expertise sont remis à l'expert lors de cette conférence.

§267
Dès le prononcé de la décision nommant l'expert, le secrétaire de la juridiction lui en notifie copie par tout moyen.
L'expert fait connaître sans délai au juge son acceptation ; il doit commencer les opérations d'expertise dès qu'il est averti que les parties ont consigné la provision mise à leur charge, ou le montant de la première échéance dont la consignation a pu être assortie, à moins que le juge ne lui enjoigne d'entreprendre immédiatement ses opérations.

§268
Les dossiers des parties ou les documents nécessaires à l'expertise sont provisoirement conservés au secrétariat de la juridiction sous réserve de l'autorisation donnée par le juge aux parties qui les ont remis d'en retirer certains éléments ou de s'en faire délivrer copie. L'expert peut les consulter même avant d'accepter sa mission.
Dès son acceptation, l'expert peut, contre émargement ou récépissé, retirer ou se faire adresser par le secrétaire de la juridiction les dossiers ou les documents des parties.

§269
Le juge qui ordonne l'expertise ou le juge chargé du contrôle fixe, lors de la nomination de l'expert ou dès qu'il est en mesure de le faire, le montant d'une provision à valoir sur la rémunération de l'expert aussi proche que possible de sa rémunération définitive prévisible. Il désigne la ou les parties qui devront consigner la

provision au greffe de la juridiction dans le délai qu'il détermine ; si plusieurs parties sont désignées, il indique dans quelle proportion chacune des parties devra consigner. Il aménage, s'il y a lieu, les échéances dont la consignation peut être assortie.

§270
Le greffier invite les parties qui en ont la charge, en leur rappelant les dispositions de l'article 271, à consigner la provision au greffe dans le délai et selon les modalités impartis.
Il informe l'expert de la consignation.

§271
A défaut de consignation dans le délai et selon les modalités impartis, la désignation de l'expert est caduque à moins que le juge, à la demande d'une des parties se prévalant d'un motif légitime, ne décide une prorogation du délai ou un relevé de la caducité. L'instance est poursuivie sauf à ce qu'il soit tiré toute conséquence de l'abstention ou du refus de consigner.

§272
La décision ordonnant l'expertise peut être frappée d'appel indépendamment du jugement sur le fond sur autorisation du premier président de la cour d'appel s'il est justifié d'un motif grave et légitime.
La partie qui veut faire appel saisit le premier président qui statue en la forme des référés. L'assignation doit être délivrée dans le mois de la décision.
S'il fait droit à la demande, le premier président fixe le jour où l'affaire sera examinée par la cour, laquelle est saisie et statue comme en matière de procédure à jour fixe ou comme il est dit à l'article 948 selon le cas.
Si le jugement ordonnant l'expertise s'est également prononcé sur la compétence, la cour peut être saisie de la contestation sur la compétence alors même que les parties n'auraient pas formé contredit.

Sous-section II : Les opérations d'expertise.

§273
L'expert doit informer le juge de l'avancement de ses opérations et des diligences par lui accomplies.

§274
Lorsque le juge assiste aux opérations d'expertise, il peut consigner dans un procès-verbal ses constatations, les explications de l'expert ainsi que les déclarations des parties et des tiers ; le procès-verbal est signé par le juge.

§275
Les parties doivent remettre sans délai à l'expert tous les documents que celui-ci estime nécessaires à l'accomplissement de sa mission.
En cas de carence des parties, l'expert en informe le juge qui peut ordonner la production des documents, s'il y a lieu sous astreinte, ou bien, le cas échéant, l'autoriser à passer outre ou à déposer son rapport en l'état. La juridiction de jugement peut tirer toute conséquence de droit du défaut de communication des documents à l'expert.

§276
L'expert doit prendre en considération les observations ou réclamations des parties, et, lorsqu'elles sont écrites, les joindre à son avis si les parties le demandent.
Toutefois, lorsque l'expert a fixé aux parties un délai pour formuler leurs observations ou réclamations, il n'est pas tenu de prendre en compte celles qui auraient été faites après l'expiration de ce délai, à moins qu'il n'existe une cause grave et dûment justifiée, auquel cas il en fait rapport au juge.
Lorsqu'elles sont écrites, les dernières observations ou réclamations des parties doivent rappeler sommairement le contenu de celles qu'elles ont présentées antérieurement. A défaut, elles sont réputées abandonnées par les parties.

L'expert doit faire mention, dans son avis, de la suite qu'il aura donnée aux observations ou réclamations présentées.

§277
Lorsque le ministère public est présent aux opérations d'expertise, ses observations sont, à sa demande, relatées dans l'avis de l'expert, ainsi que la suite que celui-ci leur aura donnée.

§278
L'expert peut prendre l'initiative de recueillir l'avis d'un autre technicien, mais seulement dans une spécialité distincte de la sienne.

§278-1
L'expert peut se faire assister dans l'accomplissement de sa mission par la personne de son choix qui intervient sous son contrôle et sa responsabilité.

§279
Si l'expert se heurte à des difficultés qui font obstacle à l'accomplissement de sa mission ou si une extension de celle-ci s'avère nécessaire, il en fait rapport au juge.
Celui-ci peut, en se prononçant, proroger le délai dans lequel l'expert doit donner son avis.

§280
L'expert peut, sur justification de l'état d'avancement de ses opérations, être autorisé à prélever un acompte sur la somme consignée si la complexité de l'affaire le requiert.
En cas d'insuffisance de la provision allouée, l'expert en fait rapport au juge qui peut ordonner la consignation d'une provision complémentaire à la charge de la partie qu'il détermine. A défaut de consignation dans le délai et selon les modalités fixés par le juge, et sauf prorogation de ce délai, l'expert dépose son rapport en l'état.

§281
Si les parties viennent à se concilier, l'expert constate que sa mission est devenue sans objet ; il en fait rapport au juge.
Les parties peuvent demander au juge de donner force exécutoire à l'acte exprimant leur accord.

Sous-section III : L'avis de l'expert.

§282
Si l'avis n'exige pas de développements écrits, le juge peut autoriser l'expert à l'exposer oralement à l'audience ; il en est dressé procès-verbal. La rédaction du procès-verbal peut toutefois être suppléée par une mention dans le jugement si l'affaire est immédiatement jugée en dernier ressort.
Dans les autres cas, l'expert doit déposer un rapport au secrétariat de la juridiction. Il n'est rédigé qu'un seul rapport, même s'il y a plusieurs experts ; en cas de divergence, chacun indique son opinion.
Si l'expert a recueilli l'avis d'un autre technicien dans une spécialité distincte de la sienne, cet avis est joint, selon le cas, au rapport, au procès-verbal d'audience ou au dossier.
Lorsque l'expert s'est fait assister dans l'accomplissement de sa mission en application de l'article 278-1, le rapport mentionne les nom et qualités des personnes qui ont prêté leur concours.

§283
Si le juge ne trouve pas dans le rapport les éclaircissements suffisants, il peut entendre l'expert, les parties présentes ou appelées.

§284

Dès le dépôt du rapport, le juge fixe la rémunération de l'expert en fonction notamment des diligences accomplies, du respect des délais impartis et de la qualité du travail fourni.
Il autorise l'expert à se faire remettre jusqu'à due concurrence les sommes consignées au greffe. Il ordonne, selon le cas, soit le versement des sommes complémentaires dues à l'expert en indiquant la ou les parties qui en ont la charge, soit la restitution des sommes consignées en excédent.
Lorsque le juge envisage de fixer la rémunération de l'expert à un montant inférieur au montant demandé, il doit au préalable inviter l'expert à formuler ses observations.
Le juge délivre à l'expert un titre exécutoire.

§284-1
Si l'expert le demande, une copie du jugement rendu au vu de son avis lui est adressée ou remise par le greffier.

CRIMINAL PROCEEDINGS

CODE DE PROCEDURE PENALE

Section 9 : De l'expertise

§156
Toute juridiction d'instruction ou de jugement, dans le cas où se pose une question d'ordre technique, peut, soit à la demande du ministère public, soit d'office, ou à la demande des parties, ordonner une expertise. Le ministère public ou la partie qui demande une expertise peut préciser dans sa demande les questions qu'il voudrait voir poser à l'expert.
Lorsque le juge d'instruction estime ne pas devoir faire droit à une demande d'expertise, il doit rendre une ordonnance motivée au plus tard dans un délai d'un mois à compter de la réception de la demande. Les dispositions des avant-dernier et dernier alinéas de l'article 81 sont applicables.
Les experts procèdent à leur mission sous le contrôle du juge d'instruction ou du magistrat que doit désigner la juridiction ordonnant l'expertise.

§157
Les experts sont choisis parmi les personnes physiques ou morales qui figurent sur la liste nationale dressée par la Cour de cassation ou sur une des listes dressées par les cours d'appel dans les conditions prévues par la loi n° 71-498 du 29 juin 1971 relative aux experts judiciaires.
A titre exceptionnel, les juridictions peuvent, par décision motivée, choisir des experts ne figurant sur aucune de ces listes.

§157-1
Si l'expert désigné est une personne morale, son représentant légal soumet à l'agrément de la juridiction le nom de la ou des personnes physiques qui, au sein de celle-ci et en son nom, effectueront l'expertise.

§158
La mission des experts qui ne peut avoir pour objet que l'examen de questions d'ordre technique est précisée dans la décision qui ordonne l'expertise.

§159
Le juge d'instruction désigne l'expert chargé de procéder à l'expertise.
Si les circonstances le justifient, il désigne plusieurs experts.

§160

Les experts ne figurant sur aucune des listes mentionnées à l'article 157 prêtent, chaque fois qu'ils sont commis, le serment prévu par la loi n° 71-498 du 29 juin 1971 relative aux experts judiciaires devant le juge d'instruction ou le magistrat désigné par la juridiction. Le procès-verbal de prestation de serment est signé par le magistrat compétent, l'expert et le greffier. En cas d'empêchement dont les motifs doivent être précisés, le serment peut être reçu par écrit et la lettre de serment est annexée au dossier de la procédure.

§161
Toute décision commettant des experts doit leur impartir un délai pour remplir leur mission.
Si des raisons particulières l'exigent, ce délai peut être prorogé sur requête des experts et par décision motivée rendue par le magistrat ou la juridiction qui les a désignés. Les experts qui ne déposent pas leur rapport dans le délai qui leur a été imparti peuvent être immédiatement remplacés et doivent rendre compte des investigations auxquelles ils ont déjà procédé. Il doivent aussi restituer dans les quarante-huit heures les objets, pièces et documents qui leur auraient été confiés en vue de l'accomplissement de leur mission. Ils peuvent être, en outre, l'objet de mesures disciplinaires allant jusqu'à la radiation de l'une ou de l'autre des listes prévues par l'article 157.
Les experts doivent remplir leur mission en liaison avec le juge d'instruction ou le magistrat délégué ; ils doivent le tenir au courant du développement de leurs opérations et le mettre à même de prendre à tout moment toutes mesures utiles.
Le juge d'instruction, au cours de ses opérations, peut toujours, s'il l'estime utile, se faire assister des experts.

§161-1
Copie de la décision ordonnant une expertise est adressée sans délai au procureur de la République et aux avocats des parties, qui disposent d'un délai de dix jours pour demander au juge d'instruction, selon les modalités prévues par l'avant-dernier alinéa de l'article 81, de modifier ou de compléter les questions posées à l'expert ou d'adjoindre à l'expert ou aux experts déjà désignés un expert de leur choix figurant sur une des listes mentionnées à l'article 157.
Si le juge ne fait pas droit, dans un délai de dix jours à compter de leur réception, aux demandes prévues au premier alinéa, il rend une ordonnance motivée. Cette ordonnance ou l'absence d'ordonnance peut être contestée dans un délai de dix jours devant le président de la chambre de l'instruction. Ce dernier statue par décision motivée qui n'est pas susceptible de recours.
Le présent article n'est pas applicable lorsque les opérations d'expertise et le dépôt des conclusions par l'expert doivent intervenir en urgence et ne peuvent être différés pendant le délai de dix jours prévu au premier alinéa ou lorsque la communication prévue au premier alinéa risque d'entraver l'accomplissement des investigations.
Il n'est pas non plus applicable aux catégories d'expertises dont les conclusions n'ont pas d'incidence sur la détermination de la culpabilité de la personne mise en examen et dont la liste est fixée par décret.
Les parties peuvent déclarer renoncer, en présence de leur avocat ou celui-ci dûment convoqué, à bénéficier des dispositions du présent article.

§161-2
Si le délai prévu à l'article 161 excède un an, le juge d'instruction peut demander que soit auparavant déposé un rapport d'étape qui est notifié aux parties selon les modalités prévues à l'article 167. Les parties peuvent alors adresser en même temps à l'expert et au juge leurs observations en vue du rapport définitif.

§162
Si les experts demandent à être éclairés sur une question échappant à leur spécialité, le juge peut les autoriser à s'adjoindre des personnes nommément désignées, spécialement qualifiées par leur compétence.
Les personnes ainsi désignées prêtent serment dans les conditions prévues à l'article 160.
Leur rapport sera annexé intégralement au rapport mentionné à l'article 166.

§163

Avant de faire parvenir les scellés aux experts, le juge d'instruction ou le magistrat désigné par la juridiction procède, s'il y a lieu, à leur inventaire dans les conditions prévues par l'article 97. Il énumère ces scellés dans un procès-verbal.
Pour l'application de leur mission, les experts sont habilités à procéder à l'ouverture ou à la réouverture des scellés, et à confectionner de nouveaux scellés après avoir, le cas échéant, procédé au reconditionnement des objets qu'ils étaient chargés d'examiner ; dans ce cas, ils en font mention dans leur rapport, après avoir, s'il y a lieu, dressé inventaire des scellés ; les dispositions du quatrième alinéa de l'article 97 ne sont pas applicables.

§164
Les experts peuvent recevoir, à titre de renseignement et pour le seul accomplissement de leur mission, les déclarations de toute personne autre que la personne mise en examen, le témoin assisté ou la partie civile.
Toutefois, si le juge d'instruction ou le magistrat désigné par la juridiction les y a autorisés, ils peuvent à cette fin recevoir, avec l'accord des intéressés, les déclarations de la personne mise en examen, du témoin assisté ou de la partie civile nécessaires à l'exécution de leur mission. Ces déclarations sont recueillies en présence de leur avocat ou celui-ci dûment convoqué dans les conditions prévues par le deuxième alinéa de l'article 114, sauf renonciation écrite remise aux experts. Ces déclarations peuvent être également recueillies à l'occasion d'un interrogatoire ou d'une déposition devant le juge d'instruction en présence de l'expert.
Les médecins ou psychologues experts chargés d'examiner la personne mise en examen, le témoin assisté ou la partie civile peuvent dans tous les cas leur poser des questions pour l'accomplissement de leur mission hors la présence du juge et des avocats.

§165
Au cours de l'expertise, les parties peuvent demander à la juridiction qui l'a ordonnée qu'il soit prescrit aux experts d'effectuer certaines recherches ou d'entendre toute personne nommément désignée qui serait susceptible de leur fournir des renseignements d'ordre technique.

§166
Lorsque les opérations d'expertise sont terminées, les experts rédigent un rapport qui doit contenir la description desdites opérations ainsi que leurs conclusions. Les experts signent leur rapport et mentionnent les noms et qualités des personnes qui les ont assistés, sous leur contrôle et leur responsabilité, pour la réalisation des opérations jugées par eux nécessaires à l'exécution de la mission qui leur a été confiée.
Lorsque plusieurs experts ont été désignés et s'ils sont d'avis différents ou s'ils ont des réserves à formuler sur des conclusions communes, chacun d'eux indique son opinion ou ses réserves en les motivant.
Le rapport et les scellés, ou leurs résidus, sont déposés entre les mains du greffier de la juridiction qui a ordonné l'expertise ; ce dépôt est constaté par procès-verbal.
Avec l'accord du juge d'instruction, les experts peuvent, directement et par tout moyen, communiquer les conclusions de leur rapport aux officiers de police judiciaire chargés de l'exécution de la commission rogatoire, au procureur de la République ou aux avocats des parties.

§167
Le juge d'instruction donne connaissance des conclusions des experts aux parties et à leurs avocats après les avoir convoqués conformément aux dispositions du deuxième alinéa de l'article 114. Il leur donne également connaissance, s'il y a lieu, des conclusions des rapports des personnes requises en application des articles 60 et 77-1, lorsqu'il n'a pas été fait application des dispositions du quatrième alinéa de l'article 60. Une copie de l'intégralité du rapport est alors remise, à leur demande, aux avocats des parties.
Les conclusions peuvent également être notifiées par lettre recommandée ou, lorsque la personne est détenue, par les soins du chef de l'établissement pénitentiaire qui adresse, sans délai, au juge d'instruction l'original ou la copie du récépissé signé par l'intéressé. L'intégralité du rapport peut aussi être notifiée, à leur demande, aux avocats des parties par lettre recommandée. Si les avocats des parties ont fait connaître au juge d'instruction qu'ils disposent d'une adresse électronique, l'intégralité du rapport peut leur être adressée par cette voie, selon les modalités prévues par l'article 803-1.

Dans tous les cas, le juge d'instruction fixe un délai aux parties pour présenter des observations ou formuler une demande, notamment aux fins de complément d'expertise ou de contre-expertise. Cette demande doit être formée conformément aux dispositions du dixième alinéa de l'article 81. Pendant ce délai, le dossier de la procédure est mis à la disposition des conseils des parties. Le délai fixé par le juge d'instruction, qui tient compte de la complexité de l'expertise, ne saurait être inférieur à quinze jours ou, s'il s'agit d'une expertise comptable ou financière, à un mois. Passé ce délai, il ne peut plus être formulé de demande de contre-expertise, de complément d'expertise ou de nouvelle expertise portant sur le même objet, y compris sur le fondement de l'article 82-1, sous réserve de la survenance d'un élément nouveau.
Lorsqu'il rejette une demande, le juge d'instruction rend une décision motivée qui doit intervenir dans un délai d'un mois à compter de la réception de la demande. Il en est de même s'il commet un seul expert alors que la partie a demandé qu'il en soit désigné plusieurs. Faute pour le juge d'instruction d'avoir statué dans le délai d'un mois, la partie peut saisir directement la chambre de l'instruction.
Le juge d'instruction peut également notifier au témoin assisté, selon les modalités prévues par le présent article, les conclusions des expertises qui le concernent en lui fixant un délai pour présenter une demande de complément d'expertise ou de contre-expertise. Le juge n'est toutefois pas tenu de rendre une ordonnance motivée s'il estime que la demande n'est pas justifiée, sauf si le témoin assisté demande à être mis en examen en application de l'article 113-6.

§167-1
Lorsque les conclusions de l'expertise sont de nature à conduire à l'application des dispositions du premier alinéa de l'article 122-1 du code pénal prévoyant l'irresponsabilité pénale de la personne en raison d'un trouble mental, leur notification à la partie civile est effectuée dans les conditions prévues par le premier alinéa de l'article 167, le cas échéant en présence de l'expert ou des experts. En matière criminelle, cette présence est obligatoire si l'avocat de la partie civile le demande. La partie civile dispose alors d'un délai de quinze jours pour présenter des observations ou formuler une demande de complément d'expertise ou de contre-expertise. La contre-expertise demandée par la partie civile est de droit. Elle doit être accomplie par au moins deux experts.

§167-2
Le juge d'instruction peut demander à l'expert de déposer un rapport provisoire avant son rapport définitif. Le ministère public et les parties disposent alors d'un délai fixé par le juge d'instruction qui ne saurait être inférieur à quinze jours ou, s'il s'agit d'une expertise comptable ou financière, à un mois, pour adresser en même temps à l'expert et au juge les observations écrites qu'appelle de leur part ce rapport provisoire. Au vu de ces observations, l'expert dépose son rapport définitif. Si aucune observation n'est faite, le rapport provisoire est considéré comme le rapport définitif.
Le dépôt d'un rapport provisoire est obligatoire si le ministère public le requiert ou si une partie en a fait la demande selon les modalités prévues par l'avant-dernier alinéa de l'article 81 lorsqu'elle est informée de la décision ordonnant l'expertise en application de l'article 161-1.

§168
Les experts exposent à l'audience, s'il y a lieu, le résultat des opérations techniques auxquelles ils ont procédé, après avoir prêté serment d'apporter leur concours à la justice en leur honneur et en leur conscience. Au cours de leur audition, ils peuvent consulter leur rapport et ses annexes.
Le président peut soit d'office, soit à la demande du ministère public, des parties ou de leurs conseils, leur poser toutes questions rentrant dans le cadre de la mission qui leur a été confiée. Le ministère public et les avocats des parties peuvent également poser directement des questions aux experts selon les modalités prévues par les articles 312 et 442-1.
Après leur exposé, les experts assistent aux débats, à moins que le président ne les autorise à se retirer.

§169
Si, à l'audience d'une juridiction de jugement, une personne entendue comme témoin ou à titre de renseignement contredit les conclusions d'une expertise ou apporte au point de vue technique des indications

nouvelles, le président demande aux experts, au ministère public, à la défense et, s'il y a lieu, à la partie civile, de présenter leurs observations. Cette juridiction, par décision motivée, déclare, soit qu'il sera passé outre aux débats, soit que l'affaire sera renvoyée à une date ultérieure. Dans ce dernier cas, cette juridiction peut prescrire quant à l'expertise toute mesure qu'elle jugera utile.

§169-1
Les dispositions des articles 168 et 169 sont applicables aux personnes appelées soit à procéder à des constatations, soit à apprécier la nature des circonstances d'un décès, conformément aux articles 60 et 74.

ADMINISTRATIVE PROCEEDINGS

CODE DE JUSTICE ADMINISTRATIVE

Titre II : Les différents moyens d'investigation

Chapitre Ier : L'expertise

§R621-1
La juridiction peut, soit d'office, soit sur la demande des parties ou de l'une d'elles, ordonner, avant dire droit, qu'il soit procédé à une expertise sur les points déterminés par sa décision. La mission confiée à l'expert peut viser à concilier les parties.

§R621-1-1
Le président de la juridiction peut désigner au sein de sa juridiction un magistrat chargé des questions d'expertise et du suivi des opérations d'expertise.
L'acte qui désigne le magistrat chargé des expertises peut lui déléguer tout ou partie des attributions mentionnées aux articles R. 621-2, R. 621-4, R. 621-5, R. 621-6, R. 621-7-1, R. 621-8-1, R. 621-11, R. 621-12, R. 621-12-1 et R. 621-13.
Ce magistrat peut assister aux opérations d'expertise.

Section 1: Nombre et désignation des experts

§R621-2
Il n'est commis qu'un seul expert à moins que la juridiction n'estime nécessaire d'en désigner plusieurs. Le président du tribunal administratif ou de la cour administrative d'appel, selon le cas, ou, au Conseil d'Etat, le président de la section du contentieux choisit les experts et fixe le délai dans lequel ils seront tenus de déposer leur rapport au greffe.
Lorsqu'il apparaît à un expert qu'il est nécessaire de faire appel au concours d'un ou plusieurs sapiteurs pour l'éclairer sur un point particulier, il doit préalablement solliciter l'autorisation du président du tribunal administratif ou de la cour administrative d'appel ou, au Conseil d'Etat, du président de la section du contentieux. La décision est insusceptible de recours.

§R621-3
Le greffier en chef ou, au Conseil d'Etat, le secrétaire du contentieux notifie dans les dix jours à l'expert ou aux experts la décision qui les commet et fixe l'objet de leur mission. Il annexe à celle-ci la formule du serment que le ou les experts prêteront par écrit et déposeront au greffe dans les trois jours pour être joint au dossier de l'affaire.
Par le serment, l'expert s'engage à accomplir sa mission avec conscience, objectivité, impartialité et diligence.

§R621-4
Dans le cas où un expert n'accepte pas la mission qui lui a été confiée, il en est désigné un autre à sa place.

L'expert qui, après avoir accepté sa mission, ne la remplit pas ou celui qui ne dépose pas son rapport dans le délai fixé par la décision peut, après avoir été invité par le président de la juridiction à présenter ses observations, être remplacé par une décision de ce dernier. Il peut, en outre, être condamné par la juridiction, sur demande d'une partie, et au terme d'une procédure contradictoire, à tous les frais frustratoires et à des dommages-intérêts.

§R621-5
Les personnes qui ont eu à connaître de l'affaire à un titre quelconque sont tenues, avant d'accepter d'être désignées comme expert ou comme sapiteur, de le faire connaître au président de la juridiction ou, au Conseil d'Etat, au président de la section du contentieux, qui apprécie s'il y a empêchement.

§R621-6
Les experts ou sapiteurs mentionnés à l'article R. 621-2 peuvent être récusés pour les mêmes causes que les juges. S'il s'agit d'une personne morale, la récusation peut viser tant la personne morale elle-même que la ou les personnes physiques qui assurent en son nom l'exécution de la mesure. La partie qui entend récuser l'expert ou le sapiteur doit le faire avant le début des opérations ou dès la révélation de la cause de la récusation. Si l'expert ou le sapiteur s'estime récusable, il doit immédiatement le déclarer au président de la juridiction ou, au Conseil d'Etat, au président de la section du contentieux.

§R621-6-1
La demande de récusation formée par une partie est présentée à la juridiction qui a ordonné l'expertise. Si elle est présentée par un mandataire, ce dernier doit être muni d'un pouvoir spécial.
Elle doit à peine d'irrecevabilité indiquer les motifs qui la soutiennent et être accompagnée des pièces propres à la justifier.

§R621-6-2
Le greffier en chef, ou, au Conseil d'Etat, le secrétaire du contentieux, communique à l'expert copie de la demande de récusation dont il est l'objet.
Dès qu'il a communication de cette demande, l'expert doit s'abstenir de toute opération jusqu'à ce qu'il y ait été statué.

§R621-6-3
Dans les huit jours de cette communication, l'expert fait connaître par écrit soit son acquiescement à la récusation, soit les motifs pour lesquels il s'y oppose.

§R621-6-4
Si l'expert acquiesce à la demande de récusation, il est aussitôt remplacé.
Dans le cas contraire, la juridiction, par une décision non motivée, se prononce sur la demande, après audience publique dont l'expert et les parties sont avertis.
Sauf si l'expertise a été ordonnée sur le fondement du titre III du livre V, cette décision ne peut être contestée devant le juge d'appel ou de cassation qu'avec le jugement ou l'arrêt rendu ultérieurement.
L'expert n'est pas admis à contester la décision qui le récuse.

Section 2 : Opérations d'expertise

§R621-7
Les parties sont averties par le ou les experts des jours et heures auxquels il sera procédé à l'expertise ; cet avis leur est adressé quatre jours au moins à l'avance, par lettre recommandée.
Les observations faites par les parties, dans le cours des opérations, sont consignées dans le rapport.
Devant les tribunaux administratifs de Mayotte, de la Polynésie française, de Mata-Utu et de Nouvelle-Calédonie, le président du tribunal fixe par ordonnance les délais dans lesquels les parties doivent être averties ainsi que les moyens par lesquels cet avis est porté à leur connaissance.

§R621-7-1
Les parties doivent remettre sans délai à l'expert tous documents que celui-ci estime nécessaires à l'accomplissement de sa mission.
En cas de carence des parties, l'expert en informe le président de la juridiction qui, après avoir provoqué les observations écrites de la partie récalcitrante, peut ordonner la production des documents, s'il y a lieu sous astreinte, autoriser l'expert à passer outre, ou à déposer son rapport en l'état.
Le président peut en outre examiner les problèmes posés par cette carence lors de la séance prévue à l'article R. 621-8-1.
La juridiction tire les conséquences du défaut de communication des documents à l'expert.

§R621-7-2
Si les parties viennent à se concilier, l'expert constate que sa mission est devenue sans objet, et en fait immédiatement rapport au magistrat qui l'a commis.
Son rapport, accompagné de sa note de frais et honoraires, doit être accompagné d'une copie du procès-verbal de conciliation signé des parties, faisant apparaître l'attribution de la charge des frais d'expertise.
Faute pour les parties d'avoir réglé la question de la charge des frais d'expertise, il y est procédé, après la taxation mentionnée à l'article R. 621-11, par application des articles R. 621-13 ou R. 761-1, selon les cas.

§R621-8
S'il y a plusieurs experts, ils procèdent ensemble aux opérations d'expertise et dressent un seul rapport. S'ils ne peuvent parvenir à la rédaction de conclusions communes, le rapport comporte l'avis motivé de chacun d'eux.

§R621-8-1
Pendant le déroulement des opérations d'expertise, le président de la juridiction peut organiser une ou plusieurs séances en vue de veiller au bon déroulement de ces opérations.A cette séance, peuvent notamment être examinées, à l'exclusion de tout point touchant au fond de l'expertise, les questions liées aux délais d'exécution, aux communications de pièces, au versement d'allocations provisionnelles ou, en matière de référés, à l'étendue de l'expertise.
Les parties et l'expert sont convoqués à la séance mentionnée à l'alinéa précédent, dans les conditions fixées à l'article R. 711-2.
Il est dressé un relevé des conclusions auxquelles ont conduit les débats. Ce relevé est communiqué aux parties et à l'expert, et versé au dossier.
La décision d'organiser une telle séance, ou de refus de l'organiser, n'est pas susceptible de recours.

Section 3 : Rapport d'expertise

§R621-9
Le rapport est déposé au greffe en deux exemplaires. Des copies sont notifiées par l'expert aux parties intéressées. Avec leur accord, cette notification peut s'opérer sous forme électronique.
Les parties sont invitées par le greffe de la juridiction à fournir leurs observations dans le délai d'un mois ; une prorogation de délai peut être accordée.

§R621-10
La juridiction peut décider que le ou les experts se présenteront devant la formation de jugement ou l'un de ses membres, les parties dûment convoquées, pour fournir toutes explications complémentaires utiles et notamment se prononcer sur les observations recueillies en application de l'article R. 621-9.

Section 4 : Frais d'expertise

§R621-11

Les experts et sapiteurs mentionnés à l'article R. 621-2 ont droit à des honoraires, sans préjudice du remboursement des frais et débours.
Chacun d'eux joint au rapport un état de ses vacations, frais et débours.
Dans les honoraires sont comprises toutes sommes allouées pour étude du dossier, frais de mise au net du rapport, dépôt du rapport et, d'une manière générale, tout travail personnellement fourni par l'expert ou le sapiteur et toute démarche faite par lui en vue de l'accomplissement de sa mission.
Le président de la juridiction, après consultation du président de la formation de jugement, ou, au Conseil d'Etat, le président de la section du contentieux fixe par ordonnance, conformément aux dispositions de l'article R. 761-4, les honoraires en tenant compte des difficultés des opérations, de l'importance, de l'utilité et de la nature du travail fourni par l'expert ou le sapiteur et des diligences mises en œuvre pour respecter le délai mentionné à l'article R. 621-2. Il arrête sur justificatifs le montant des frais et débours qui seront remboursés à l'expert.
S'il y a plusieurs experts, ou si un sapiteur a été désigné, l'ordonnance mentionnée à l'alinéa précédent fait apparaître distinctement le montant des frais et honoraires fixés pour chacun.
Lorsque le président de la juridiction envisage de fixer la rémunération de l'expert à un montant inférieur au montant demandé, il doit au préalable l'aviser des éléments qu'il se propose de réduire, et des motifs qu'il retient à cet effet, et l'inviter à formuler ses observations.

§R621-12
Le président de la juridiction, après consultation du président de la formation de jugement, ou, au Conseil d'Etat, le président de la section du contentieux peut, soit au début de l'expertise, si la durée ou l'importance des opérations paraît le comporter, soit au cours de l'expertise ou après le dépôt du rapport et jusqu'à l'intervention du jugement sur le fond, accorder aux experts et aux sapiteurs, sur leur demande, une allocation provisionnelle à valoir sur le montant de leurs honoraires et débours.
Il précise la ou les parties qui devront verser ces allocations. Sa décision ne peut faire l'objet d'aucun recours.

§R621-12-1
L'absence de versement, par la partie qui en a la charge, de l'allocation provisionnelle, dans le mois qui suit la notification de la décision mentionnée à l'article R. 621-12, peut donner lieu, à la demande de l'expert, à une mise en demeure signée du président de la juridiction.
Si le délai fixé par cette dernière n'est pas respecté, et si le rapport d'expertise n'a pas été déposé à cette date, l'expert est appelé par le président à déposer, avec sa note de frais et honoraires, un rapport se limitant au constat des diligences effectuées et de cette carence, dont la juridiction tire les conséquences, notamment pour l'application des dispositions du deuxième alinéa de l'article R. 761-1.
Le président peut toutefois, avant d'inviter l'expert à produire un rapport de carence, soumettre l'incident à la séance prévue à l'article R. 621-8-1.

§R621-13
Lorsque l'expertise a été ordonnée sur le fondement du titre III du livre V, le président du tribunal ou de la cour, après consultation, le cas échéant, du magistrat délégué, ou, au Conseil d'Etat, le président de la section du contentieux en fixe les frais et honoraires par une ordonnance prise conformément aux dispositions des articles R. 621-11 et R. 761-4. Cette ordonnance désigne la ou les parties qui assumeront la charge de ces frais et honoraires. Elle est exécutoire dès son prononcé, et peut être recouvrée contre les personnes privées ou publiques par les voies de droit commun. Elle peut faire l'objet, dans le délai d'un mois à compter de sa notification, du recours prévu à l'article R. 761-5.
Dans le cas où les frais d'expertise mentionnés à l'alinéa précédent sont compris dans les dépens d'une instance principale, la formation de jugement statuant sur cette instance peut décider que la charge définitive de ces frais incombe à une partie autre que celle qui a été désignée par l'ordonnance mentionnée à l'alinéa précédent ou par le jugement rendu sur un recours dirigé contre cette ordonnance.
Dans les cas mentionnés au premier alinéa, il peut être fait application des dispositions des articles R. 621-12 et R. 621-12-1.

§R621-14
L'expert ou le sapiteur ne peut, en aucun cas, et sous quelque prétexte que ce soit, réclamer aux parties ou à l'une d'entre elles une somme quelconque en sus des allocations provisionnelles prévues à l'article R. 621-12, des honoraires, frais et débours liquidés par le président du tribunal ou de la cour ou, au Conseil d'Etat, le président de la section du contentieux.

GERMANY

CIVIL PROCEEDINGS

Zivilprozessordnung, ZPO

Titel 8 - Beweis durch Sachverständige

§ 402 (*Anwendbarkeit der Vorschriften für Zeugen*)
Für den Beweis durch Sachverständige gelten die Vorschriften über den Beweis durch Zeugen entsprechend, insoweit nicht in den nachfolgenden Paragraphen abweichende Vorschriften enthalten sind.

§403 (*Beweisantritt*)
Der Beweis wird durch die Bezeichnung der zu begutachtenden Punkte angetreten.

§ 404 (*Sachverständigenauswahl*)
(1) Die Auswahl der zuzuziehenden Sachverständigen und die Bestimmung ihrer Anzahl erfolgt durch das Prozessgericht. Es kann sich auf die Ernennung eines einzigen Sachverständigen beschränken. An Stelle der zuerst ernannten Sachverständigen kann es andere ernennen.
(2) Sind für gewisse Arten von Gutachten Sachverständige öffentlich bestellt, so sollen andere Personen nur dann gewählt werden, wenn besondere Umstände es erfordern.
(3) Das Gericht kann die Parteien auffordern, Personen zu bezeichnen, die geeignet sind, als Sachverständige vernommen zu werden.
(4) Einigen sich die Parteien über bestimmte Personen als Sachverständige, so hat das Gericht dieser Einigung Folge zu geben; das Gericht kann jedoch die Wahl der Parteien auf eine bestimmte Anzahl beschränken.

§ 404a (*Leitung der Tätigkeit des Sachverständigen*)
(1) Das Gericht hat die Tätigkeit des Sachverständigen zu leiten und kann ihm für Art und Umfang seiner Tätigkeit Weisungen erteilen.
(2) Soweit es die Besonderheit des Falles erfordert, soll das Gericht den Sachverständigen vor Abfassung der Beweisfrage hören, ihn in seine Aufgabe einweisen und ihm auf Verlangen den Auftrag erläutern.
(3) Bei streitigem Sachverhalt bestimmt das Gericht, welche Tatsachen der Sachverständige der Begutachtung zugrunde legen soll.
(4) Soweit es erforderlich ist, bestimmt das Gericht, in welchem Umfang der Sachverständige zur Aufklärung der Beweisfrage befugt ist, inwieweit er mit den Parteien in Verbindung treten darf und wann er ihnen die Teilnahme an seinen Ermittlungen zu gestatten hat.
(5) Weisungen an den Sachverständigen sind den Parteien mitzuteilen. Findet ein besonderer Termin zur Einweisung des Sachverständigen statt, so ist den Parteien die Teilnahme zu gestatten.

§ 405 (*Auswahl durch den mit der Beweisaufnahme betrauten Richter*)
Das Prozessgericht kann den mit der Beweisaufnahme betrauten Richter zur Ernennung der Sachverständigen ermächtigen. Er hat in diesem Falle die Befugnisse und Pflichten des Prozessgerichts nach den §§ 404, 404a.

§ 406 (*Ablehnung eines Sachverständigen*)
(1) Ein Sachverständiger kann aus denselben Gründen, die zur Ablehnung eines Richters berechtigen, abgelehnt werden. Ein Ablehnungsgrund kann jedoch nicht daraus entnommen werden, dass der Sachverständige als Zeuge vernommen worden ist.
(2) Der Ablehnungsantrag ist bei dem Gericht oder Richter, von dem der Sachverständige ernannt ist, vor seiner Vernehmung zu stellen, spätestens jedoch binnen zwei Wochen nach Verkündung oder Zustellung des Beschlusses über die Ernennung. Zu einem späteren Zeitpunkt ist die Ablehnung nur zulässig, wenn der

Antragsteller glaubhaft macht, dass er ohne sein Verschulden verhindert war, den Ablehnungsgrund früher geltend zu machen. Der Antrag kann vor der Geschäftsstelle zu Protokoll erklärt werden.
(3) Der Ablehnungsgrund ist glaubhaft zu machen; zur Versicherung an Eides statt darf die Partei nicht zugelassen werden.
(4) Die Entscheidung ergeht von dem im zweiten Absatz bezeichneten Gericht oder Richter durch Beschluss.
(5) Gegen den Beschluss, durch den die Ablehnung für begründet erklärt wird, findet kein Rechtsmittel, gegen den Beschluss, durch den sie für unbegründet erklärt wird, findet sofortige Beschwerde statt.

§ 407 (*Pflicht zur Erstattung des Gutachtens*)
(1) Der zum Sachverständigen Ernannte hat der Ernennung Folge zu leisten, wenn er zur Erstattung von Gutachten der erforderten Art öffentlich bestellt ist oder wenn er die Wissenschaft, die Kunst oder das Gewerbe, deren Kenntnis Voraussetzung der Begutachtung ist, öffentlich zum Erwerb ausübt oder wenn er zur Ausübung derselben öffentlich bestellt oder ermächtigt ist.
(2) Zur Erstattung des Gutachtens ist auch derjenige verpflichtet, der sich hierzu vor Gericht bereit erklärt hat.

§ 407a (*Weitere Pflichten des Sachverständigen*)
(1) Der Sachverständige hat unverzüglich zu prüfen, ob der Auftrag in sein Fachgebiet fällt und ohne die Hinzuziehung weiterer Sachverständiger erledigt werden kann. Ist das nicht der Fall, so hat der Sachverständige das Gericht unverzüglich zu verständigen.
(2) Der Sachverständige ist nicht befugt, den Auftrag auf einen anderen zu übertragen. Soweit er sich der Mitarbeit einer anderen Person bedient, hat er diese namhaft zu machen und den Umfang ihrer Tätigkeit anzugeben, falls es sich nicht um Hilfsdienste von untergeordneter Bedeutung handelt.
(3) Hat der Sachverständige Zweifel an Inhalt und Umfang des Auftrages, so hat er unverzüglich eine Klärung durch das Gericht herbeizuführen. Erwachsen voraussichtlich Kosten, die erkennbar außer Verhältnis zum Wert des Streitgegenstandes stehen oder einen angeforderten Kostenvorschuss erheblich übersteigen, so hat der Sachverständige rechtzeitig hierauf hinzuweisen.
(4) Der Sachverständige hat auf Verlangen des Gerichts die Akten und sonstige für die Begutachtung beigezogene Unterlagen sowie Untersuchungsergebnisse unverzüglich herauszugeben oder mitzuteilen. Kommt er dieser Pflicht nicht nach, so ordnet das Gericht die Herausgabe an.
(5) Das Gericht soll den Sachverständigen auf seine Pflichten hinweisen.

§ 408 (*Gutachtenverweigerungsrecht*)
(1) Dieselben Gründe, die einen Zeugen berechtigen, das Zeugnis zu verweigern, berechtigen einen Sachverständigen zur Verweigerung des Gutachtens. Das Gericht kann auch aus anderen Gründen einen Sachverständigen von der Verpflichtung zur Erstattung des Gutachtens entbinden.
(2) Für die Vernehmung eines Richters, Beamten oder einer anderen Person des öffentlichen Dienstes als Sachverständigen gelten die besonderen beamtenrechtlichen Vorschriften. Für die Mitglieder der Bundes- oder einer Landesregierung gelten die für sie maßgebenden besonderen Vorschriften.
(3) Wer bei einer richterlichen Entscheidung mitgewirkt hat, soll über Fragen, die den Gegenstand der Entscheidung gebildet haben, nicht als Sachverständiger vernommen werden.

§ 409 (*Folgen des Ausbleibens oder der Gutachtenverweigerung*)
(1) Wenn ein Sachverständiger nicht erscheint oder sich weigert, ein Gutachten zu erstatten, obgleich er dazu verpflichtet ist, oder wenn er Akten oder sonstige Unterlagen zurückbehält, werden ihm die dadurch verursachten Kosten auferlegt. Zugleich wird gegen ihn ein Ordnungsgeld festgesetzt. Im Falle wiederholten Ungehorsams kann das Ordnungsgeld noch einmal festgesetzt werden.
(2) Gegen den Beschluss findet sofortige Beschwerde statt.

§ 410 (*Sachverständigenbeeidigung*)

(1) Der Sachverständige wird vor oder nach Erstattung des Gutachtens beeidigt. Die Eidesnorm geht dahin, dass der Sachverständige das von ihm erforderte Gutachten unparteiisch und nach bestem Wissen und Gewissen erstatten werde oder erstattet habe.
(2) Ist der Sachverständige für die Erstattung von Gutachten der betreffenden Art im Allgemeinen beeidigt, so genügt die Berufung auf den geleisteten Eid; sie kann auch in einem schriftlichen Gutachten erklärt werden.

§ 411 (*Schriftliches Gutachten*)
(1) Wird schriftliche Begutachtung angeordnet, soll das Gericht dem Sachverständigen eine Frist setzen, innerhalb derer er das von ihm unterschriebene Gutachten zu übermitteln hat.
(2) Versäumt ein zur Erstattung des Gutachtens verpflichteter Sachverständiger die Frist, so kann gegen ihn ein Ordnungsgeld festgesetzt werden. Das Ordnungsgeld muss vorher unter Setzung einer Nachfrist angedroht werden. Im Falle wiederholter Fristversäumnis kann das Ordnungsgeld in der gleichen Weise noch einmal festgesetzt werden. § 409 Abs. 2 gilt entsprechend.
(3) Das Gericht kann das Erscheinen des Sachverständigen anordnen, damit er das schriftliche Gutachten erläutere.
(4) Die Parteien haben dem Gericht innerhalb eines angemessenen Zeitraums ihre Einwendungen gegen das Gutachten, die Begutachtung betreffende Anträge und Ergänzungsfragen zu dem schriftlichen Gutachten mitzuteilen. Das Gericht kann ihnen hierfür eine Frist setzen; § 296 Abs. 1, 4 gilt entsprechend.

§ 411a (*Verwertung von Sachverständigengutachten aus anderen Verfahren*)
Die schriftliche Begutachtung kann durch die Verwertung eines gerichtlich oder staatsanwaltschaftlich eingeholten Sachverständigengutachtens aus einem anderen Verfahren ersetzt werden.

§ 412 (*Neues Gutachten*)
(1) Das Gericht kann eine neue Begutachtung durch dieselben oder durch andere Sachverständige anordnen, wenn es das Gutachten für ungenügend erachtet.
(2) Das Gericht kann die Begutachtung durch einen anderen Sachverständigen anordnen, wenn ein Sachverständiger nach Erstattung des Gutachtens mit Erfolg abgelehnt ist.

§ 413 (*Sachverständigenvergütung*)
Der Sachverständige erhält eine Vergütung nach dem Justizvergütungs- und -entschädigungsgesetz.

§ 414 (*Sachverständige Zeugen*)
Insoweit zum Beweis vergangener Tatsachen oder Zustände, zu deren Wahrnehmung eine besondere Sachkunde erforderlich war, sachkundige Personen zu vernehmen sind, kommen die Vorschriften über den Zeugenbeweis zur Anwendung.

CRIMINAL PROCEEDINGS
Strafprozeßordnung, StPO

§72 *(Application of Provisions concerning Witnesses)*
Chapter VI concerning witnesses shall apply *mutatis mutandis* to experts, except as otherwise provided by the following sections.

§73 *(Selection of Experts)*
(1) The judge shall select the experts to be consulted, and shall determine their number. He shall agree with them on a time limit within which their opinions may be rendered.
(2) If experts are publicly appointed for certain kinds of opinions, other persons are to be selected only if this is required by special circumstances.

§74 *(Challenge)*
(1) An expert may be challenged for the same reasons that a judge may be challenged. The fact, however, that the expert was examined as a witness shall not be a reason for challenge.
(2) The public prosecution office, the private prosecutor and the accused shall have a right of challenge. The appointed experts shall be made known to the persons entitled to challenge unless special circumstances present an obstacle thereto.
(3) The ground for challenge shall be substantiated; the taking of an oath to substantiate a challenge shall be precluded.

§75 (*Duty to Render Opinion*)
(1) The person appointed as an expert must comply with the appointment if he has been publicly appointed to render opinions of the required kind, or if he publicly and commercially practises the science, art, or trade, the knowledge of which is a prerequisite for rendering an opinion, or if he has been publicly appointed or authorized to practise such profession.
(2) The obligation to render an opinion shall also be incumbent upon a person who has stated his willingness to do so before the court.

§76 (*Privilege of Refusing to Render Opinion*)
(1) An expert may refuse to render an opinion for the same reasons for which a witness may refuse to testify. An expert may also be released for other reasons from his obligation to render an opinion.
(2) The special provisions of the law concerning public officials shall apply to the examination of judges, officials and other persons in the public service as experts. Members of the Federal Government or of a *Land* Government shall be subject to the special provisions applicable to them.

§77 (*Consequences of Non-Appearance or Refusal*)
(1) In the case of non-appearance or refusal of an expert obliged to render an opinion he shall be charged with the costs caused by his non-appearance or refusal. At the same time a coercive fine shall be imposed on him. In the case of repeated disobedience the coercive fine may be assessed a second time in addition to the costs.
(2) If an expert obliged to render the opinion refuses to agree upon a reasonable time limit pursuant to Section 73 subsection (1), second sentence, or if he fails to observe the time limit agreed upon, a coercive fine may be imposed on him. The assessment of a coercive fine must be preceded by an admonition setting an extension of the time limit. In the case of repeated failure to observe the time limit the coercive fine may be assessed again.

§78 (*Judicial Direction*)
The judge shall guide the experts' participation, so far as he deems this necessary.

§79 (*Oath Administered to an Expert*)
(1) An expert may be placed under oath at the discretion of the court.
(2) The oath shall be taken after the opinion has been rendered; it shall contain the assurance that the expert has rendered his opinion impartially and to the best of his knowledge and belief.
(3) If the expert has been sworn generally to render opinions of the kind concerned, a reference to his oath shall be sufficient.

§80 (*Preparation of an Opinion*)
(1) The expert may, at his request, be given further details for the preparation of his opinion by examining witnesses or the accused.
(2) For the same purpose, he may be permitted to examine the file, to be present at the examination of witnesses or of the accused, and to address questions to them directly.

§80a (*Consultations During the Preliminary Proceedings*)

An expert is to be given the opportunity, during the course of the preliminary proceedings, to prepare the opinion that he is to render at the main hearing, if it is expected that the committal of the accused to a psychiatric hospital, to an institution for withdrawal treatment or to preventive detention will be ordered.

§81 (*Committal for Observation of the Accused*)
(1) For the preparation of an opinion on the accused's mental condition the court may, after hearing an expert and defence counsel, order that the accused be brought to a public psychiatric hospital and be held under observation there.
(2) The court shall make the order pursuant to subsection (1) only if the accused is strongly suspected of the offence. The court may not make this order if it is disproportionate to the importance of the matter or to the penalty or measure of reform and prevention to be expected.
(3) In the preparatory proceedings the court which would be competent to open the main proceedings shall decide.
(4) An immediate complaint against the order shall be admissible. It shall have suspensive effect.
(5) Committal to a psychiatric hospital pursuant to subsection (1) may not exceed a total period of six weeks.

§81a (*Physical Examination; Blood Test*)
(1) A physical examination of the accused may be ordered for the purposes of establishing facts which are of importance for the proceedings. For this purpose, the taking of blood samples and other bodily intrusions which are effected by a physician in accordance with the rules of medical science for the purpose of examination shall be admissible without the consent of the accused, provided no detriment to his health is to be expected.
(2) The authority to give such order shall be vested in the judge and, if a delay would endanger the success of the examination, also in the public prosecution office including the officials assisting it (section 152 of the Courts Constitution Act).
(3) Blood samples or other body cells taken from the accused may be used only for the purposes of the criminal proceedings for which they were taken or in other criminal proceedings pending; they shall be destroyed without delay as soon as they are no longer required for such purposes.

§ 81b (*Photographs and Fingerprints*)
Photographs and fingerprints of the accused may be taken, even against his will, and measurements may be made of him and other similar measures taken with regard to him insofar as is required for the purposes of conducting the criminal proceedings or of the police records department.

§81c (*Examination of Other Persons*)
(1) Persons other than the accused, who might be considered called as witnesses, may be examined without their consent only insofar as establishing the truth involves ascertaining whether their body shows a particular trace or consequence of a criminal offence.
(2) Examinations to ascertain descent and the taking of blood samples from persons other than the accused shall be admissible without such persons' consent provided no detriment to their health is to be expected and the measure is indispensable for establishing the truth. The examination and the taking of blood samples may only ever be carried out by a physician.
(3) Examinations or the taking of blood samples may be refused for the same reasons as testimony may be refused. Where minors lack intellectual maturity or where minors or persons placed in care due to mental illness or mental or emotional deficiency have no sufficient understanding of the importance of their right of refusal, their statutory representative shall decide; section 52 subsection (2), second sentence, and subsection (3) shall apply *mutatis mutandis*. If the statutory representative is precluded from taking a decision (Section 52 subsection (2), second sentence) or is prevented from taking a decision in time for other reasons, and the immediate investigation or taking of blood samples appears necessary to secure evidence, such measures shall be admissible only upon special order by the judge. The decision ordering the measures shall not be contestable. The evidence furnished pursuant to the third sentence may be used in further proceedings only with the consent of the statutory representative authorized to give such consent.

(4) Measures pursuant to subsections (1) and (2) shall be inadmissible if on evaluation of the circumstances as a whole the person concerned cannot reasonably be expected to undergo such measures.
(5) The authority to give such order shall be vested in the judge and, if a delay would endanger the success of the investigation, with the exception of the cases referred to in subsection (3), third sentence, also in the public prosecution office including the officials assisting it (section 152 of the Courts Constitution Act). Section 81a subsection (3) shall apply *mutatis mutandis*.
(6) The provisions in Section 70 shall apply *mutatis mutandis* to cases where the person concerned refuses to undergo an examination. Direct force may be used only upon special order of the judge. The order shall presuppose either that the person concerned insists upon the refusal despite the imposition of a coercive fine or that there are exigent circumstances.

§81d (*Physical Examination*)
(1) If the physical examination may violate the sense of shame of the person to be examined, it shall be carried out by a person of the same sex or by a female or male physician. Where there is a legitimate interest, a request that a physician of a particular gender be appointed to perform the examination should be granted. Upon the request of the person concerned, a trusted person is to be admitted. The person concerned is to be instructed as to the provisions of the second and third sentences.
(2) This provision shall also be applicable where the person concerned consents to the examination.

§81e (*Molecular and Genetic Examinations*)
(1) Material obtained by measures pursuant to Section 81a subsection (1) may also be subjected to molecular and genetic examinations, insofar as such measures are necessary to establish descent or to ascertain whether traces found originate from the accused or the aggrieved person; in so doing the gender of the person may also be determined by examination. Examinations pursuant to the first sentence shall also be admissible to obtain similar findings on material obtained by measures pursuant to Section 81c. Findings on facts other than those referred to in the first sentence shall not be made; an examination designed to establish such facts shall be inadmissible.
(2) Examinations admissible pursuant to subsection (1) may also be carried out on trace materials which have been found, secured or seized. Subsection (1), third sentence, and Section 81a subsection
(3), first part of the sentence, shall apply *mutatis mutandis*.

§81f (*Ordering and Carrying Out Molecular and Genetic Examinations*)
(1) Without the written consent of the person concerned, examinations pursuant to Section 81e may be ordered only by the court and, in exigent circumstances, by the public prosecution office including the officials assisting it (section 152 of the Courts Constitution Act). A persons who consents is to be instructed as to the purpose for which the data to be obtained will be used.
(2) In the written order only experts who are publicly appointed, who are obliged under the Obligations Act or who hold public office and who are not members of the authority conducting the investigation, or belong to an organizational unit of such authority which, both in terms of its organization and its area of work, is separate from the official agency conducting the investigation, shall be appointed to carry out the examinations pursuant to Section 81e. The experts shall take technical and organizational steps to ensure that no inadmissible molecular and genetic examinations can be carried out and that no unauthorized third parties have access to information concerning the examinations. The material to be examined shall be given to the expert with no indication of the name, address or date or month of birth of the individual concerned. Where the expert is not a public agency, section 38 of the Federal Data Protection Act shall apply subject to the proviso that the supervisory authority shall also monitor compliance with data protection rules even if it has no sufficient indication that such rules are being violated and the expert is not processing personal data in data files.

§81g (*DNA Analysis*)
(1) If the accused person is suspected of a criminal offence of substantial significance or of a crime against sexual self-determination then, for the purposes of establishing identity in future criminal proceedings, cell

tissue may be collected from him and subjected to molecular and genetic examination for the purposes of identifying the DNA code if the nature of the offence or the way it was committed, the personality of the accused or other information provide grounds for assuming that criminal proceedings will be conducted against him in future in respect of a criminal offence of substantial significance. If the person concerned habitually commits other offences, this may be deemed to be equivalent to a criminal offence of substantial significance by reference to the level of the injustice done.
(2) The cell tissue collected may be used only for the molecular and genetic examination referred to in subsection (1); it shall be destroyed without delay once it is no longer required for that purpose. Information other than that required in order to establish the DNA code or the gender may not be ascertained during the examination; tests to establish such information shall be inadmissible.
(3) Without the written consent of the person concerned, the collection of cell tissue may be ordered only by the court and, in exigent circumstances, by the public prosecution office including the officials assisting it (section 152 of the Courts Constitution Act). Without the written consent of the person concerned, the molecular and genetic examination of cell tissue may be ordered only by the court. Persons who have consented are to be instructed as to the purpose for which the data to be obtained will be used. Section 81f subsection (2) shall apply *mutatis mutandis*. In its written reasons the court shall specify in relation to the particular case concerned:

1. the determining facts relevant to ascertaining the seriousness of the criminal offence,
2. the information giving rise to the assuming that the accused will be the subject of criminal proceedings in the future, as well as
3. an evaluation of the relevant circumstances in each case.

(4) Subsections (1) to 3 shall apply *mutatis mutandis* if the person concerned has been convicted of the offence with binding effect or was not convicted merely on the grounds that:
1. lack of criminal responsibility has been proven or cannot be ruled out,
2. he is unfit to stand trial on the grounds of insanity, or
3. lack of criminal responsibility has been proven or cannot be ruled out (section 3 of the Youth Courts Act)
and the corresponding entry in the Federal Central Criminal Register or the Youth Register has not yet expired or been deleted.
(5) The data collected may be stored at the Federal Criminal Police Office and used in accordance with the Federal Criminal Police Office Act. The same shall apply

1. subject to the conditions listed in subsection (1), to the data obtained pursuant to Section 81e subsection (1), in respect of an accused person, as well as
2. to the data obtained pursuant to Section 81e subsection (2).

The data may be transmitted only for the purposes of criminal proceedings, for threat prevention and for international mutual legal assistance in respect thereof. In the case of number 1 of the second sentence, the accused is to be informed without delay that the data has been stored, and is to be instructed that he may apply for a judicial decision.

§81h *(Serial Molecular and Genetic Examination)*
(1) Where certain facts give rise to the suspicion that a felony against life, physical integrity, personal freedom or sexual self-determination has been committed, then with their written consent, persons who manifest certain significant features which may be assumed to apply to the accused

1. may have cell tissue collected from them which will be
2. subjected to a molecular-genetic examination to ascertain gender and the DNA profile, and
3. the DNA profile ascertained automatically matched against the DNA profile of trace material,

insofar as this is necessary in order to ascertain whether the trace material originated from such persons and the measure is not disproportionate to the gravity of the offence, particularly in view of the number of persons affected by the measure.
(2) Any measure pursuant to subsection (1) shall require a court order. This order shall be issued in writing. The order shall designate the persons concerned by reference to specified significant features and shall give reasons. A prior examination of the persons concerned is not required. The decision ordering the measure shall not be contestable.

(3) Sections 81f subsection (2) and Section 81g subsection (2) shall apply mutatis mutandis to the implementation of the measure. Insofar as the data relating to the DNA profiles ascertained by the measure is no longer necessary for clearing up the felony it shall be deleted without delay. The fact of the deletion shall be documented.
(4) The persons concerned are to be instructed in writing that the measure may only be implemented with their consent. They are also to be instructed that

1. the cell tissue collected shall be used exclusively for the molecular and genetic examination pursuant to subsection (1) and shall be destroyed without delay once they are no longer required for this purpose, and
2. that the DNA profiles established shall not be stored by the Federal Criminal Police Office for the purposes of establishing identity in future criminal proceedings.

§82 (*Rendering Opinion in Preliminary Proceedings*)
In preliminary proceedings the judge shall decide whether the experts shall render their opinion in writing or orally.

§83 (*Rendering a New Opinion*)
(1) The judge may order that a new opinion be rendered by the same or by other experts if he considers the opinion insufficient.
(2) The judge may order that an opinion be rendered by another expert if the first expert was successfully challenged after rendering his opinion.
(3) In important cases the opinion of a specialist authority may be obtained.

§84 (*Fees for Experts*)
The expert shall be compensated pursuant to the Judicial Remuneration and Compensation Act.

§85 (*Expert Witnesses*)
The provisions concerning evidence by witnesses shall apply if experienced persons have to be examined to prove past facts or conditions the observation of which required special professional knowledge.

§ 86 (*Judicial Inspection*)
If a judicial inspection takes place, the facts as found shall be stated in the record and such record shall include information regarding any missing traces or signs whose presence could have been expected, given the special nature of the case.

§87 (*Post Mortem Examination; Autopsy*)
(1) The post mortem examination shall be carried out with the assistance of a physician by the public prosecution office and, upon application by the public prosecution office, also by the judge. The physician shall not be called in if this is evidently unnecessary for clarification of the facts.
(2) The autopsy shall be performed by two physicians. One of them must be a court physician or the head of a public forensic or pathology institute or a physician of the institute entrusted with this task and having specialist knowledge of forensic medicine. The autopsy shall not be performed by the physician who treated the deceased person during his illness directly preceding his death. However, that physician may be asked to attend the autopsy to give information relating to the medical history. The public prosecution office may attend the autopsy. Upon application by the public prosecution office the autopsy shall be carried out in the judge's presence.
(3) For the purpose of examination or autopsy, it shall be admissible to exhume a corpse that has been interred.
(4) The autopsy and exhumation of an interred corpse shall be ordered by the judge; the public prosecution office shall be authorized to order such action if a delay would endanger the success of the investigation. Where exhumation is ordered, notification of a relative of the deceased person shall be ordered at the same

time if the relative can be located without particular difficulty and such notification does not endanger the purpose of the investigation.

§ 88 (*Identification*)
(1) The identity of the deceased person shall be established before the autopsy. In particular, persons who knew the deceased person may be questioned to this end and measures of forensic identification applied. In order to establish identity and gender, cell tissue may be removed and subjected to a genetic-molecular examination. Section 81f subsection (2) shall apply mutatis mutandis to the genetic and molecular examination.
(2) If there is an accused, the corpse should be shown to him for the purpose of identification.

§ 89 (*Extent of Autopsies*)
To the extent that the condition of the corpse permits, the autopsy shall always include the opening of the head, the chest cavity and the abdomen.

§90 (*Autopsies of New-born Children*)
Where an autopsy is performed on a new-born child, the examination shall be directed in particular to the question whether it was alive after or during birth, and whether it was mature or at least capable of continuing its life outside the womb.

§91 (*Suspected Poisoning*)
(1) Where poisoning is suspected, the suspicious substance found in the corpse or elsewhere shall be examined by a chemist or by a specialist authority appointed for such examination.
(2) It may be ordered that this examination be performed with the assistance, or under the direction, of a physician.

§92 (*Opinions in Counterfeiting Cases*)
(1) Where counterfeiting money or official stamps is suspected, the money or official stamps shall, if necessary, be submitted to the authority which brings the genuine money or genuine official stamps of that kind into circulation. The opinion of this authority shall be obtained as to the falsity or adulteration, as well as concerning the probable method of counterfeiting.
(2) If money or official stamps of a foreign currency are involved, the opinion of a German authority may be sought in lieu of an opinion by the respective foreign authority.

§93 (*Handwriting Analysis*)
To ascertain the authenticity or falsity of a document, as well as to ascertain its author, a handwriting comparison may be conducted with the assistance of experts.

ITALY

CIVIL PROCEEDINGS

Codice di procedura civile (Code of civil procedure)

§ 61 *(Consulente tecnico)*
Quando è necessario, il giudice può farsi assistere, per il compimento di singoli atti o per tutto il processo, da uno o più consulenti di particolare competenza tecnica.
La scelta dei consulenti tecnici deve essere normalmente fatta tra le persone iscritte in albi speciali formati a norma delle disposizioni di attuazione al presente codice.

§62 *(Attività del consulente)*
Il consulente compie le indagini che gli sono commesse dal giudice e fornisce, in udienza e in camera di consiglio, i chiarimenti che il giudice gli richiede a norma degli articoli 194 e seguenti, e degli articoli 441 e 463.

§63 *(Obbligo di assumere l'incarico e ricusazione del consulente)*
Il consulente scelto tra gli iscritti in un albo ha l'obbligo di prestare il suo ufficio, tranne che il giudice riconosca che ricorre un giusto motivo di astensione.
Il consulente può essere ricusato dalle parti per i motivi indicati nell'art. 51.
Della ricusazione del consulente conosce il giudice che l'ha nominato.

§64 *(Responsabilità del consulente)*
Si applicano al consulente tecnico le disposizioni del codice penale relative ai periti.
In ogni caso, il consulente tecnico che incorre in colpa grave nell'esecuzione degli atti che gli sono richiesti, è punito con l'arresto fino a un anno o con l'ammenda fino a lire venti milioni. Si applica l'art. 35 del codice penale. In ogni caso è dovuto il risarcimento dei danni causati alle parti.

§191 *(Nomina del consulente tecnico)*
Nei casi di cui agli articoli 61 e seguenti il giudice istruttore, con l'ordinanza prevista nell'articolo 187 ultimo comma o con altra successiva, nomina un consulente tecnico e fissa l'udienza nella quale questi deve comparire.
Possono essere nominati più consulenti soltanto in caso di grave necessità o quando la legge espressamente lo dispone.

§192 *(Astensione e ricusazione del consulente)*
L'ordinanza è notificata al consulente tecnico a cura del cancelliere, con invito a comparire all'udienza fissata dal giudice.
Il consulente che non ritiene di accettare l'incarico o quello che, obbligato a prestare il suo ufficio, intende astenersi, deve farne denuncia o istanza al giudice che l'ha nominato almeno tre giorni prima dell'udienza di comparizione; nello stesso termine le parti debbono proporre le loro istanze di ricusazione, depositando nella cancelleria ricorso al giudice istruttore.
Questi provvede con ordinanza non impugnabile.

§ 193 *(Giuramento del consulente)*
All'udienza di comparizione il giudice istruttore ricorda al consulente l'importanza delle funzioni che è chiamato ad adempiere, e ne riceve il giuramento di bene e fedelmente adempiere le funzioni affidategli al solo scopo di fare conoscere ai giudici la verità.

§194 *(Attività del consulente)*

Il consulente tecnico assiste alle udienze alle quali è invitato dal giudice istruttore; compie, anche fuori della circoscrizione giudiziaria, le indagini di cui all'articolo 62, da sè solo o insieme col giudice secondo che questi dispone. Può essere autorizzato a domandare chiarimenti alle parti, ad assumere informazioni da terzi e a eseguire piante, calchi e rilievi.
Anche quando il giudice dispone che il consulente compia indagini da sè solo, le parti possono intervenire alle operazioni in persona e a mezzo dei propri consulenti tecnici e dei difensori, e possono presentare al consulente, per iscritto o a voce, osservazioni e istanze.

§ 195 *(Processo verbale e relazione)*
Delle indagini del consulente si forma processo verbale, quando sono compiute con l'intervento del giudice istruttore, ma questi può anche disporre che il consulente rediga relazione scritta.
Se le indagini sono compiute senza l'intervento del giudice, il consulente deve farne relazione, nella quale inserisce anche le osservazioni e le istanze delle parti.
La relazione deve essere depositata in cancelleria nel termine che il giudice fissa.

Art. 196 *(Rinnovazione delle indagini e sostituzione del consulente)*
Il giudice ha sempre la facoltà di disporre la rinnovazione delle indagini e, per gravi motivi, la sostituzione del consulente tecnico.

Art. 197 *(Assistenza all'udienza e audizione in camera di consiglio)*
Quando lo ritiene opportuno il presidente invita il consulente tecnico ad assistere alla discussione davanti al collegio e ad esprimere il suo parere in camera di consiglio in presenza delle parti, le quali possono chiarire e svolgere le loro ragioni per mezzo dei difensori.

Art. 198 *(Esame contabile)*
Quando è necessario esaminare documenti contabili e registri, il giudice istruttore può darne incarico al consulente tecnico, affidandogli il compito di tentare la conciliazione delle parti.
Il consulente sente le parti e, previo consenso di tutte, può esaminare anche documenti e registri non prodotti in causa. Di essi tuttavia, senza il consenso di tutte le parti, non può fare menzione nei processi verbali o nella relazione di cui all'articolo 195.

Art. 199 *(Processo verbale di conciliazione)*
Se le parti si conciliano, si redige processo verbale della conciliazione, che è sottoscritto dalle parti e dal consulente tecnico e inserito nel fascicolo d'ufficio.
Il giudice istruttore attribuisce con decreto efficacia di titolo esecutivo al processo verbale.

Art. 200 *(Mancata conciliazione)*
Se la conciliazione delle parti non riesce, il consulente espone i risultati delle indagini compiute e il suo parere in una relazione, che deposita in cancelleria nel termine fissato dal giudice istruttore.
Le dichiarazioni delle parti, riportate dal consulente nella relazione, possono essere valutate dal giudice a norma dell'articolo 116 secondo comma.

Art. 201 *(Consulente tecnico di parte)*
Il giudice istruttore, con l'ordinanza di nomina del consulente, assegna alle parti un termine entro il quale possono nominare, con dichiarazione ricevuta dal cancelliere, un loro consulente tecnico.
Il consulente della parte, oltre ad assistere a norma dell'articolo 194 alle operazioni del consulente del giudice, partecipa all'udienza e alla camera di consiglio ogni volta che vi interviene il consulente del giudice, per chiarire e svolgere con l'autorizzazione del presidente, le sue osservazioni sui risultati delle indagini tecniche.

Disposizioni di attuazione del Codice di procedura civile (Enactment provisions of the Code of civil proceedings)

§13 *(Albo dei consulenti tecnici)*
Presso ogni tribunale è istituito un albo dei consulenti tecnici.
L'albo è diviso in categorie.
Debbono essere sempre comprese nell'albo le categorie: 1. medico-chirurgica; 2. industriale; 3. commerciale; 4. agricola; 5. bancaria; 6. assicurativa.

§14 *(Formazione dell'albo)*
L'albo è tenuto dal presidente del tribunale ed è formato da un comitato da lui presieduto e composto dal procuratore della Repubblica e da un professionista iscritto nell'albo professionale, designato dal consiglio dell'ordine, o dal collegio della categoria, cui appartiene il richiedente l'iscrizione nell'albo dei consulenti tecnici.
Il consiglio predetto ha facoltà di designare, quando lo ritenga opportuno, un professionista iscritto nell'albo di altro ordine o collegio, previa comunicazione al consiglio che tiene l'albo a cui appartiene il professionista stesso.
Quando trattasi di domande presentate da periti estimatori, la designazione è fatta dalla camera di commercio, industria e agricoltura.
Le funzioni di segretario del comitato sono esercitate dal cancelliere del tribunale.

§15.*(Iscrizione nell'albo)*
Possono ottenere l'iscrizione nell'albo coloro che sono forniti di speciale competenza tecnica in una determinata materia, sono di condotta morale specchiata e sono iscritti nelle rispettive associazioni professionali.
Nessuno può essere iscritto in più di un albo.
Sulle domande di iscrizione decide il comitato indicato nell'articolo precedente.
Contro il provvedimento del comitato è ammesso reclamo, entro quindici giorni dalla notificazione, al comitato previsto nell'articolo 5

§16.*(Domande d'iscrizione)*
Coloro che aspirano all'iscrizione nell'albo debbono farne domanda al presidente del tribunale.
La domanda deve essere corredata dai seguenti documenti:
1. estratto dell'atto di nascita;
2. certificato generale del casellario giudiziario di data non anteriore a tre mesi dalla presentazione;
3. certificato di residenza nella circoscrizione del tribunale;
4. certificato di iscrizione all'associazione professionale;
5. i titoli e i documenti che l'aspirante crede di esibire per dimostrare la sua speciale capacità tecnica.

§17. *(Informazioni)*
A cura del presidente del tribunale debbono essere assunte presso le autorità di polizia specifiche informazioni sulla condotta pubblica e privata dell'aspirante.

§18 *(Revisione dell'albo)*
L'albo è permanente. Ogni quattro anni il comitato di cui all'articolo deve provvedere alla revisione dell'albo per eliminare i consulenti per i quali è venuto meno alcuno dei requisiti previsti nell'articolo o è sorto un impedimento a esercitare l'ufficio.

§19 *(Disciplina)*
La vigilanza sui consulenti tecnici è esercitata dal presidente del tribunale, il quale, d'ufficio o su istanza del procuratore della Repubblica o del presidente dell'associazione professionale, può promuovere procedimento

disciplinare contro i consulenti che non hanno tenuto una condotta morale specchiata o non hanno ottemperato agli obblighi derivanti dagli incarichi ricevuti.
Per il giudizio disciplinare è competente il comitato indicato nell'articolo.

§20 *(Sanzioni disciplinari)*
Ai consulenti che non hanno osservato i doveri indicati nell'articolo precedente possono essere inflitte le seguenti sanzioni disciplinari:
1. l'avvertimento;
2. la sospensione dall'albo per un tempo non superiore ad un anno;
3. la cancellazione dall'albo.

§21 *(Procedimento disciplinare)*
Prima di promuovere il procedimento disciplinare, il presidente del tribunale contesta l'addebito al consulente e ne raccoglie la risposta scritta.
Il presidente, se dopo la contestazione ritiene di dovere continuare il procedimento, fa invitare il consulente, con biglietto di cancelleria, davanti al comitato disciplinare.
Il comitato decide sentito il consulente. Contro il provvedimento è ammesso reclamo a norma dell'articolo ultimo comma.

§22 *(Distribuzione degli incarichi)*
Tutti i giudici che hanno sede nella circoscrizione del tribunale debbono affidare normalmente le funzioni di consulente tecnico agli iscritti nell'albo del tribunale medesimo.
Il giudice istruttore che conferisce un incarico a un consulente iscritto in albo di altro tribunale o a persona non iscritta in alcun albo, deve sentire il presidente e indicare nel provvedimento i motivi della scelta.
Le funzioni di consulente presso la corte d'appello sono normalmente affidate agli iscritti negli albi dei tribunali del distretto. Se l'incarico è conferito ad iscritti in altri albi o a persone non iscritte in alcun albo, deve essere sentito il primo presidente e debbono essere indicati nel provvedimento i motivi della scelta.

§23 *(Vigilanza sulla distribuzione degli incarichi)*
Il presidente del tribunale vigila affinché, senza danno per l'amministrazione della giustizia, gli incarichi siano equamente distribuiti tra gli iscritti nell'albo in modo tale che a nessuno dei consulenti iscritti possano essere conferiti incarichi in misura superiore al 10 per cento di quelli affidati dall'ufficio, e garantisce che sia assicurata l'adeguata trasparenza del conferimento degli incarichi anche a mezzo di strumenti informatici.
Per l'attuazione di tale vigilanza il presidente fa tenere dal cancelliere un registro in cui debbono essere annotati tutti gli incarichi che i consulenti iscritti ricevono e i compensi liquidati da ciascun giudice.
Questi deve dare notizia degli incarichi dati e dei compensi liquidati al presidente del tribunale presso il quale il consulente è iscritto.
Il primo presidente della corte di appello esercita la vigilanza prevista nel primo comma per gli incarichi che vengono affidati dalla corte.

§146 *(Albo dei consulenti tecnici)*
Nell'albo dei consulenti tecnici istituiti presso ogni tribunale debbono essere inclusi, per i processi relativi a domande di prestazioni previdenziali e assistenziali, i medici legali e delle assicurazioni e i medici del lavoro.

§194 *(Nomina dell'esperto nel giudizio di divisione)*
Quando per la formazione della massa da dividersi e delle quote è necessaria l'opera di un esperto, questi è nominato, d'ufficio o su istanza del notaio o di uno degli interessati, dal giudice istruttore, che ne riceve il giuramento a norma dell'articolo 193 del Codice.

CRIMINAL PROCEEDINGS

Codice di procedura penale (Code of criminal procedure)

§220 *(Oggetto della perizia)*
La perizia è ammessa quando occorre svolgere indagini o acquisire dati o valutazioni che richiedono specifiche competenze tecniche, scientifiche o artistiche.
Salvo quanto previsto ai fini dell'esecuzione della pena o della misura di sicurezza, non sono ammesse perizie per stabilire l'abitualità o la professionalità nel reato, la tendenza a delinquere, il carattere e la personalità dell'imputato e in genere le qualità psichiche indipendenti da cause patologiche.

§221 *(Nomina del perito).*
Il giudice nomina il perito scegliendolo tra gli iscritti negli appositi albi o tra persone fornite di particolare competenza nella specifica disciplina. Quando la perizia è dichiarata nulla, il giudice cura, ove possibile, che il nuovo incarico sia affidato ad altro perito.
Il giudice affida l'espletamento della perizia a più persone quando le indagini e le valutazioni risultano di notevole complessità ovvero richiedono distinte conoscenze in differenti discipline.
Il perito ha l'obbligo di prestare il suo ufficio, salvo che ricorra uno dei motivi di astensione previsti dall'articolo 36.

§222 *(Incapacità e incompatibilità del perito)*
Non può prestare ufficio di perito, a pena di nullità:
a) il minorenne, l'interdetto, l'inabilitato e chi è affetto da infermità di mente;
b) chi è interdetto anche temporaneamente dai pubblici uffici ovvero è interdetto o sospeso dall'esercizio di una professione o di un'arte ;
c) chi è sottoposto a misure di sicurezza personali o a misure di prevenzione ;
d) chi non può essere assunto come testimone o ha facoltà di astenersi dal testimoniare o chi è chiamato a prestare ufficio di testimone o di interprete;
e) chi è stato nominato consulente tecnico nello stesso procedimento o in un procedimento connesso.

§223 *(Astensione e ricusazione del perito)*
Quando esiste un motivo di astensione, il perito ha l'obbligo di dichiararlo.
Il perito può essere ricusato dalle parti nei casi previsti dall'articolo 36 a eccezione di quello previsto dal comma 1 lettera h) del medesimo articolo.
La dichiarazione di astensione o di ricusazione può essere presentata fino a che non siano esaurite le formalità di conferimento dell'incarico e, quando si tratti di motivi sopravvenuti ovvero conosciuti successivamente, prima che il perito abbia dato il proprio parere.
Sulla dichiarazione di astensione o di ricusazione decide, con ordinanza, il giudice che ha disposto la perizia.
Si osservano, in quanto applicabili, le norme sulla ricusazione del giudice.

§224 *(Provvedimenti del giudice)*
Il giudice dispone anche di ufficio la perizia con ordinanza motivata, contenente la nomina del perito, la sommaria enunciazione dell'oggetto delle indagini, l'indicazione del giorno, dell'ora e del luogo fissati per la comparizione del perito.
Il giudice dispone la citazione del perito e dà gli opportuni provvedimenti per la comparizione delle persone sottoposte all'esame del perito. Adotta tutti gli altri provvedimenti che si rendono necessari per l'esecuzione delle operazioni peritali.

§225 *(Nomina del consulente tecnico)*
Disposta la perizia, il pubblico ministero e le parti private hanno facoltà di nominare propri consulenti tecnici in numero non superiore, per ciascuna parte, a quello dei periti.
Le parti private, nei casi e alle condizioni previste dalla legge sul patrocinio statale dei non abbienti, hanno diritto di farsi assistere da un consulente tecnico a spese dello Stato.
Non può essere nominato consulente tecnico chi si trova nelle condizioni indicate nell'articolo 222 comma 1 lettere a), b), c), d).

§226 *(Conferimento dell'incarico)*
Il giudice, accertate le generalità del perito, gli chiede se si trova in una delle condizioni previste dagli articoli 222 e 223, lo avverte degli obblighi e delle responsabilità previste dalla legge penale e lo invita a rendere la seguente dichiarazione: «consapevole della responsabilità morale e giuridica che assumo nello svolgimento dell'incarico, mi impegno ad adempiere al mio ufficio senza altro scopo che quello di far conoscere la verità e a mantenere il segreto su tutte le operazioni peritali».
Il giudice formula quindi i quesiti, sentiti il perito, i consulenti tecnici, il pubblico ministero e i difensori presenti.

§227 *(Relazione peritale)*
Concluse le formalità di conferimento dell'incarico, il perito procede immediatamente ai necessari accertamenti e risponde ai quesiti con parere raccolto nel verbale.
Se, per la complessità dei quesiti, il perito non ritiene di poter dare immediata risposta, può chiedere un termine al giudice.
Quando non ritiene di concedere il termine, il giudice provvede alla sostituzione del perito; altrimenti fissa la data, non oltre novanta giorni, nella quale il perito stesso dovrà rispondere ai quesiti e dispone perché ne venga data comunicazione alle parti e ai consulenti tecnici.
Quando risultano necessari accertamenti di particolare complessità, il termine può essere prorogato dal giudice, su richiesta motivata del perito, anche più volte per periodi non superiori a trenta giorni. In ogni caso, il termine per la risposta ai quesiti, anche se prorogato, non può superare i sei mesi.
Qualora sia indispensabile illustrare con note scritte il parere, il perito può chiedere al giudice di essere autorizzato a presentare, nel termine stabilito a norma dei commi 3 e 4, relazione scritta.

§228 *(Attività del perito)*
Il perito procede alle operazioni necessarie per rispondere ai quesiti. A tal fine può essere autorizzato dal giudice a prendere visione degli atti, dei documenti e delle cose prodotti dalle parti dei quali la legge prevede l'acquisizione al fascicolo per il dibattimento.
Il perito può essere inoltre autorizzato ad assistere all'esame delle parti e all'assunzione di prove nonché a servirsi di ausiliari di sua fiducia per lo svolgimento di attività materiali non implicanti apprezzamenti e valutazioni.
Qualora, ai fini dello svolgimento dell'incarico, il perito richieda notizie all'imputato, alla persona offesa o ad altre persone, gli elementi in tal modo acquisiti possono essere utilizzati solo ai fini dell'accertamento peritale.
Quando le operazioni peritali si svolgono senza la presenza del giudice e sorgono questioni relative ai poteri del perito e ai limiti dell'incarico, la decisione è rimessa al giudice, senza che ciò importi sospensione delle operazioni stesse.

§229 *(Comunicazioni relative alle operazioni peritali)*
Il perito indica il giorno, l'ora e il luogo in cui inizierà le operazioni peritali e il giudice ne fa dare atto nel verbale.
Della eventuale continuazione delle operazioni peritali il perito dà comunicazione senza formalità alle parti presenti.

§230 *(Attività dei consulenti tecnici)*
I consulenti tecnici possono assistere al conferimento dell'incarico al perito e presentare al giudice richieste, osservazioni e riserve, delle quali è fatta menzione nel verbale.
Essi possono partecipare alle operazioni peritali, proponendo al perito specifiche indagini e formulando osservazioni e riserve, delle quali deve darsi atto nella relazione.
Se sono nominati dopo l'esaurimento delle operazioni peritali, i consulenti tecnici possono esaminare le relazioni e richiedere al giudice di essere autorizzati a esaminare la persona, la cosa e il luogo oggetto della perizia.

La nomina dei consulenti tecnici e lo svolgimento della loro attività non può ritardare l'esecuzione della perizia e il compimento delle altre attività processuali.

§231 *(Sostituzione del perito)*
Il perito può essere sostituito se non fornisce il proprio parere nel termine fissato o se la richiesta di proroga non è accolta ovvero se svolge negligentemente l'incarico affidatogli.
Il giudice, sentito il perito, provvede con ordinanza alla sua sostituzione, salvo che il ritardo o l'inadempimento sia dipeso da cause a lui non imputabili. Copia dell'ordinanza è trasmessa all'ordine o al collegio cui appartiene il perito.
Il perito sostituito, dopo essere stato citato a comparire per discolparsi, può essere condannato dal giudice al pagamento a favore della cassa delle ammende di una somma da euro 154 a euro 1.549.
Il perito è altresì sostituito quando è accolta la dichiarazione di astensione o di ricusazione.
Il perito sostituito deve mettere immediatamente a disposizione del giudice la documentazione e i risultati delle operazioni peritali già compiute.

§232 *(Liquidazione del compenso al perito)*
Il compenso al perito è liquidato con decreto del giudice che ha disposto la perizia, secondo le norme delle leggi speciali.

§233 *(Consulenza tecnica fuori dei casi di perizia)*
Quando non è stata disposta perizia, ciascuna parte può nominare, in numero non superiore a due, propri consulenti tecnici. Questi possono esporre al giudice il proprio parere, anche presentando memorie a norma dell'articolo 121.
1-bis. Il giudice, a richiesta del difensore, può autorizzare il consulente tecnico di una parte privata ad esaminare le cose sequestrate nel luogo in cui esse si trovano, ad intervenire alle ispezioni, ovvero ad esaminare l'oggetto delle ispezioni alle quali il consulente non è intervenuto. Prima dell'esercizio dell'azione penale l'autorizzazione è disposta dal pubblico ministero a richiesta del difensore. Contro il decreto che respinge la richiesta il difensore può proporre opposizione al giudice, che provvede nelle forme di cui all'articolo 127.
1-ter. L'autorità giudiziaria impartisce le prescrizioni necessarie per la conservazione dello stato originario delle cose e dei luoghi e per il rispetto delle persone.
Qualora, successivamente alla nomina del consulente tecnico, sia disposta perizia, ai consulenti tecnici già nominati sono riconosciuti i diritti e le facoltà previsti dall'articolo 230, salvo il limite previsto dall'articolo 225 comma 1.
Si applica la disposizione dell'articolo 225 comma 3.

Disposizioni di attuazione del codice di procedura penale
(Enactment provisions of the Code of criminal proceedings)

§67 *(Albo dei periti presso il tribunale)*
Presso ogni tribunale è istituito un Albo dei periti (221 c.p.p.), diviso in categorie.
Nell'Albo sono sempre previste le categorie di esperti in medicina legale, psichiatria, contabilità, ingegneria e relative specialità, infortunistica del traffico e della circolazione stradale, balistica, chimica, analisi e comparazione della grafia.
Quando il giudice nomina come perito un esperto non iscritto negli Albi designa, se possibile, una persona che svolge la propria attività professionale presso un ente pubblico.
Nel caso previsto dal comma 3, il giudice indica specificamente nell'ordinanza di nomina le ragioni della scelta.
In ogni caso il giudice evita di designare quale perito le persone che svolgano o abbiano svolto attività di consulenti di parte (225, 233, 359, 360 c.p.p.) in procedimenti collegati a norma dell'art. 371 comma 2 del Codice.

§68 *(Formazione e revisione dell'Albo dei periti)*
L'Albo dei periti previsto dall'art. 67 è tenuto a cura del presidente del tribunale ed è formato da un comitato da lui presieduto e composto dal procuratore della Repubblica presso il medesimo tribunale, dal pretore dirigente, dal procuratore della Repubblica presso la pretura, dal presidente del consiglio dell'ordine forense, dal presidente dell'Ordine o del Collegio a cui appartiene la categorie di esperti per la quale si deve provvedere ovvero da loro delegati.
Il comitato decide su richiesta di iscrizione e di cancellazione dall'Albo.
Il comitato può assumere informazioni e delibera a maggioranza dei voti. In caso di parità di voti, prevale il voto del presidente.
Il comitato provvede ogni due anni alla revisione dell'Albo per cancellare gli iscritti per i quali è venuto meno alcuno dei requisiti previsti dall'art. 69 comma 3 o è sorto un impedimento a esercitare l'ufficio di perito.

§69 *(Requisiti per la iscrizione nell'Albo dei periti)*
Salvo quanto previsto dal comma 3, possono ottenere l'iscrizione nell'Albo le persone fornite di speciale competenza nella materia.
La richiesta di iscrizione, diretta al presidente del tribunale, deve essere accompagnata dall'estratto dell'atto di nascita, dal certificato generale del casellario giudiziale, dal certificato di residenza nella circoscrizione del tribunale e dai titoli e documenti attestanti la speciale competenza del richiedente.
Non possono ottenere l'iscrizione nell'Albo le persone:
a) condannate con sentenza irrevocabile alla pena della reclusione per delitto non colposo, salvo che sia intervenuta riabilitazione (178-181 c.p.);
b) che si trovano in una delle situazioni di incapacità previste dall'art. 222 comma 1 lett. a), b), c) del Codice;
c) cancellate o radiate dal rispettivo Albo professionale a seguito di provvedimento disciplinare definitivo.
La richiesta di iscrizione nell'Albo resta sospesa per il tempo in cui la persona è imputata di delitto non colposo per il quale è consentito l'arresto in flagranza ovvero è sospesa dal relativo Albo professionale.

§70 *(Sanzioni applicabili agli iscritti nell'Albo dei periti)*
Agli iscritti nell'Albo dei periti che non abbiano adempiuto agli obblighi derivanti dal conferimento dell'incarico possono essere applicate, su segnalazione del giudice procedente, le sanzioni dell'avvertimento, della sospensione dall'Albo per un periodo non superiore a un anno o della cancellazione.
È disposta la sospensione dall'Albo nei confronti delle persone che si trovano nelle situazioni previste dall'art. 69 comma 4 per il tempo in cui perdurano le situazioni medesime.
È disposta la cancellazione dall'Albo, anche prima della scadenza del termine stabilito per la revisione degli Albi, nei confronti degli iscritti per i quali è venuto meno alcuno dei requisiti previsti dall'art. 69 comma 3.
Competente a decidere è il comitato previsto dall'art. 68.

§71 *(Procedimento per l'applicazione delle sanzioni)*
Ai fini dell'applicazione delle sanzioni previste dall'art. 70, il presidente del tribunale contesta l'addebito al perito mediante lettera raccomandata con avviso di ricevimento, invitandolo a fornire deduzioni scritte entro il termine di dieci giorni dalla ricezione della raccomandata. Decorso tale termine e assunte se del caso informazioni, il comitato delibera a norma dell'art. 68 comma 3.

§72 (*Reclamo avverso le decisioni del comitato*)
Entro quindici giorni dalla notificazione, contro le decisioni del Comitato può essere proposto reclamo sul quale decide una commissione composta dal presidente della Corte di Appello nel cui distretto ha sede il comitato, dal procuratore generale della Repubblica presso la Corte medesima, dal presidente del Consiglio dell'Ordine forense, dal presidente dell'ordine o del Collegio professionale cui l'interessato appartiene ovvero da loro delegati.
Della Commissione non possono far parte persone che abbiano partecipato alla decisione oggetto del reclamo.
La Commissione decide entro trenta giorni dalla ricezione degli atti.

ADMINISTRATIVE PROCEEDINGS

Art. 35 Statute 80/1998
(as amended by §7 Statute 205/2000)

Il giudice amministrativo, nelle controversie di cui al comma 1, può disporre l'assunzione dei mezzi di prova previsti dal codice di procedura civile, nonché della consulenza tecnica d'ufficio, ….

Translation: *Administrative courts, in the cases under para. 1, may order the collection of evidence in accordance with the provisions of the Code of civil procedure, including the expertise on their own motion…*