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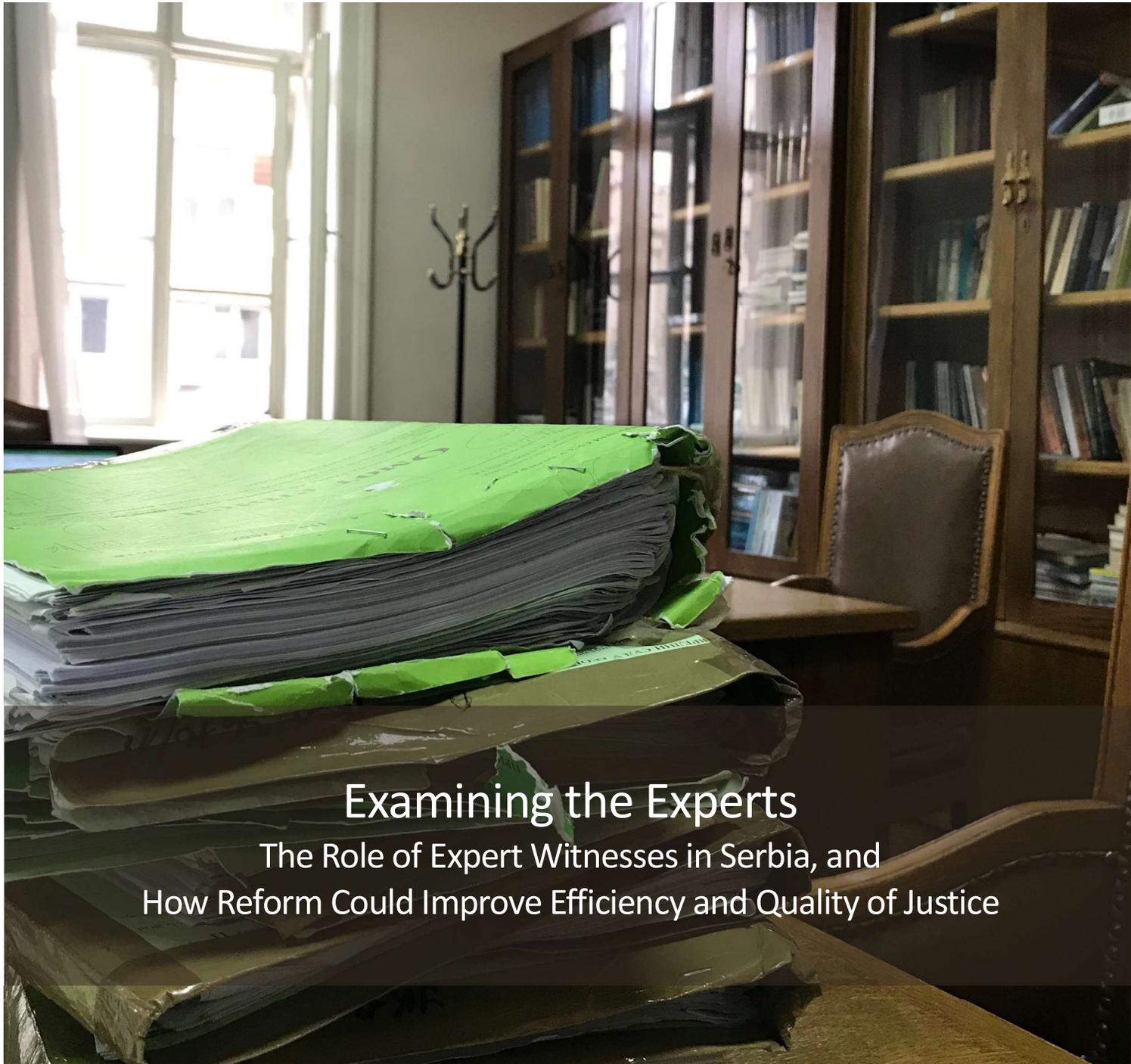
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Examining the Experts

The Role of Expert Witnesses in Serbia, and How Reform Could Improve Efficiency and Quality of Justice

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Methodology

- 1.** The Report sets out findings of a two-stage analytical process undertaken to examine the role of expert witnesses in Serbia.
- 2.** The first stage of the process focused on desk research which included review of documents, laws and regulations available to the public to examine expert witness status and the issues relevant for the project assignment. This stage also included about 20 informal interviews with litigant lawyers, judges and expert witnesses. The purpose of the analysis was to examine how key issues relating to expert witnesses influence the efficiency and quality of trials and what can be done to improve this. The analysis reviewed access to the profession, selection, remuneration, caliber, and training of experts, as well as quality of expertise, sanctions in case of breach of duty and procedural rules which regulate expert witness work during trial. The results were compiled to produce actionable recommendations aimed at increasing the quality and efficacy of trials.
- 3.** The second stage of the process focused on analysis of implementation of legislation in practice. Analysis of the implementation of legislation in practice was conducted for eight courts in Serbia, four Commercial Courts and four Basic Courts. Commercial and Basic Courts visited were located in Belgrade (First Basic Court in Belgrade), Niš, Subotica and Užice. The geographical coverage ensures adequate regional representation, includes small-mid and large cities and represents the territory of each of the four Appellate Court jurisdictions.
- 4.** During the analysis of implementation of legislation in practice, data was collected in two ways. First, based on questionnaires developed by the World Bank and filled in by the courts. The data included statistics at the level of the entire court on the number of cases where expert witnesses were heard, aggregate remuneration values, number of expert witnesses used, etc. The Questionnaire used for this method analysis is annexed as Annex 1 of this Report.¹ Second, through review of a random sample of closed cases in each court. The review was performed by the World Bank team to identify issues which could not be captured by any other methodology. It included collection of statistical data on the duration of expert witness opinion, adjournments for reasons related to expert witness work, etc. Samples of decisional practice of courts were recorded. The Questionnaires used for this method of analysis is attached as Annex 2 of this Report. The World Bank team reviewed a total of 445 cases. The random sample was prepared to include different types of court disputes including labor, family, litigious and criminal proceedings in Basic Courts and litigious proceedings and commercial offences in Commercial Courts. Statistical data was collected for the years 2015, 2016 and 2017.

¹ The Questionnaires are available only in Serbian.

Preface

Role of Expert Witnesses

5. Objective fact-finding is the basis of any court process; expert witnesses play a key role when specialized facts need to be established and complex issues analyzed. The European Commission for Efficiency of Justice (CEPEJ) issued the Guidelines on the Role of Court-appointed Experts in Judicial proceedings of Council of Europe's Member States (CEPEJ Guidelines).² The CEPEJ Guidelines provide a set of good practices on expert witness work examining key topics such as: the subject matter of expert opinions, the persons acting as experts, the selection, duties and rights of experts, etc.³

6. Using the analytical framework provided in the CEPEJ Guidelines, this Report aims to identify if and how expert witnesses in Serbia cause contention and frustration of parties and courts. This Report first outlines the existing legal framework governing the work of expert witnesses in Serbia and processes at trial that underpin this type of fact-finding. Then, the Report lists the key issues identified as relevant for Serbia. When using statistics, the Report tries to empirically confirm findings and pin-point the main reasons for existing issues. Finally, the Report outlines recommendations on issues identified relying on the guidance provided in the CEPEJ Guidelines and in the Guide to Good Practices in Civil Judicial Expertise in the European Union (EGLE Guide).

² The CEPEJ Guidelines are available at: https://www.coe.int/t/dghl/cooperation/cepej/textes/Guidelines_en.pdf.

³ The EGLE Guide is available at: <https://experts-institute.eu/wp-content/uploads/2018/03/2016-01-07-eeee-guide-to-good-practices-egle-en-brochure.pdf>. For more on expert witnesses also see: *Civil-law expert reports in the EU: national rules and practices published by the Policy Department: Citizens' Rights and Constitutional Affairs*, European Parliament, available on: [http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/519211/IPOL_IDA\(2015\)519211_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/519211/IPOL_IDA(2015)519211_EN.pdf), and the *CEPEJ Study on the role of experts in judicial systems of the Council of Europe Member States*, available at: https://static1.squarespace.com/static/534f89eee4b0aedbe40ae270/t/558a6d15e4b0dfba0a2afcc8/1435135253774/3rev_2014_CEPEJ-GT-QUAL_RoleExperts_en.pdf.

Executive Summary

Key Issues Identified

7. Experienced expert witnesses are repeatedly engaged by courts and are overburdened with work. Because of this heavy workload they delay submission of their opinions and cause trial delays.

8. New and less experienced expert witnesses have no training in trial requirements, so the opinions they produce are of lower quality and judges avoid engaging them. As they do not have a chance to appear in trials, they do not have the opportunity to learn from experience and are in a vicious circle of being seldom, if ever, engaged.

9. Courts are overburdened with cases where the state as a defendant is inert, fails to supply evidence or build a formidable defense. To cope with this situation, rather than ruling to the detriment of the state, courts use expert witnesses to do fact-finding as substitute for a defense. In these cases, expert witness work is superfluous. Moreover, **most of these cases should have never reached the court but should have been settled by public defender offices before trial** (e.g. stray dog bite damage claims).

10. There is no training for expert witnesses, no exams for expert witnesses, no duty to continuously update knowledge, all of which adversely affects the quality of expert witness opinions.

11. Appointment into the expert witness profession is disconnected from real needs of the courts, the register of expert witnesses is not regularly updated, and expert witness licenses are not regularly renewed. This causes that on the books there is an oversupply of experts, but, **in practice, there is a serious shortage of high quality expertise needed for trials.**

12. Collected statistical data could not confirm the perception that expert witness opinions are used too often. Looking at the use of expert witnesses in civil and commercial litigation cases, criminal cases and commercial offences, expert witnesses appear in average in only about 13.5% of all such cases.

13. Judges are not using the available tools set out in laws to manage expert witness work and keep trial schedules on track. Adjournments and slippages of trial schedules because of expert witness or party delays are common. Namely, **on average, there is a deadline breach by an expert witness in every other case reviewed.**

14. Judges are reluctant to sanction experienced expert witnesses with whom they work regularly. Also, the Ministry of Justice (MOJ) is not in touch with the work of expert witnesses and, in practice, does not revoke expert witnesses' license on grounds of unethical, incompetent or inadequate work. Tools which would ensure expert witness accountability exist only on paper but are not applied in practice.

15. Judges often give unclear instructions for the development of the expert witness opinion. These **instructions are often too wide or not precise enough**. Judges do not have adequate capacity to review expert opinions received.

16. Existing rules on reimbursement of expert witnesses are not applied in practice. Reimbursement depends on what the judge deems would be most appropriate to pay for an expert witness opinion.

Recommended priority actions:

Introducing Training to Improve Quality of Expert Witness Work and Efficiency of Trial

17. Set up training for expert witnesses. Training for expert witnesses should include training on trial requirements and training on methodology for providing an expert witness opinion to the court. Training should be carried out by the Judicial Academy (JA). Expert witnesses should be obligated to take exams and continuously update their knowledge. By providing training and improving the quality of the work of all expert witnesses experienced experts would no longer hold a competitive advantage over other less engaged ones.

18. Allow experts to take on expert associates and then sanction frequently engaged experts for breaches of deadlines. The role of expert associates in the trial phase should be defined in laws, which would provide an opportunity for frequently used expert witnesses to have qualified support staff. This would, in the long term, bring a new qualified cadre into the expert witness profession. Once frequently used expert witnesses have adequate assistance in office, being overburdened with cases should no longer be a valid justification for delays and imposing sanctions on such expert witnesses would be warranted.

19. Improve training of judges. Judges should be trained to review commonly used expert witness opinions and to better instruct and coordinate the work of experts in trial. Training of judges should be carried out by the JA using the methods complementary to those used for training of expert witnesses.

Activity & Authority Responsible for Implementation:

Ministry of Justice

Draft amendments of the LEW which would introduce:

- Mandatory training for expert witnesses prior to entry into the profession;
- Mandatory exams for expert witnesses for entry into the profession;
- Mandatory continuous training of expert witnesses;
- Institutionalize the expert witness trainees, interns and associates and define their rights and duties in and out of trial.

Judicial Academy

- Organize trainings for expert witnesses, judges and prosecutors.

Eradicating Superfluous Expertise to Increase Efficiency of Trials

20. Settlement commissions should be set up in state institutions, funds, state-owned enterprises (SOEs) and other state entities and be the first stop for all claims with the same subject matter filed against the state. Courts should receive only cases where judicial scrutiny brings added value and is justified in cost. **Settlement commissions' and public defenders' work should be tightly monitored.**

21. Through decisional practice, higher instance courts should support the first instance courts in using the burden of proof rules and deciding to the detriment of the party who has failed to supply evidence (be it a state defendant or not). **Expert witnesses should not be called where superfluous.** Procedural laws should limit the number of expert witnesses which could be used in trial to examine a specific issue.

Activity & Authority Responsible for Implementation:

Higher Instance Courts

- Developing a decisional practice which would support first instance courts when dismissing superfluous expertise.

Supreme Cassation Court

- Consider adopting an interpretative opinion which would provide clarity on when using expert witness statements as evidence is appropriate and when they should be dismissed.

Ministry of Justice

- Working with other state bodies, particularly: (i) Ministry of Economy – Sector for Oversight of the Work of State Owned Companies; (ii) Local Municipalities (e.g. the Union of Cities and Municipalities) (iii) Public Defenders; to set up settlement commissions to proactively seek settlement and to actively would monitor success rates of public defenders/state attorneys at trial;
- Develop amendments to the CPC and CrPC to limit the number of expert witnesses which could be used in trial to examine a specific issue.

Connecting the Real Needs for Expertise with Available Supply of Experts

22. The Law on Expert Witnesses (LEW) should be amended to connect the needs with the existing supply of expertise. The register of expert witnesses should be updated on a regular basis, expert witness licenses should be renewed, courts should have more authority in deciding on expert witness appointment into the profession and on expert witness revocation.

23. Clear rules on the method by which expert witnesses are selected in trials by PPOs should be set out.

Activity & Authority Responsible for Implementation:

Ministry of Justice

Draft amendments to the LEW which would introduce:

- Regular calls into the expert witness profession;
- Regular update of the list of expert witnesses (e.g. renewal of the licence);
- Require that calls into the profession be organised by request of Higher Courts.

Public Prosecutors Offices

- Rendering rules which would define the method of selection of expert witness for a case;
- Rendering bylaws which would require the case files in criminal pre-investigation proceeding to be kept orderly.

Strengthening Accountability of Expert Witnesses

24. Courts should do more to manage expert witness work. Some simple trial management techniques and tools should be used to improve efficiency of trials and strengthen accountability of expert witnesses, such as (i) setting out the exact date when the expert witness opinion should be received; (ii) frequent review of the case files outside of hearings to keep track of all required activities; (iii) monitoring of adherence to deadlines and justifications for breaches; (iv) schedule of hearings to allow enough time between hearings; and (v) provide only selected (electronic) copies of document case files to expert witnesses.

25. Courts and parties should be vested with more authority to monitor and sanction the work of expert witnesses. Courts should be vested with a power to conduct proceedings against expert witnesses and even revoke their license. Parties under the LEW should have clear rights to report wrongdoing of expert witnesses to all relevant authorities.

Activity & Authority Responsible for Implementation:

Ministry of Justice

Draft amendments to the LEW which would introduce:

- Court competence to conduct proceedings against an expert witness and even revoke licenses;
- Set out rights and processes in which parties can report wrongdoing of expert witnesses to all relevant authorities;
- Clarify the rights and processes for damage claim lawsuits against expert witnesses.

Judicial Academy

- Include good trial management techniques into the curriculum for training of judges and prosecutors.

Courts (Court Presidents)

- Organise the work of court clerks to allow submission of only (electronic) copies of documentation to expert witnesses;
- Organise the court staff to monitor cases out of hearings and signal delays to judges.

26. Payment for expert witness work should be ordered soon after the expert witness provides the opinion. Given that upon completion of the opinion money is already available in court deposit accounts, there is no reason to delay the payment of expert witnesses for their opinion. Judges and parties should ask in advance for an estimated value of fees and costs for the engagement of the expert witness and resolve any issues ahead of receipt of the opinion.

Activity & Authority Responsible for Implementation:

Ministry of Justice

Revise the Rulebook on Reimbursement of Court Expenses to explain in detail:

- Exact deadlines and timing for payment of expert witnesses;
- Define the processes for submission of the invoice/statement of expenses and fees;
- Define criteria under which judges review expert witness invoice/statement of expenses and fees.
- Define the right and processes for a complaint to the awarded expenses and fees.

Legal Framework and Trial Requirements

27. The Government of Serbia recognizes the importance of expert witnesses and the judicial reform strategy aims to improve training, expertise and accountability of expert witnesses. The National Strategy for Judicial Reform for the period 2013-2018 (Strategy), which is further worked through the Action Plan for Implementation of the National Strategy for Judicial Reform for the period 2013-2018 (Action Plan) as strategic goals and directions, sets out that the LEW should be amended to include new criteria for the appointment of expert witnesses. The amendments should improve professionalism, expertise and liability of expert witnesses. Also, the Strategy and the Action Plan envisage implementation of transparent mechanisms to strengthen training and improve expertise and accountability of expert witnesses.⁴

28. The LEW regulates expert witness statutory matters including the appointment process, revocation of status, and rights and duties of expert witnesses:

- Appointment:** The LEW provides that the MOJ appoints expert witnesses and registers them at the Register of Experts Witnesses.⁵ The appointment process includes the following steps: (i) first instance courts supply the MOJ with information on whether there is a need for expert witnesses; (ii) when the MOJ determines that there is a need for expert witnesses for a specific field of

⁴ Strategy is available at: <https://www.mpravde.gov.rs/files/Nacionalna-Strategija-reforme-pravosudja-za-period-2013.-2018.-godine.pdf>. Action Plan is available at: <https://www.mpravde.gov.rs/tekst/2963/akcioni-plan-za-sprovodjenje-strategije.php>.

⁵ The LEW is available only in Serbian, please see: https://www.paragraf.rs/propisi/zakon_o_sudskim_vestacima.html. For the competences of the MOJ for appointment and registration of expert witnesses please see Articles 4 and 16 of the LEW.

expertise, the MOJ then publishes a call for appointment.⁶ To be appointed, experts need to have at least five years of work experience and a post-undergrad degree.⁷ No special exams are organized for appointment.

- b. **Revocation:** The expert witness status could be revoked upon the court's or parties' request made to the MOJ. The MOJ could revoke expert witness status, among other things, if the expert witness is performing duties in an unethical, incompetent or inadequate manner.⁸ An expert witness is unethical and incompetent if it refuses to provide expertise, does not appear when summoned or breaches deadlines. An expert witness is unprofessional if it provides incomplete, unclear, contradictory or wrong opinions.⁹
- c. **Rights and duties:** Expert witnesses could be both legal and natural persons. Expert witnesses have the right to reimbursement of fees and expenses, and an obligation to provide quality expertise and adhere to deadlines and confidentiality rules.¹⁰

The LEW does not set up continuous or other training for expert witnesses nor does it set up a chamber or other association which would be a focal point for the work of expert witnesses.

29. The role of expert witnesses during trial is regulated by the Civil Procedure Code (CPC) and the Criminal Procedure Code (CrPC).¹¹ Key rules defining the role of expert witnesses in trial include:

- a. **Engagement of expert witnesses in trial and their selection:** Under the CPC parties may request an expert witness opinion as evidence in trial. Parties propose the expert witness' name and the subject of opinion. Courts decide on the proposals. This approach is somewhat different from what is set out in the CrPC, which provides for the right of the court or public prosecutor (PPO) to unilaterally and without party request decide on the appointment of expert witnesses.¹² Under both the CPC and the CrPC, expert witnesses are selected from a list of court certified experts. Only exceptionally could they be selected outside of this list.
- b. **Number of expert witnesses:** The CPC and the CrPC stipulate that as a general rule, one expert should be engaged. Still, in complex issues, two or more could be called for. There is no limit on the number of expert witnesses which could appear in a case.¹³
- c. **Adherence to trial schedules:** Under the CrPC, expert witnesses could be fined by courts if they do not appear as summoned or if they, without a justified

⁶ Article 11 of the LEW. Also see: <https://www.mpravde.gov.rs/obavestjenje/4906/javni-poziv-za-imenovanje-sudskih-vestaka.php>.

⁷ Article 6 of the LEW. Please note that other qualification criteria include fulfillment of general requirements for work in a state institution, professional knowledge and practical skills in certain field of expertise and ethics for performing activities of expert witnesses. Exceptionally, individuals may be appointed as expert witness only with a higher education if there are not enough expert witnesses for certain fields of expertise.

⁸ Article 18 of the LEW.

⁹ Article 19 of the LEW.

¹⁰ Part V of the LEW.

¹¹ The CrPC is available at: <https://www.mpravde.gov.rs/files/Criminal%20Procedure%20Code%20-%202012.pdf>, while for the CPC (available only in Serbian) please see: https://www.paragraf.rs/propisi/zakon_o_parnicnom_postupku.html.

¹² Based on Article 262 of the CPC, court may decide to undertake expert witness opinion *ex officio* if this is set out under specific laws. Also see Article 117 of the CrLC.

¹³ Article 264 of the CPC; Article 114 of the CrPC.

reason, decline to provide their opinion. Similar rules exist in the CPC. Only on party request does the court has the right to order the expert witness to cover expenses caused by him/her not appearing in court or not providing the opinion.¹⁴

- d. **Deadlines for providing the opinion:** In civil procedure, deadlines for providing the opinion cannot be longer than 60 days while the opinion has to be submitted 15 days before the hearing and forwarded to parties eight days before the hearing. The CrPC does not set out any deadline for expert witness work, still the CrPC indicates that a court order requesting an expert witness opinion has to set out a deadline.¹⁵
- e. **Review of submitted opinions and conflict of interests:** In both civil and criminal procedure, expert witness opinions are reviewed by parties and comments are provided. Standard rules on conflict of interests are in place.
- f. **Reimbursement:** Expert witness fees are paid out of court deposit based on advance payments made by parties. In civil procedure, the court can even decide without an expert witness opinion if the advance is not paid.

30. The Rulebook on Reimbursement of Court Expenses regulates reimbursement of fees and expenses of expert witnesses (Rulebook on Reimbursement of EW).¹⁶ The Rulebook on Reimbursement of EW sets out which expenses could be reimbursed to expert witnesses and includes rules on how to calculate expert witness fees. Expert witnesses' fees are calculated per hour - an hour is valued the same as an hour of a person whose salary is twice the average salary in Serbia.

31. Several activities need to be sequenced in trial to request and review the expert witness opinion. The graph below shows sequencing of trial activities under the CPC. The graph assumes usual court practices and usual circumstances of the case. Additional activities may occur between certain steps, several opposing requests for an opinion could be filed, the

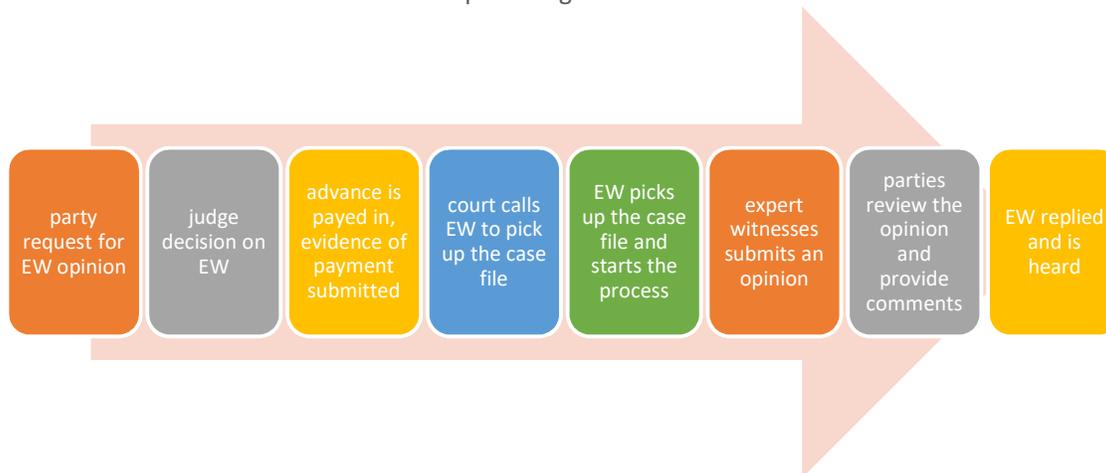
¹⁴ Article 267 of the CPC; Article 115 of the CrPC.

¹⁵ Articles 269 and 270 of the CPC; Article 118 of the CrPC.

¹⁶ The Rulebook is available only in Serbian: https://aks.org.rs/aks/wp-content/uploads/2016/02/pravilnik_o_naknadi_troskova_u_sudskom_postupku.doc.

expert witness could decline to provide the opinion, multiple comments to the opinion could be provided and several hearings could be scheduled or adjourned or other.

Box 1 – Sequencing of Trial Processes



Role of Expert Witnesses in Court Proceedings in Serbia - Key Issues Identified

32. Systemizing the findings of the analysis of implementation of legislation in practice and of the desk review, this Report examines expert witness work in Serbia as per the following thematic areas: (i) scope and need for expert witness opinion, (ii) persons who act as experts, (iii) selection of expert witnesses, (iv) quality of expertise, (v) timing and management of expert witness work in trial, (vi) remuneration of expert witnesses, (vii) possibilities to sanction expert witnesses. The framework is guided by the topics analyzed under the CEPEJ Guidelines and the World Bank Comparative Study on Expert Witnesses in Court Proceedings¹⁷ and adjusted to address issues as relevant for Serbia.

Scope and Need for an Expert Witness Opinion

No Opinion on Law

33. Courts in Serbia often request the expert witnesses to opine on questions of law. Both the CPC and the CrPC clearly set out that an expert witness should be hired only to establish matters of fact.¹⁸ This is in line with internationally recognized guides on expert witness engagement.¹⁹ Based on information provided by judges and expert witnesses, it seems that judges in Serbia often rely on expert witnesses to provide guidance on matters of law. For example, frequently, expert witnesses opine on whether there is a legal basis for a claim or whether maturity of debt has occurred.

¹⁷ Comparative Study on Expert Witnesses in Court Proceedings, World Bank June 30, 2010

¹⁸ Article 259 of the CPC; Article 113 of the CrPC.

¹⁹ Please see the CEPEJ Guidelines para 18 and the EGLE Guide para 2.2.

Box 2 – Example of a Court Instruction Given to an Expert Witness

The court orders the expert witness to opine on **whether the applicable laws require construction workers to adhere to the occupational safety rules.**

In criminal case before a Basic Courts, the court has ordered an expert witness - a construction engineer - to determine whether, based on evidence in the case files, the (i) bundling slab was positioned adequately and in compliance with all relevant regulation and (ii) ***whether the construction workers were required by law to adhere to the occupational safety rules.***

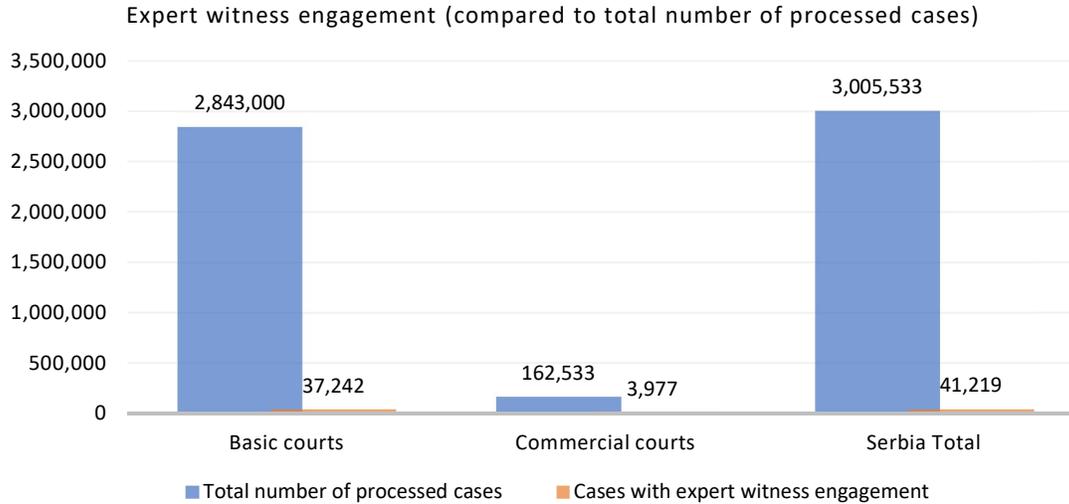
When should the expert witness opinion be requested?

34. There is a wide perception that expert witnesses are used more often than needed and that courts overly rely on them. The CPC and CrPC state that experts should be engaged only in cases when the court does not possess the needed expert knowledge.²⁰ Still, it seems that courts rely on expert witnesses' opinion even in cases when it adds little value to the case. The Multi-Donor Trust Fund for Justice Sector Support in Serbia (MTDF) Report - Serbia Judicial Functional Review (Functional Review) reports that judges excessively rely on expert witnesses. According to the MTDF Functional Review there is a fear among judges that the Appellate Courts will not support a judge's decision when not based on expert witness opinion.²¹ The same was also stated by litigant lawyers and first instance court judges during informant interviews.

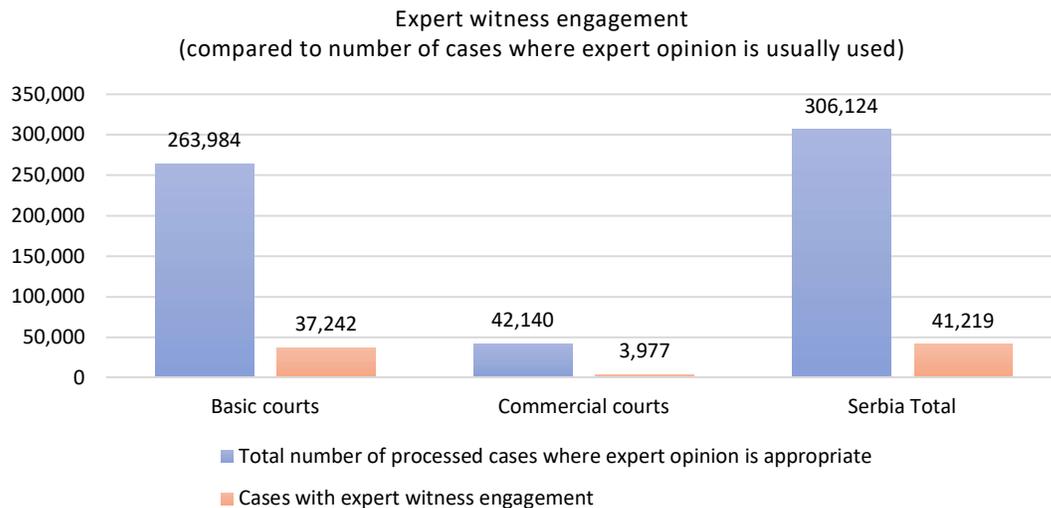
35. Collected statistical data could not, however, confirm the perception that expert witness opinion is used too often. According to collected data, expert witness opinion was used in 41,219 cases in eight observed Basic and Commercial Courts in Serbia in 2015 and 2016, which is on average only 1.4% of total number of cases in these courts.

²⁰ Article 259 of the CPC, Article 113 of the CrPC.

²¹ See p. 111 of the MTDF Functional Review. MTDF Functional Review is available at: <http://www.vk.sud.rs/sites/default/files/attachments/Serbia%20Judicial%20Functional%20Review-Full%20Report.pdf>.

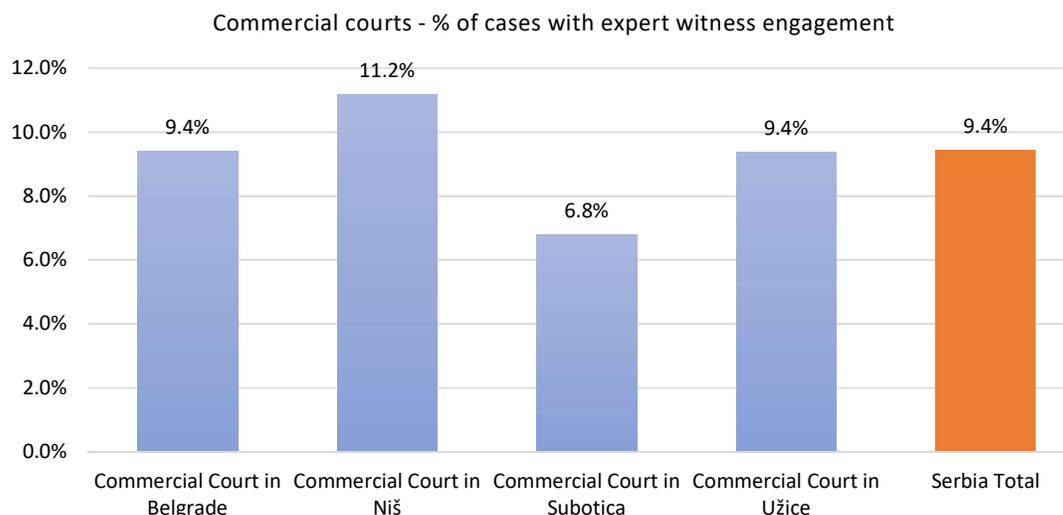
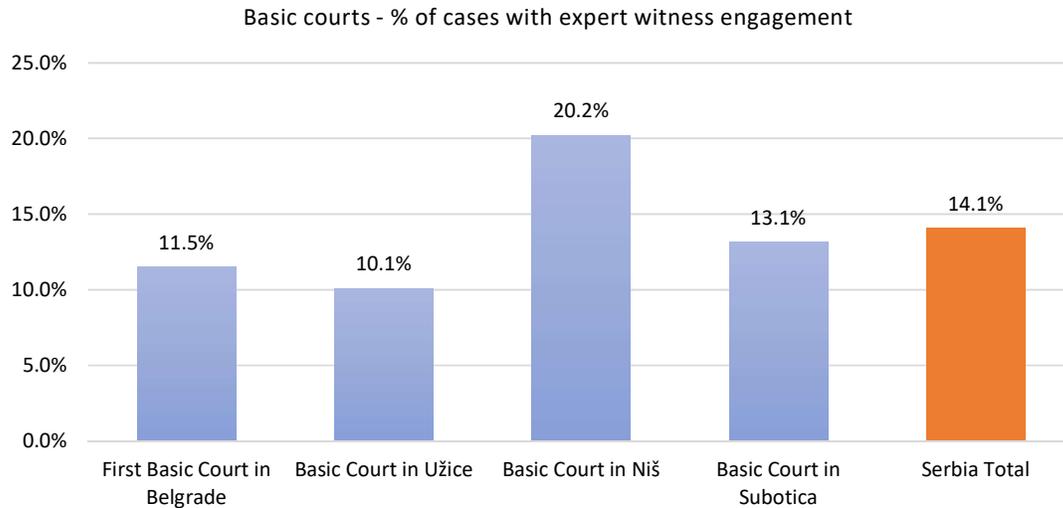


36. Looking at the use of expert witnesses in civil and commercial litigation cases, criminal cases and commercial offences,²² the expert witnesses appear in average in only about 13.5% of all such cases. Naturally, for some case types expert witness opinion is not used (e.g. for most types of enforcement proceedings), thus, the frequency of expert witness engagement in types of cases where their engagement is appropriate was analyzed. Specifically, if one compares: (i) the number of cases where an expert witness was engaged, with (ii) the number of litigant, labor, family and criminal cases in Basic Courts and litigant and commercial offence cases in Commercial Courts; the statistics shows that expert witnesses were engaged **on average in 13.5% of all such cases**. Please find the statistical overview below.



If we look separately at Basic and Commercial Courts, the findings are the following:

²² These are the case types that expert witnesses are more commonly used.



While in Basic Courts engagement varies from 10.1% in Užice to 20.2% in Niš, in Commercial Courts it varies from 6.8% in Subotica to 11.2% in Niš.²³ Use of expert witness opinion is more frequent before Basic Courts than before Commercial Courts.

37. Perception that expert witness opinion is used too often might be caused by overreliance on expert witnesses in so-called “template” cases. Colloquially named by courts as “template cases” (serb. *tipski predmeti*) are cases where different parties have very similar or identical claims and where defendants are usually the state, municipality, SOEs, a state pension or a health fund. The typical *template cases* are: damage claims for a stray dog bite, labor disputes on owed sums for working in shifts or at night (particularly against State Railway), compensation of daycare fees (against the municipal governments), disputes over pension amounts, etc. There seems to be a vast number of such cases and almost for all *template cases* expert witnesses are regulatory called. But, for these cases expert witness

²³ No explanation of the extensive use of expert witnesses in Niš could be provided.

opinions are superfluous for two reasons. First, these cases should not be in court. They should be settled out of court, but public defenders lack the interest or capacity to attempt their settlement. These cases are trialed even if losing the case is inevitable and brings high trial costs for the state and the courts. Second, expert witness statements are in these cases used as substitute for evidence the defense public defenders fail to provide. Namely, lacking a defense, judges call expert witnesses to conduct fact-finding rather than using the burden of proof rules to the detriment of the party who has failed to supply adequate evidence.²⁴

²⁴ For example, the EGLE Guide in para 6.1 clearly states that *“the Expert and the judge will need to ensure that the cost of the expertise remains proportionate to the value of the case.”*

Box 3 – Example of a “Template Case”

Template case – stray dog bite

To resolve a damage claim for a stray dog bite filed against a local city government, a court needs to schedule at least four hearings and call two expert witnesses. One expert witness should be a doctor that would assess the degree of physical injury. The other expert witness is a psychiatrist that will determine the emotional suffering and fear at the time of the bite. These two experts are needed to evaluate the total value of the damage claim.

Adjudication is expected within two years. Wining the case against the municipal government is almost certain. Awarded damages are usually not more than RSD 100,000 (approx. EUR 850). Total trial costs are higher or at best close to the value of damages awarded. The municipal government is ordered to pay all trial costs.

Persons Acting as Experts

Natural Persons vs Individuals as Expert Witnesses

38. The LEW provides that natural and legal persons can be expert witnesses, yet natural persons are more often used as expert witness. The MOJ maintains registers of both natural and legal persons as expert witnesses. The LEW provides the opportunity for a legal entity to be an expert witness as long as it has registered expert witnesses as employees. Still, statistics show that in practice very few legal persons are called to be expert witnesses. This is particularly the case in Basic Courts where the top 10 most frequently engaged expert witnesses are all individuals, while in Commercial Courts over 68% of the top 10 most frequently engaged expert witnesses are individuals.



39. Individual expert witnesses do not hire support staff. The CEPEJ Guidelines provide that expert witnesses should have the right to hire support staff,²⁵ yet the LEW is silent on

²⁵ The CEPEJ Guidelines para 25.

this and existing practice seems to be that expert witnesses work alone. Informant interviews with expert witnesses indicate that it is not common for expert witnesses to hire support staff, even in cases when they, as natural persons, establish sole entrepreneur shops. They seem to be reluctant given that neither the LEW nor the CPC or CrPC give any guidance on the role or rights of expert witness support staff. It should be noted that (as it will be further explained below) many of the expert witnesses are individuals which have been overburdened with work and that would benefit from more support staff.

Available Expertise

40. Judges report shortages of high quality experts and, particularly, shortages of experts of particular expertise. Some regions and courts do not have adequate supply of expertise. For example, judges of the Basic Court in Subotica in the territory this court services note a lack of good experts in a number of expert fields. Because of this, experts are often called from Novi Sad. Given the high travel costs of experts in some regions, parties are reluctant to use them which causes contention in trial and frustrates all parties involved. Expert witnesses from Belgrade also report having to travel to service the needs of courts across the country. Also, available graphology expertise is lacking in Serbia and different professions seem to supply it.

Box 4 – Shortage of Expertise

One of the observed Commercial Court has no Information Technology Experts

In one case before the Commercial Court, the claimant has objected to the person proposed as an expert witness by the defendant and has requested the court to select another expert. The court has determined that there are no information technology experts registered for the territory of the Higher Court²⁶ and has called an expert from Belgrade to conduct the expertise. The expert witness from Belgrade was to travel for over five hours to attend hearings and pick up/review case files. This led to delays and increased costs of the trial.

Expertise of Expert Witnesses

41. There is no training of expert witnesses, no exams for entry into the profession, and no obligation to regularly update knowledge, all of which causes lack of quality, efficiency and transparency of expert witness work. The LEW sets out qualification criteria for appointment into the profession.²⁷ These criteria should ensure that expert witnesses have adequate knowledge in their field of expertise at the time of admission. Yet, their expertise is in fact not checked nor updated. New experts have no knowledge of trial requirements and no place to learn but through practice. This leads to issues at trial and narrows down the selection pool of expert witnesses engaged by courts. Expert witnesses with knowledge of trial requirements are more frequently engaged and are, therefore, overstretched with work which leads to delays. At the same time, other experts have less opportunity to appear before courts, thus less opportunity to train from experience and are, in a virtuous cycle, seldom, if

²⁶ In the Republic of Serbia expert witnesses are registered for the territories of Higher Courts. The register is available on the MOJ website: <https://www.mpravde.gov.rs/court-experts.php>.

²⁷ Article 6 of the LEW.

ever engaged. In the end, this creates an appearance of lack of transparency in the selection of expert witnesses as some expert witnesses are constantly engaged over others.

Number of Experts Used in Trial

42. Regulatory framework does not cap the number of expert witnesses per case. The CEPEJ Guidelines indicate that hiring too many expert witnesses in a case overburdens the trial and leads to inefficiencies.²⁸ Both the CPC and the CrPC allow the court to call as many expert witnesses as needed in a case.²⁹ In case two expert witnesses have opposing opinions, the court is entitled to ask for validation from a commission of expert witnesses (*serb. supervestačenje*) which analyzes the findings of the opposing experts. Even after such third expertise is conducted, courts are still entitled to call more expert witnesses to analyze the same matter all over again.³⁰

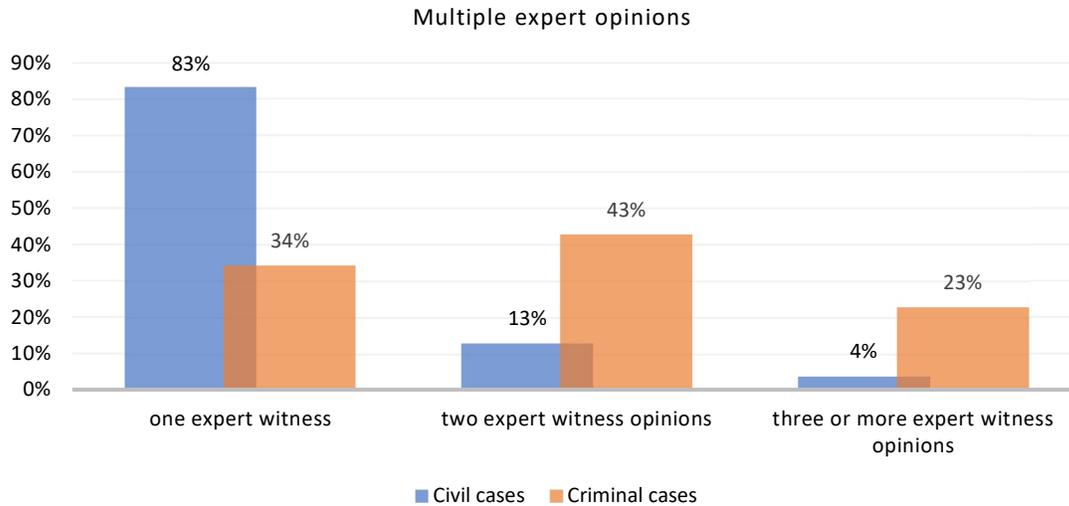
43. According to criminal lawyers, it is very common to have more than one expert witness opinion in a criminal proceeding. Informal interviews with litigant lawyers specializing in criminal cases have revealed that having multiple expert witness opinions is common. If there are issues in the first expert witness' opinion – or even just to check the initial opinion – parties seem to request additional expert witnesses or hire expert advisers. So, having three or more expert witness opinions is a widespread practice for criminal proceeding, which prolongs the process and overburdens the court.

44. Statistical findings did confirm the perception that several expert witnesses are usually hired in a criminal case. The share of civil cases and share of criminal cases reviewed with (i) one, (ii) two, and (ii) three or more expert witness opinions shows that it is more common to have one expert witness in a civil case, while it is more common to have several expert witnesses in a criminal case. Please see the statistics below. Please note that the statistics do not include expertise which was submitted by the parties and not ordered by the court.

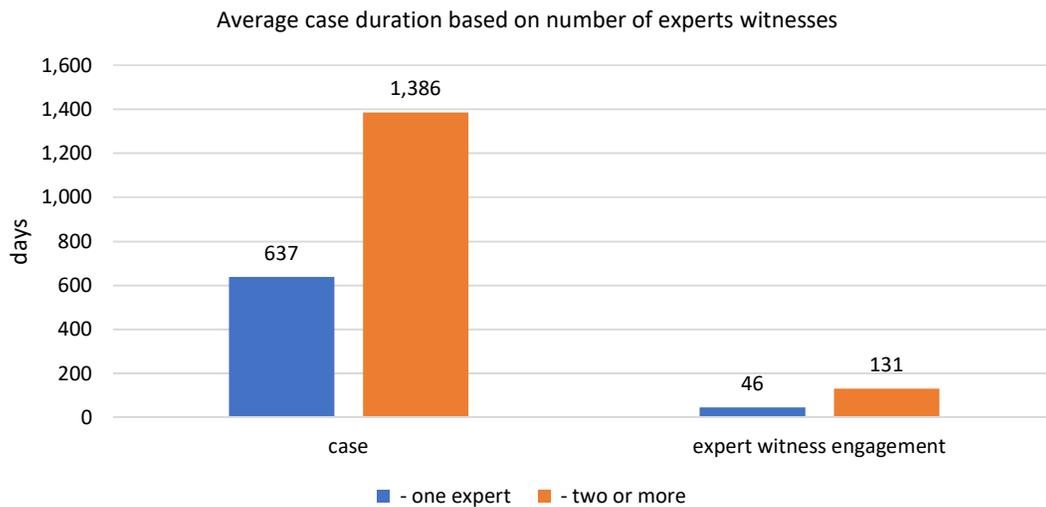
²⁸ The CEPEJ Guidelines report that “*the number of expert appointed should remain manageable and not become too large, to avoid problems with clarity and simplicity. It should be limited to a certain number that depends on the complexity and expediency of the question under examination. This number should be defined by the court or by law.*” For more please see para 28 of the CEPEJ Guidelines.

²⁹ Article 264 of the CPC; Article 114 of the CrLC.

³⁰ Article 271 of the CPC; Article 124 of the CrLC.



45. Having many experts in a case impacts the trial duration. Statistics show that having multiple expert witnesses engaged in the same case burdens the trial and that these cases are processed for a longer period of time. Please see below for the average duration of cases with one and with two or more expert witnesses.



46. The introduction of expert consultants into procedural laws seems not to have increased efficiency as intended but has improved quality of expert witness work. The CrPC amendments of 2011 which came into force in 2013 allow for a party to file an expert advisor’s/consultant’s opinion during trial. According to judges and expert witnesses, this option did not lead to increased trial efficiency. To the contrary, this usually slows down the case processing as opposing parties then submit their own expertise and expert witnesses are also called to reconcile the findings of consultants. Yet, expert witnesses claim that this has increased the quality of their work as in such cases they feel the pressure of the additional review of their expertise by the opposing party consultant.

Selection of Expert Witnesses

Appointment into the Profession

47. The LEW system for appointment of expert witnesses into the profession seems to be creating skills shortages. The LEW rules on appointment into the profession set out that first instance courts supply the MOJ with information on whether there is a need for expert witnesses of a specific expertise. Yet, the MOJ is not bound by the information provided by courts. The MOJ, at its own discretion, publishes a call for appointment of expert witnesses for a specific field of expertise.³¹ This mechanism disconnects the needs for expert witnesses as determined by courts from the supply of experts as allowed by the MOJ. This approach is also not in line with the CEPEJ Guidelines.³²

48. The LEW does not allow for scheduled regular calls for appointment. According to the information available on the MOJ website, the last call into the profession was in 2014³³ and no call has been published since nor is there an open call at the time of writing of this Report. At the same time, courts during the analysis of implementation of legislation in practice have noted the lack of experts in some fields (see para 40).

49. The list of registered expert witnesses is not updated. The LEW does not require regular updates of the register, so there is currently over 6,800 registered expert witnesses in Serbia which is a considerable number. This number may be so because the MOJ is reluctant to admit more experts into the profession. However, many informant interviews with different stakeholders have shown that the list of registered experts is not up to date. Some expert witnesses are active and overburdened while others have left the profession but have failed to deregister themselves. Also, with time, needs for expertise change which is not reflected in the current list of registered experts.

Selection of Expert Witnesses by the Parties and by the Judge in Trial

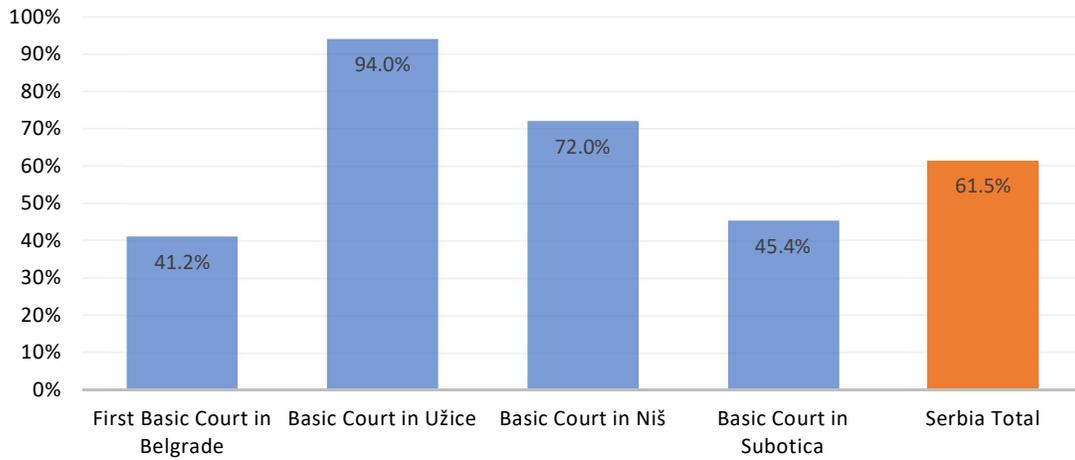
50. Some expert witnesses are much more frequently engaged than others. Informal interviews with expert witnesses, lawyers and judges showed that some expert witnesses are more often engaged by parties and courts than others. This was also confirmed by the statistics collected from courts. Looking at the reviewed Basic Courts, the top 10 most frequently engaged expert witnesses are engaged in **as much as 61.5%** of all cases where an expert witness opinion was used. In smaller courts such as the Basic Court in Užice or Commercial Court in Subotica, the repeated use of the same top 10 most frequently used experts amounts to **94%** of all cases.

³¹ Article 11 of the LEW.

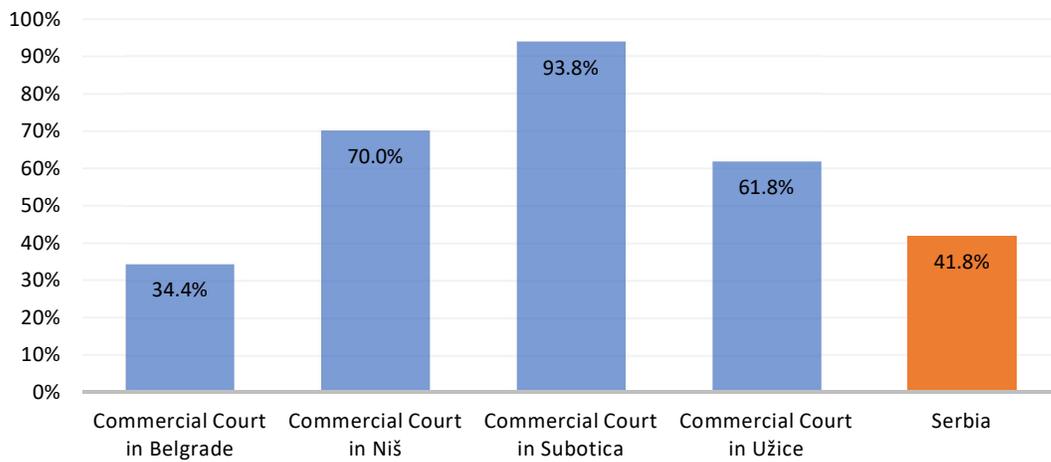
³² Please see the Part 3.2.1 of the CEPEJ Guidelines, please also see the EGLE guide para 3.12.

³³ Please see: <https://www.mpravde.gov.rs/obavestjenje/4906/javni-poziv-za-imenovanje-sudskih-vestaka.php>.

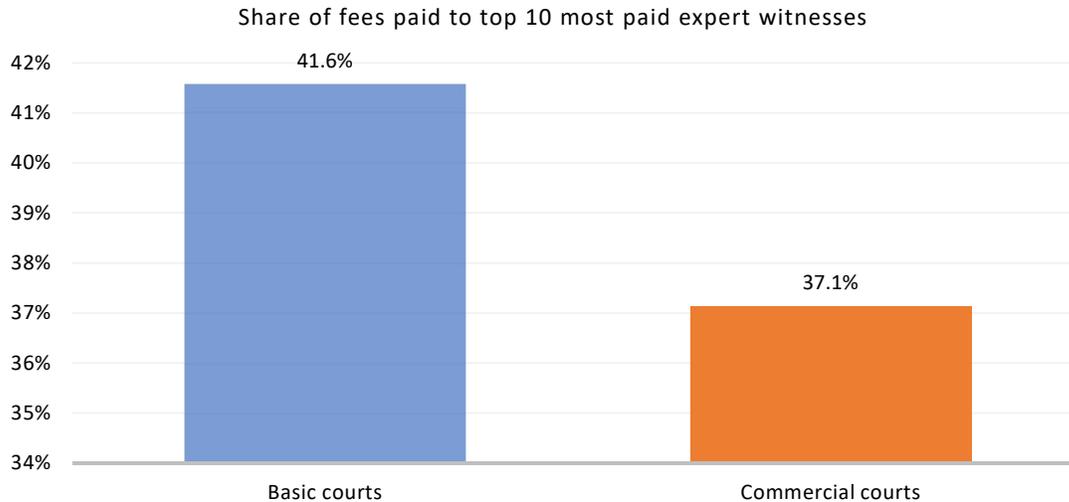
Basic Courts - Engagement of top 10 expert witnesses



Commercial Courts - Engagement of top 10 expert witnesses



Based on fees, the share of payments made to the top 10 most paid expert witnesses also indicates a heavy reliance on some expert witnesses.

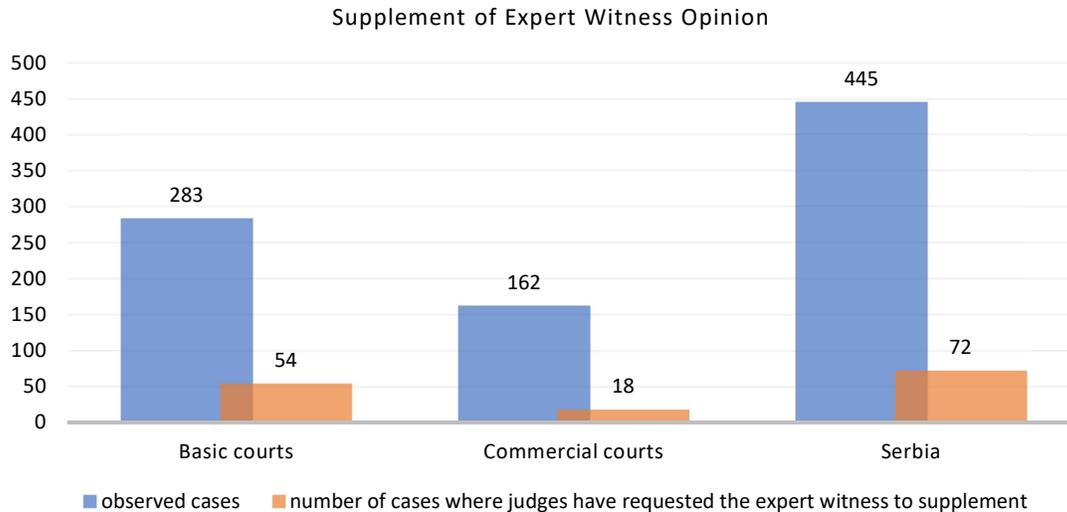


51. Higher quality of work of some expert witnesses leads to their frequent engagement. Rather than poor selection rules or bias towards some expert witnesses, it seems that good quality of work of certain experts is the reason for their repeated selection by courts and parties. Informal interviews with judges, lawyers and expert witnesses show that using an experienced expert witness with good knowledge of trial requirements supports court fact-finding and ensures that awards are not overturned on appeal. Because of this, both courts and parties are reluctant to select expert witnesses which are unknown or inexperienced. Again, as stated above, this practice leads to delays, efficiency and transparency issues.

52. No clear rules are in place for the selection of expert witnesses by PPOs. Criminal lawyers have indicated that there are no transparent rules for the selection of expert witnesses by PPOs in criminal proceedings. Expert witnesses have confirmed this. This is particularly relevant for the pre-investigation stage of criminal proceedings as PPOs are the ones who are vested with powers to call and appoint expert witnesses. The desk review analysis was also unable to identify any rule which would guide the PPOs in the selection of expert witnesses in the pre-investigation stage of criminal proceedings. The analysis of implementation of legislation in practice in courts also noticed that in pre-investigation of criminal proceedings expert witness selection, management and scheduling is not orderly documented and that the processes seem to lack transparency and clarity.

Quality of Expertise and Requirements for the Preparation of the Expert Opinion

53. Expert witness opinions, once prepared, undergo revisions; statistic shows a considerable number of requests for supplements of opinions. In total, judge ordered an expert witness to further supplement an expert opinion in 16% of all observed cases. Supplements of expert witness opinions are more common before Basic Courts than Commercial Courts.



54. Judges often give unclear and even wrong instructions on the content of the expert witness opinion. Judges often give unclear, overly wide or even wrong instructions to expert witnesses or fail to adequately scrutinize the received opinions. There is a widespread practice to request an expert witness to review the entire case files and give opinions on credibility of submitted witness statements.³⁴

Box 5 – Issues with Judges’ Instructions Given to Expert Witnesses

Examples of Inadequate Instructions

- Basic Court – Accountant to establish whether the suspect has sold vehicles

In a criminal case, a judge has ordered an expert witness who is an accountant to evaluate: (i) whether the sale of a vehicles occurred and what were the paid amounts and (ii) what was the total value of tax evasion for the identified sales.

- Commercial Court - Expert witness should determine all relevant facts

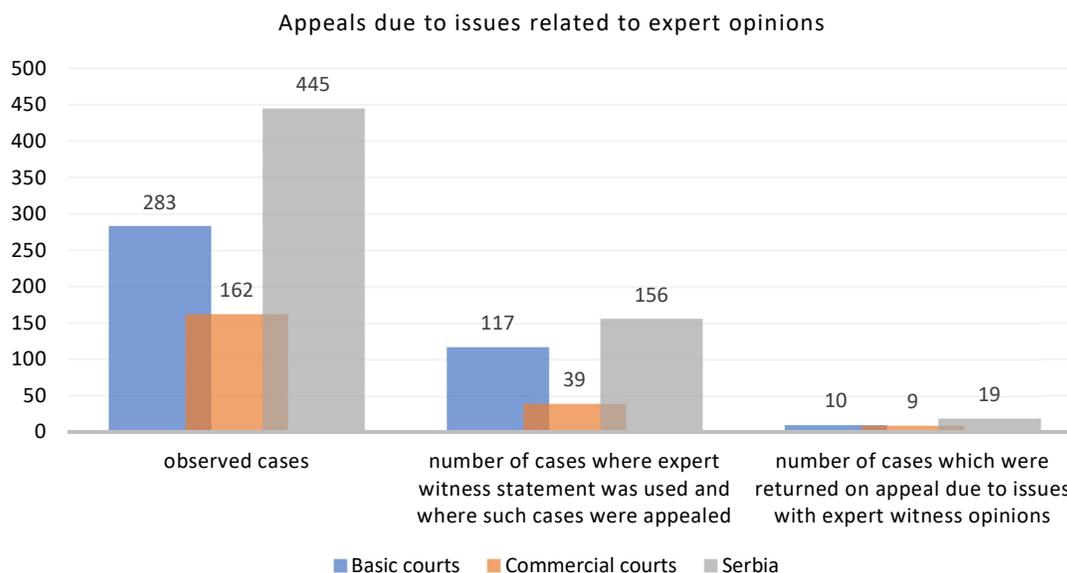
Instruction of the court to the expert witness in a commercial litigation was to determine the value of debt on the day the insolvency procedure was opened and all other facts relevant.

Examples of Lack of Scrutiny of Expert Witness Opinions

In a criminal case related to road safety, the reason for which the award was returned on appeal was deficiencies in the expert witness opinion. Namely, the first instance court did not call a traffic expert but only relied on the expertise provided by a medical doctor. The medical doctor indicated that a severe bodily injury occurred (which was within the scope of its engagement) but also opined on whether the car was speeding.

³⁴ For example, the EGLE Guide notes that “The instructions must be defined as precisely as possible and as tailored as necessary to resolve the dispute.”

55. A considerable number of returns on appeal due to issues with expert witness opinions was identified. Statistics looked at the (i) total number of appealed cases in the reviewed sample (all appeals) and (ii) number of cases where the appeal was successful and case returned because of issues in expert witness opinions. In Basic Courts, 8% of cases appealed were returned due to issues with expert witness opinions (along with other reasons). In Commercial Courts the share was as much as 23% of appealed cases.



56. There seems to be no scrutiny of expert witness opinions, particularly for *template cases* or for cases where the defendant is the state. Public defendants of cities, SOEs or state funds are often not interested nor proactive in reviewing received expert witness opinions. Sometimes the key constraint is that these offices do not have adequate expertise or staff which would be able to review and provide an adequate reply. Expert witnesses indicate that they are aware of this and often do not produce high quality statements meeting all requirements when engaged in template cases or if a defendant is the state.

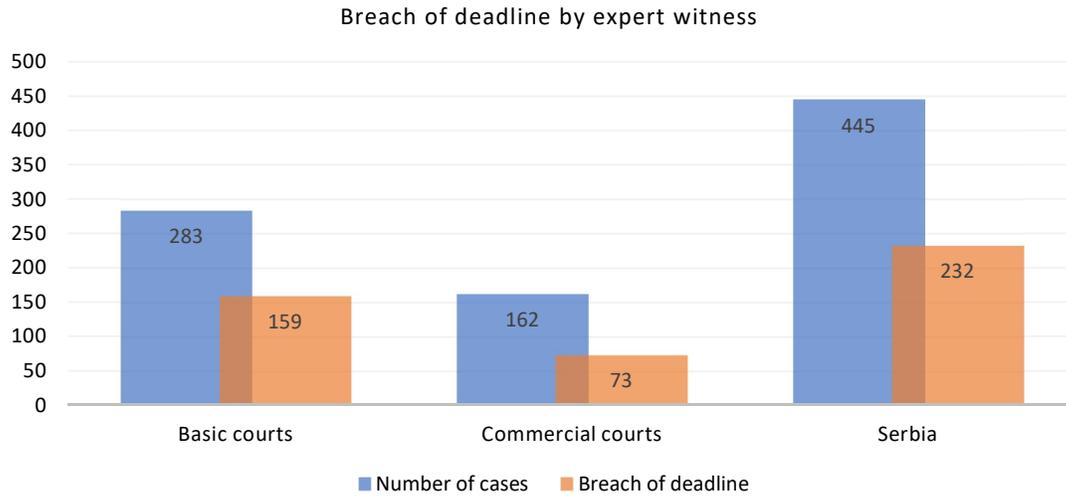
Timing and Management of Expert Witness Work in Trial

Duty to Produce an Expert Witness Opinion on Time

57. Expert witnesses do not fully adhere to trial schedules. The MTD Functional Review indicates that expert witnesses often delay the submission of their opinion, which causes adjournments and delays. Hearings are sometimes cancelled or adjourned because expert witnesses do not appear before the court or for other reasons related to expert witnesses.³⁵ Collected statistics also confirmed this finding. Expert witnesses breached the deadline in 56%

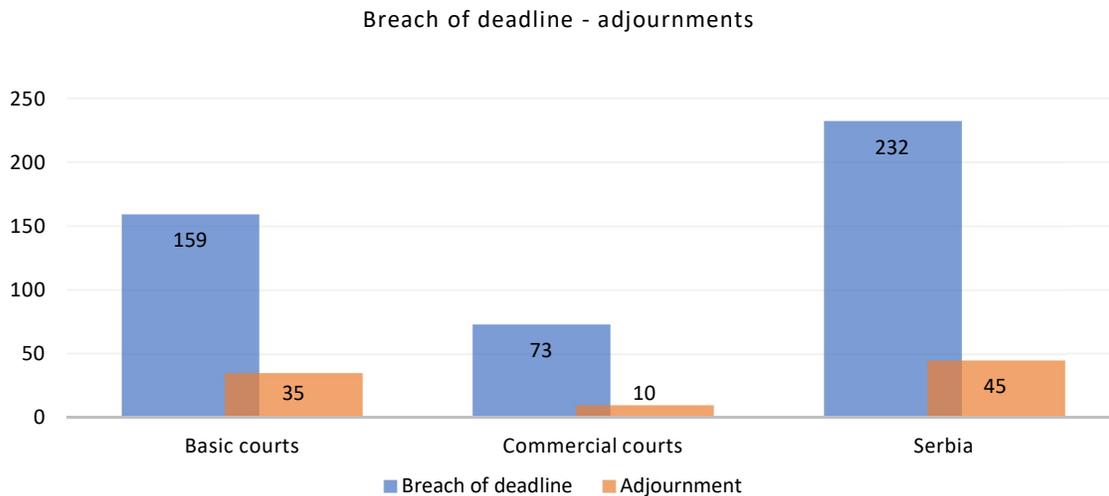
³⁵ See p. 11 of the MTD Functional Review. The same are the findings of the MTD Survey: *Experiences and Perceptions of Justice in Serbia*. Based on this Survey available at: <http://www.mdtfjss.org.rs/archive//file/Experiences%20and%20Perceptions%20of%20Justice%20in%20Serbia%20-%20EN.pdf>, judges, prosecutors and lawyers share opinion that participants in procedure such as witnesses and court experts are often a reason for cancellation of hearings. Please see pg 30.

of all reviewed cases in Basic Courts and in 45% of all reviewed cases in Commercial Courts. **Namely, on average, there was a deadline breach in every other case reviewed.**



58. Frequently used expert witnesses confirm that they delay submission of opinions, justifying this with being overburdened with work. Frequently used expert witnesses have at any given moment 50 or more expert witness engagements. Working alone and having to travel across the country to service the needs of many regions, and often having to appear at hearings multiple times (given frequent hearing adjournments), these experts claim that delays are inevitable. They indicate that the only options available to them are to either delay or refuse cases; the latter, according to them, being “bad for business”.

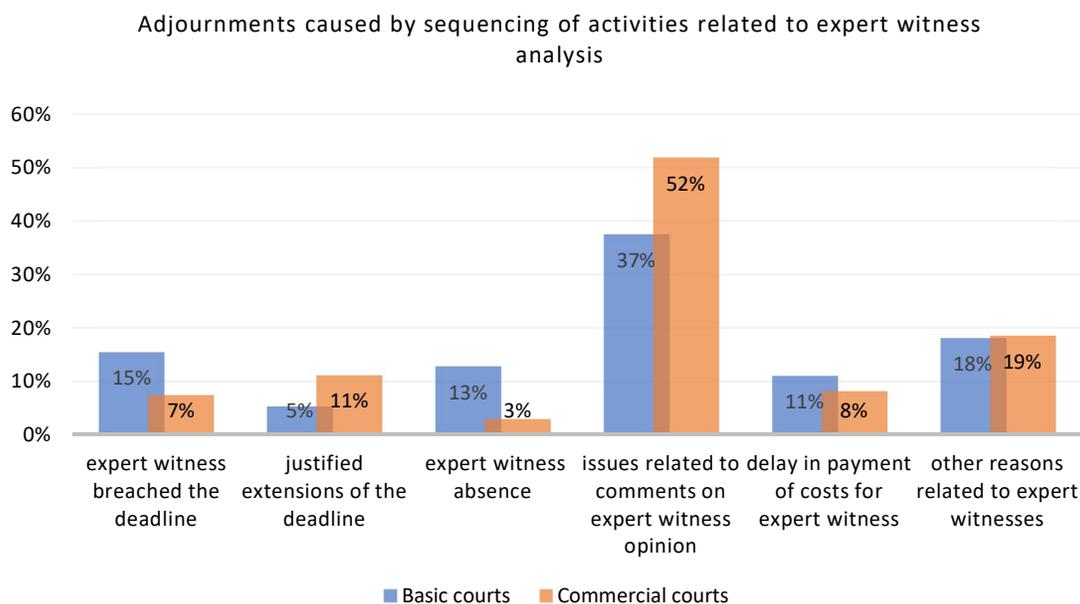
59. Expert witness deadline breaches cause trial adjournments. In 19% of observed cases, deadline breaches caused trial adjournments. Deadline breaches caused adjournments more often in Basic Courts than in Commercial Courts. In selected Basic Courts, 22% of deadline breaches by expert witnesses resulted in adjournment, while in Commercial Courts 14% of cases were adjourned.



Sequencing of Activities Related to Production of Expert Witness Opinions

60. One third of all adjournments is due to poor sequencing of activities related to the production of expert witness opinions. One third of all reasons for adjournment are issues related to management of expert witness work and of sequencing all trial activities depicted in Box 1 of this Report (such as breach of deadlines in submitting the opinion, expert witness absence from hearings, payment of expert witness fees, etc.). Namely, the total number of observed adjournments in the 445 cases reviewed was 1,014. Adjournments caused by issues related to timing of expert witness work amounted to 362 adjournments. Approximately 30% of all adjournments can be attributed to reasons related to managing expert witness work at trial.

61. Both expert witnesses and judges should better manage timing of when parties are given the right to review expert witness opinion. There seems to be a practice that expert witnesses bring their opinion to the hearing rather than preparing the opinion beforehand. This practice is very common even though the CPC clearly indicates that the expert witness opinion should be provided at least 15 days in advance. This practice leads to frequent adjournments as parties have a justified reason to request the court to postpone a hearing to have time to review and opine on the submitted opinion. Looking at each reason associated with expert witness work (including breach of deadlines by expert witnesses, expert witness absence from hearing and others), requests for additional time to review expert witness opinions caused adjournments almost **50% of the time**.



In Basic Courts, requests to be given additional time to review expert witness opinions account for 37% of all examined adjournments, while in Commercial Courts this issue caused 52% of all examined adjournments.

62. Party delays to make advance payments for expert witness work cause trial delays.

Delays in the payment of expert witness advance cause adjournments in as much as 10% of cases (please see para 61 above). A review of court cases has indicated that judges are lenient to parties and, even in civil procedure cases, allow for hearings to be postponed if the advance is not paid. It should be noted that the CPC allows the court to make a decision without an expert witness opinion if the advance is not paid.

Box 6 – Delays in Payment of an Advance Can Cause Serious Delays in Trial

Basic Court – Advance was not Paid in for a Year

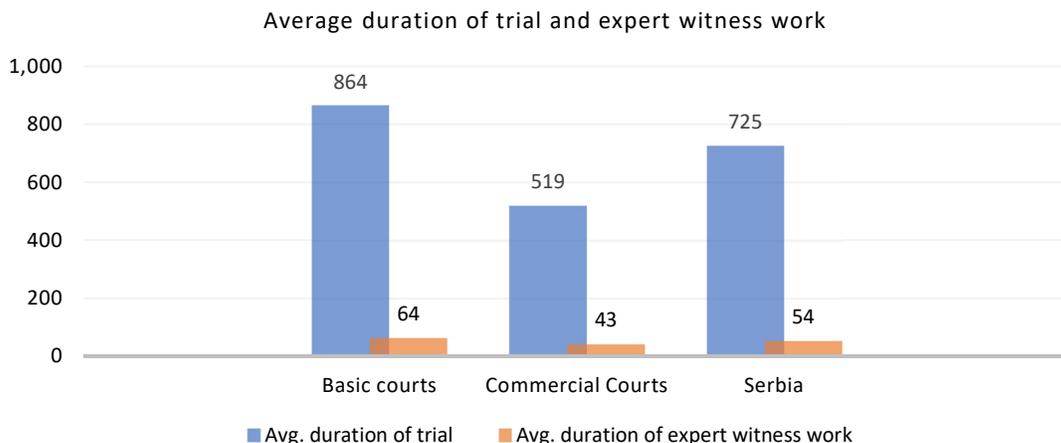
In one civil litigation, the court ordered payment of an advance at a hearing which took place on May 5, 2014. The deadline for payment was eight days. Evidence of payment was not submitted. The court sent three warning notices on December 29, 2014, on March 3, 2015 and on May 7, 2015. Payment was made on May 28, 2015, a year later. The case processing was delayed during this time. The value of the advance was RSD 8,000 (approx. EUR 70).

63. Poor trial management on the part of courts rather than expert witness inefficiency cause weak trial discipline, adjournments and delays.

It seems that better sequencing of procedural steps and implementation of techniques for good trial management are warranted to improve efficiency of expert witness work and avoid delays. For example, scheduling of the timing for parties’ review/comments of expert witness opinion should be improved. It should be noted that the MTFD Functional Review also reports that delays are not simply due to lack of expert witness discipline but also poor trial management on the part of the courts.³⁶

64. Statistics indicate that the duration in which expert witness produce their opinion is not a reason for lengthy trials.

Average duration for production of expert witness opinions over the past three years was 54 days and it was longer in Basic Court, 64 days; while in Commercial Court, in average, experts took 43 days to produce an opinion.



³⁶ See p. 69 of the MTFD Functional Review.

Comparing the duration of expert witness work on producing the opinion with total trial time, the work of the expert witness took an average of **7.5% of total trial time**.



Expert Witness Duty to Return the Case Files to the Court

65. Expert witnesses are given the entire original court case files to be reviewed out of court, which is both an efficiency and an integrity issue. Courts keep a single original copy of the case files throughout the duration of the trial. If an expert witness opinion is needed, courts call expert witnesses to pick up the original case file from the court, review the file and return it once their opinion is completed. Sending the original case files out of court creates the opportunity for undue tampering of the files or at least creates a perception that this is easily possible.³⁷ In addition, this is a common cause of inefficiency as no other trial activity can be undertaken until the expert witness completes its opinion and returns the case file to the court.

66. Statistics shows that expert witnesses do breach their duty to orderly pick up and return cases, which causes trial delays. In the sample of 445 cases reviewed in this Report, breach of orderly pick up and return of case files occurred in 30 instances. This amounts to a little less than one instance in 10 cases reviewed. It should be noted that if the expert witness decides not to return the file for any reason, the entire court process is halted. Anecdotal evidence indicates that there were instances where police was used to return case files from non-responsive expert witnesses.

Remuneration of Expert Witnesses

67. It often happens that for the same type of expertise different expert witnesses charge different amounts. The significant differences in fees charged by expert witnesses has been reported in informant interviews with lawyers and expert witnesses. These differences are reportedly influencing the selection and the quality of work done by expert witnesses. Judges indicate that, particularly for the *template cases*, high fees cause frustration during

³⁷ It was confirmed in all visited courts that court regularly surrender the entire original case file to the expert witness without making a separate internal copy.

trials as parties are reluctant to pay the expert witness in advance or cover the full fee later. Some report that there are unofficial lists of cheap and expensive expert witnesses, regardless of the fact that there is a set Rulebook on Reimbursement of EW. Expert witnesses would also prefer clear rules on their remuneration.

68. Statistical findings show that variances do exist in the average fees paid across different courts; variances are highest between Commercial Courts and Basic Courts. For example, the average fee paid for expert witness work in the Basic Court in Užice is RSD 10.883 (approx. EUR 93) while expertise is in average charged RSD 24.316 in the Commercial Court in Užice (approx. EUR 207).

69. Expert witnesses report that the Rulebook on Reimbursement of EW which regulates reimbursement of expert witnesses does not apply in practice at all. According to expert witnesses, fees do not depend on the complexity of the case or the duration of work but of what the parties and particularly judges estimate would be adequate for an expert witness to receive. In practice the Rulebook on Reimbursement of EW does not apply, judges make unilateral decisions on the value of the expertise and sometimes even of the expenses incurred and order payment of only that much. It is very rare that judges request the expert witnesses to supply a statement of expenses and specification of fees upon completion of the opinion, even though this requirement is set out under the Rulebook on Reimbursement of EW. Such practice creates inherent vulnerabilities to corruption. In fact, in the end, the expert witness receives the amount which was paid as an advance by the parties. In criminal cases, under CrPC Article 261, expert witnesses must submit their statement of expenses which is verified by the judge. There is no criteria for such verification set up by any rules. Expert witnesses may complain on the approved amount if different from the original request made.

BOX 7 – Judge Decides on Appropriate Fees for Expert Witness Work

Fees and Expenses of Expert Witnesses - Basic Court

In one criminal case in Basic Court, the judge has issued a separate decision setting that the fee and expenses requested by the expert witness were too high. It has in the decision decided unilaterally on the amount which he considered more adequate.

70. Courts and PPOs significantly delay reimbursing expert witnesses in criminal proceedings and during the criminal investigation process. Data obtained from the Supreme Cassation Court shows significant court arrears for payment of external services during court proceedings and investigation process which, among other things, includes reimbursement of expert witnesses. In the courts analyzed, these arrears range from RSD 62,040,888 (approx. half a million EUR) for the Belgrade First Basic Court to RSD 3,183,167 (approx. 25,000 EUR) in smaller courts such as the Užice Basic Court.

71. The reasons for such delays are two-fold. On one hand, there is a weak regulatory framework concerning engagement of expert witnesses and payment for their services which causes uncertainty around when (i.e. at which point during the process) and how much expert

witnesses will be paid. On the other, the 'services' budget of courts and PPOs are constantly falling short of what is required to eliminate arrears accumulation.³⁸

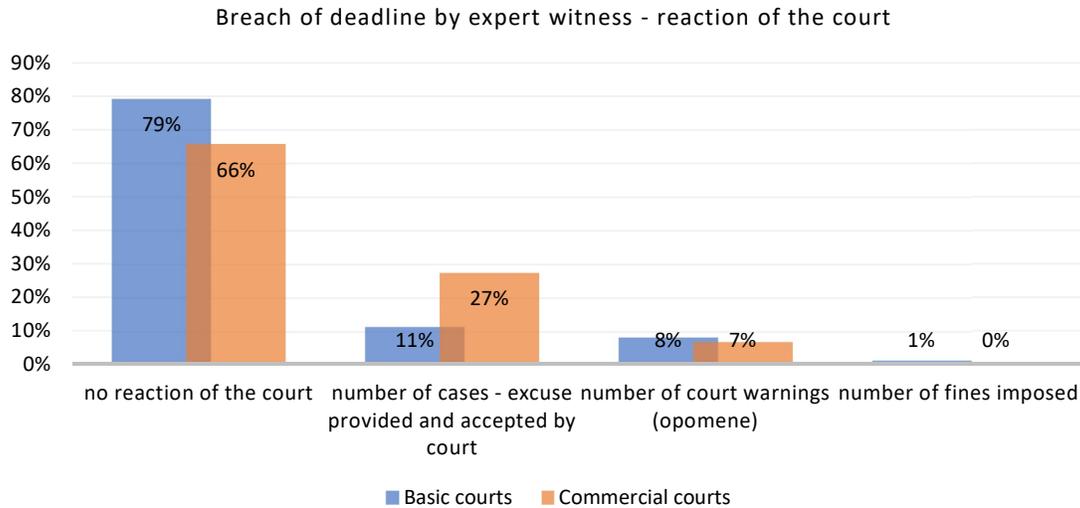
72. Delays in reimbursement cause some expert witnesses to refuse to work unless the court settles existing debts to expert witnesses. Informant interviews have confirmed the finding of the MTDf Functional Review that there are some expert witnesses which refuse to work with courts which have accumulated a significant backlog of arrears. The practice is causing delays and reducing overall quality of services.

Possibilities for Sanction in Cases of Breaches of Duty

73. In practice there is no sanction for an expert witness who breaches its duties. Relevant laws provide several types of sanctions for expert witnesses for breach of duty. Under the CLC and CrLC, courts may fine expert witnesses for breach of discipline (not appearing when summoned, declining to provide the opinion and the like). Under the LEW, the MOJ is competent to revoke the license of an expert witness, if the expert witness is performing duties in an unethical, incompetent or inadequate manner. Finally, parties under standard damage claim rules may decide to take action against an expert witness and seek damages for malperformance. Yet, although available on paper all these tools are not used in practice.

74. Most expert witness breaches of deadline go with no reaction of the court, warning notices and fines are issued only for severe and repeated breaches but are not enforced. The statistical data gathered for courts indicates that courts do not react or sanction expert witnesses for breach of deadline. Most breaches go unnoticed (as much as 79% of all recorded breaches in Basic Courts). Please see below for a chart on shares of rendered fines, warning notices and reactions of the court when compared with all identified deadline breaches in the reviewed sample.

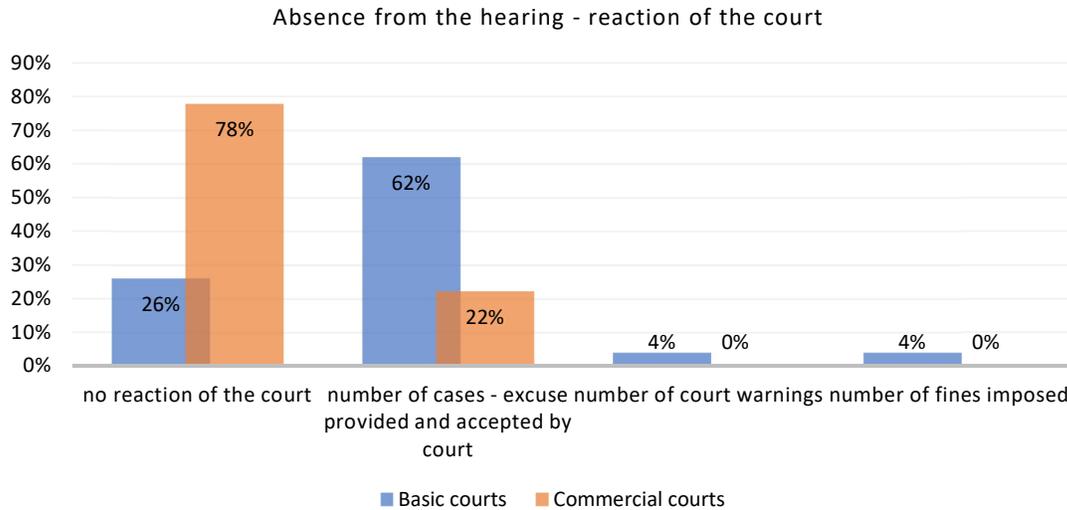
³⁸ For detailed assessment of arrears in Serbian courts and PPOs please refer to *Analysis of Arrears of Courts in Serbia* available at: <http://www.mdtfjss.org.rs/archive//file/Serbia%20Court%20Arrears%20-%20draft%20May2018.pdf> ; and *Analysis of Arrears of Public Prosecutors Offices in Serbia*, available at: <http://documents.worldbank.org/curated/en/793961508178431209/Analysis-of-arrears-of-public-prosecutors-offices-in-Serbia>.



75. According to the data made available by the MOJ, in 2016, courts imposed less than 20 fines on expert witnesses across Serbia. Given the hundreds of thousands of cases where expert witnesses appear per year in Serbia and the many trial deadlines which should be adhered to in each case, such a small number of fines indicates that courts seem to neglect to monitor or sanction expert witnesses for omissions and lack of trial discipline. There is a wide perception that judges fail to apply sanctions when called on to by any party involved in the trial. In fact, judges in informant interviews have noted that fines are just an additional burden of the trial that they later need to see through being implemented.

76. The reason for such a small number of fines seems to be, in part, judges being reluctant to sanction frequently used expert witnesses that judges are dependent on. Informant interviews with judges indicated that frequently used experts refuse to work with certain judges or certain courts which have previously sanctioned them. This creates a serious issue for a judge because, after sanctioning an expert, he/she cannot process other cases where expertise of that particular expert is needed. So, due to shortage of good experts, in a way, judges are dependent on expert witnesses.

77. Basic Courts seem to be more vigilant in monitoring adherence to court summons than Commercial Courts. Statistical data on the absence of expert witnesses from a hearing when summoned shows that Basic Courts monitor expert witnesses' presence at trial and require them to justify their absence. Also, Basic Courts do issue court warnings and render fines if such absence is not accounted for. Please see below for data on shares of rendered fines, warning notices and reactions of the court when compared with all instances of an expert witness being absent from the court hearing.



78. The MOJ does not keep systematized data on the license revocation of expert witnesses for acting in an unethical, incompetent or inadequate manner; it seems that the MOJ rarely if ever revokes a license on these grounds. The LEW sets out that the expert witness status could be revoked upon a court’s or party’s request made to the MOJ. The data made available by the MOJ indicates that, in year 2017, 65 complains were made to the MOJ on expert witness work. Yet no revocations were made on grounds of acting in an unethical, incompetent or unprofessional manner. Unified and systemized data for previous years is not available. Expert witnesses in informant interviews also confirmed that no revocation has ever occurred on these grounds. They noted that the MOJ has no expertise or adequate processes in place to evaluate the work of expert witnesses and revoke their licenses, nor does the department/staff who will be in charge of evaluation of expert witness work.

Recommendations and Next Steps

Introducing Training to Improve Quality of Expert Witness Work and Efficiency of Trial

79. Training should be introduced at entry into the expert witness profession; expert witnesses should be obligated to continuously update their knowledge.³⁹ Under the LEW and in practice no training of expert witnesses is available or required. Providing and requiring training of expert witness would improve overall quality and efficiency. Adequate training would give all expert witnesses knowledge of trial requirements which would enable them to all compete on equal footing for engagements before courts. This would decrease frequency of engagement of the same expert witnesses and improve efficiency of trials. Moreover, training would improve the overall quality of expert witness work. Several types of trainings should be introduced as follows:

³⁹ For example, the EGLE Guide in Section III provides detailed information on quality insurance for expert witnesses. To be accredited as an expert witness one should particularly have the following skills: (i) knowledge and competence in the field of expertise; (ii) practical knowledge and competence; (iii) ethics and professional attitude and (iv) efficiency. The EGLE Guide goes on to explain the quality assurance system and national certification bodies which would deal with the transparency, the admissions, the training and the quality of experts.

- a. **Entry training on trial processes at the time of admission into the profession.** Each expert witness should be obligated to take training on the CPC and CrPC rules, trial requirements and processes, and drafting of expert witness opinions. Mock trials should be organized, and the role of expert witnesses explained and showcased to the new expert witnesses. Potentially, entry examinations at the time of admission should be set up. Judges and senior experts should participate in delivery of such trainings.
- b. **Expert witnesses should be obligated to continuously update their knowledge on both (i) the expertise they provide and (ii) trial requirements.** Updates may be required on a biannual or other regular basis, potentially through refreshments of the registered list of expert witnesses.⁴⁰

80. Judges and prosecutors should be trained on some of the most common expertise used in trial. Judges and prosecutors should have a general knowledge of the expertise they usually use in trial. For example, basic classes on reading the financial statements or calculation of the default interest rate would be useful for Commercial Court judges. This would give the judges and prosecutors an advantage in reviewing and identifying real issues in expert witness opinions. This would also improve the quality of trials and minimize courts' reliance on expert witness opinions.

81. The LEW should allow for and clearly regulate the rights and duties of expert witness trainees, interns and associates. Very experienced and most frequently used expert witnesses interviewed have stated that they would hire additional expert witness associates [serb. *pripravnici*] if rights and duties of such individuals at trial would be clearly regulated by law. Such rights could include the right to pick up and return case files, to assist in composition of the opinion and to attend the trial. Expert witnesses indicated that this would help in several ways:

- a. With more manpower there would be fewer trial delays. This is particularly important for the overburdened, most frequently used expert witnesses that produce high quality reports.
- b. Associates would be exposed to practice and able to learn from more experienced expert witnesses. This would, in the long term, help develop a high-quality expert witness cadre. Associates, should they later become individual expert witnesses themselves, would have both the expertise and experience needed for the profession and already be recognized by judges as suitable experts to take on engagements.

The CEPEJ Guidelines advise that an expert witness should have staff that can not only do the preparatory work but also draft the expert witness opinion under supervision of the expert witness.⁴¹

⁴⁰ The EGLE Guide in para 3.14 states that it should be “regularly ascertained, for example every five years, that the registered Expert still satisfies the criteria which allowed him to register, and check that he has fulfilled his obligation of continuous training both in his core profession as well as in his work as an Expert and in his judicial knowledge in terms of proceedings.”

⁴¹ The CEPEJ Guidelines pg 55.

Eradicating Superfluous Expertise to Increase Efficiency of Trials

82. Higher instance courts should develop a decisional practice which would support the lower instance courts in dismissing requests for expert witness opinions if expertise is superfluous. The Supreme Court of Cassation should consider rendering an interpretative opinion on the adequate use of experts. In civil procedure, if a defendant (be it a state or another entity) objects to the claim, it should provide full evidence on the reasons for the objection, as laid down by the CPC. If the defendant merely objects to a claim but fails to supply evidence, courts of all instances should work to apply the burden of proof rules rather than supporting party proposals in seeking superfluous expertise. First instance courts' decisions should be supported by higher instance courts should they decide to the detriment of the party which has failed to supply adequate evidence. The Supreme Court of Cassation should consider rendering an interpretive opinion to provide clarity on when a party request to use an expert witness should be accepted and when dismissed.

83. *Template cases should be moved out of court.* Settlement commissions for *template cases*, particularly dog bites, should be set up in various state entities. All *template claims* should be as a first step received and reviewed by settlement commissions. Courts should only receive claims which cannot be settled and where judicial scrutiny is in fact mandated. In addition to clearing out the court of superfluous trials and expert engagements, this would also work to the benefit of the state entities as they would save on trial costs that would otherwise be incurred. For this recommendation to be successfully implemented, the public defenders and newly established settlement commissions would have to be properly monitored. Success rates in terms of the number of cases defended, trial costs saved, and claims settled should be accounted for.

84. The CrPC and CPC should cap the number of expert witness opinions which are used to analyze a specific issue at trial. If a court decides to examine a question by ordering two experts and then also ask for validation from a commission of expert witnesses (serb. *supervestačenje*) or from a third expert, it should, once this process is completed, stop with further analysis and decide on the matter at hand. The material built after such a complex process of fact-finding should suffice for a court to make a valid judgment. Any further review would only overburden the court and bring little value to resolution of the matter. The CEPEJ Guidelines are clear that the number of expert witnesses should be limited, which limit should be defined by a court or by law.⁴²

Connecting the Real Needs for Expertise with Available Supply of Experts

85. The appointment into the profession should be organized to connect the real needs of the courts with existing local expertise. Several activities should be undertaken to achieve this:

- **Improving coordination between the MOJ and courts on information on needs.** Under the LEW, the MOJ should be bound by the information expressed by courts on the needs for expertise in their regions. It is the courts rather than the MOJ that are aware of which expertise is needed most in their locality and at what time. Potentially,

⁴² The CEPEJ Guidelines para 28.

Higher Courts, to which expert witness registered lists are mapped to, should be the ones to decide on the needs and on whether a call into the profession should be published and they should keep a register of the expressed needs of the first instance courts within their territory.⁴³

- **The LEW should require for biannual or other regular calls into profession.** This would allow refreshment of the list and ensure that the supply of expert witnesses is adequate and in line with market availability.
- **Regular refreshment of the existing list of experts should be conducted.** Expert witnesses should be required to renew their licenses every several years.⁴⁴ At the time of renewal they should be obligated to show that they have worked to continuously update their knowledge in line with training requirements mentioned in paragraph 79 above.

Opening up the profession for new expert witnesses would alleviate shortages and ensure that some expert witnesses are not more frequently used than others. Yet, this could be achieved only if adequate training is organized and associate positions allowed as recommended in paragraph 79-81 above.

86. Clear rules on the method by which expert witnesses are selected for trial by PPOs should be set out. Case files in criminal pre-investigation proceedings should be orderly kept and the manner, reason and method for selection of an expert witness by PPOs should be properly documented in each case.

Strengthening Accountability of Expert Witnesses

87. Courts should do more to manage expert witness work. Tools for adequate management of expert witness work are in place under the CrPC and the CPC. Yet, it seems to be that the courts are not using the tools available to them. Some simple trial management techniques and tools should be used to improve efficiency of trials and strengthen accountability of expert witnesses:

- a. **Judge should set out the exact date when the expert witness opinion should be received.** Judges should not simply copy the CLC language on deadlines in the request for an expert witness opinion but set out an actual date by which the opinion should be received. If clear on the exact time when its opinion should be submitted, the expert will manage accordingly rather than filing the opinion on the day of the hearing.
- b. **Court staff (associates and judges) should frequently review the case files out of hearing to keep track that all required activities are conducted as scheduled** – that payment is made in advance, documentation is picked up, etc. – and they should send out warning notices if delays occurs.
- c. **Judges should monitor adherence to deadlines and require justifications for breaches.**

⁴³ Please also see the EGLE Guide para 3.21 which indicates that *“The judge should ensure that there is an adequate number of Experts in each field and should try to avoid appointing the same expert again while excluding others who have the same qualifications.”*

⁴⁴ The EGLE Guide suggest a maximum of five years, para 3.11.

- d. **Judges should schedule hearings to allow enough time between hearings** for all out of court activities to take place: the advance to be paid, expert witness opinion produced, and expert witness opinion reviewed and commented on by parties. If time is sufficient and an adjournment happens, judges should identify the reason and warn or sanction as needed.
- e. **Judges should surrender to the expert witnesses only the part of the case files which is relevant for their analysis.** Technical means of the courts should be improved to allow for an expert witness to receive either a hard copy of the case files or an electronic copy. **Original case files should not be provided to the expert but only copies.**

88. Courts and parties should be vested with more authority to monitor and sanction the work of expert witnesses. The MOJ is the authority that decides on revocation of expert witness licenses. Yet, the MOJ staff has no capacity to review expert witness work and decide on expert witness competence. The CEPEJ Guidelines note that “*certain countries have found it useful to appoint judges who are specifically in charge of expertise-related matters, including matters relating to the selection of the experts, the failure of the experts to deliver and expert opinion meeting good quality standards, etc.*”⁴⁵ So courts should be vested with a power to conduct proceedings against an expert witness and even revoke licenses. Parties under the LEW should have clear rights to report wrongdoings of expert witnesses to all relevant authorities, both the MOJ and courts. Provisions in the CPC and CrPC or the LEW should be specific so as to provide a clear right of damage claim action and criminal action for parties in cases of expert witness malpractice.

Resolving Issues on Remuneration of Expert Witnesses

89. Soon after the expert witness has provided its expertise, the judge should order payment to the account of expert witnesses. There is no reason for courts to accumulate arrears towards expert witnesses as the funds are already available in the court deposit accounts after the advance is paid. So very soon after the expert witnesses has supplied his/her opinion in trial he/she should be awarded the payment. This would prevent accumulation of arrears and backlog.

90. Judges and parties should seek in advance an estimate of costs and fees from the expert witness. Seeking a fee and cost estimate would ensure that there are no issues with payment later on. This would also reveal upfront any issues as too high or too low of a figure should be further examined by the court.⁴⁶ It should be, however, taken into account that this additional activity could lead to serious efficiency issues should the courts not improve trial management practices as noted in paragraph 87.

⁴⁵ The CEPEJ Guideline para 61.

⁴⁶ Please also see the CEPEJ Guidelines para 83 point 3.

Table 1 – Recommendations - review

Description:	Activity & Authority Responsible for Implementation:
1. Introducing Training to Improve Quality of Expert Witness Work and Efficiency of Trial	
<p><u>Training for Expert Witnesses</u> Several types of trainings should be introduced as follows:</p> <ul style="list-style-type: none"> • Entry training of expert witnesses on trial processes at the time of admission into the profession including training on the CPC and CrPC rules, trial requirements and processes, drafting of expert witness opinions, and organised mock trials, with judges and experienced expert witnesses participating in delivery of training. • Regular updates of expert witnesses’ knowledge on both expertise they provide and trial requirements. <p><u>Training of Judges and Prosecutors</u> Training should be focused on some of the most common expertise used in trial in connection with the needs of the particular judge/prosecutor.</p> <p><u>Introducing Expert Witness Trainees and Associates under the LEW</u> The LEW should be amended to clearly indicate rights and duties of expert witness trainees, interns and associates, such as the right to pick up and return case files, to assist in composition of the opinion and to attend the trial (please see CEPEJ Guidelines as well).</p>	<p>Ministry of Justice Draft amendments to the LEW which would introduce:</p> <ul style="list-style-type: none"> • Mandatory training for expert witnesses prior to entry into the profession; • Mandatory exams for expert witnesses for entry into the profession; • Mandatory continuous training of expert witnesses; • Institutionalize the expert witness trainees, interns and associates and define their rights and duties in and out of trial. <p>Judicial Academy</p> <ul style="list-style-type: none"> • Organize trainings for expert witnesses, judges and prosecutors.
2. Eradicating Superfluous Expertise to Increase Efficiency of Trials	
<p><u>Support to Lower Instance Courts to Dismiss Requests for Expert Witness Opinions when Superfluous</u> First instance courts’ decisions should be supported by higher instance courts’ decisional practice when deciding on dismissing requests for expert witness opinions. The Supreme Cassation Court should consider rendering an interpretive opinion to provide clarity on when a party request to use an expert witness should be adopted or dismissed.</p> <p><u>Setting up Settlement Commissions and Monitor the Work of Public Defenders</u> All template claims should be as a first step received and reviewed by settlement commissions. Courts should only receive claims which cannot be settled and where judicial scrutiny is in fact mandated. This would also work for the benefit of the state entities as they would save on trial costs that would otherwise be incurred.</p> <p><u>Limit the Number of Expert Witness Opinions.</u> By law, set limits on the number of expert witnesses used to analyse a specific issue in trial.</p>	<p>Higher Instance Courts</p> <ul style="list-style-type: none"> • Developing a decisional practice which would support first instance courts in dismissing superfluous expertise. <p>Supreme Cassation Court</p> <ul style="list-style-type: none"> • Consider adopting an interpretative opinion which would provide clarity on when using expert witness statements as evidence is appropriate. <p>Ministry of Justice</p> <ul style="list-style-type: none"> • Working with other state bodies, particularly: (i) Ministry of Economy – Sector for Oversight of the Work of State Owned Companies; (ii) Local Municipalities (e.g. the Union of Cities and Municipalities) (iii) Public Defenders; to set up settlement commissions to proactively seek settlement and to actively monitor success rates of public defenders/state attorneys at trial. • Develop amendments to the CPC and CrPC to limit the number of expert witnesses which could be used in trial to examine a specific issue.

3. Connecting the Real Needs for Expertise with Available Supply of Experts

Revising the Method of Appointment into the Expert Witness Profession:

- Higher Courts, to which expert witness registered lists are mapped to, should be the one to decide whether a call into the expert witness profession should be published and should keep a register of the expressed needs of the first instance courts within their territory.
- Amendments to the LEW to require biannual or other regular calls into the profession.
- Regular requirement to renew expert witness licenses every few years. At the time of renewal, expert witnesses should be obligated to show that they have worked to continuously update their knowledge.

Setting out Clear and Transparent Rules on:

- The method by which expert witnesses are selected in trial by PPOs;
- Orderly keeping case files in criminal pre-investigation proceedings regarding expert witness work.

Ministry of Justice

Draft amendments to the LEW which would introduce:

- Regular calls into the expert witness profession;
- Regular update of the list of expert witnesses (e.g. renewal of the licence);
- Require that calls into the profession be organised on request of Higher Courts.

Public Prosecutors Offices

- Rendering rules/bylaws which would define the method of selection of expert witnesses in criminal cases by PPOs;
- Rendering bylaws which would require the case files in criminal pre-investigation proceedings to be kept orderly.

4. Strengthening Accountability of Expert Witnesses

Use of Trial Management Techniques to Improve Efficiency and Accountability of Expert Witnesses, particularly:

- Setting out the exact date when the expert witness opinion should be received;
- Frequent review of the case files outside of hearings to keep track that all required activities are conducted as scheduled;
- Monitor of adherence to deadlines by judges and require justifications for breaches;
- Schedule hearings to allow enough time between hearings;
- Surrender only copies of the case files relevant for the analysis to expert witnesses.

Courts / Parties Vested with More Authority to Monitor and Sanction the Work of Expert Witnesses.

Courts should be vested with the power to conduct proceedings against an expert witness and even revoke licenses. Parties under the LEW should have clear rights to report wrongdoing of expert witnesses to all relevant authorities- both the MOJ and courts. Right to damage claims should be clarified.

Ministry of Justice

Draft amendments to the LEW which would introduce:

- Court competence to conduct proceedings against an expert witness and even revoke licenses;
- Set out rights and processes in which parties can report wrongdoing of expert witnesses to all relevant authorities;
- Clarify the rights and processes for damage claim lawsuits against expert witnesses;
- Keep electronic register of complaints and processes on revocation of licences.

Judicial Academy

- Include good trial management techniques into the curriculum for training of judges and prosecutors.

Courts (Court Presidents)

- Organise the work of court clerks to allow submission of only (electronic) copies of documentation to expert witnesses,
- Organise the court staff to monitor cases out of hearings and signal delays to judges.

5. Resolving Issues on Remuneration of Expert Witnesses

Increase Clarity on Time and Efficiency for Payments to Expert Witnesses

Judge should order payment to the account of expert witnesses soon after the expert witness has provided its expertise. This would prevent accumulation of arrears and backlog.

Increase Predictability of Costs

Judges and parties should, in advance, seek an estimate of costs and fees from expert witnesses.

Ministry of Justice

Revise the Rulebook on Reimbursement of Court Expenses to explain in greater detail:

- Exact deadlines and timing for payment of expert witnesses;
- Define the processes for submission of the invoice/statement of expenses and fees;
- Define criteria under which judges review expert witness invoice/statement of expenses and fees and decide on final amounts;
- Define the rights to complain on awarded amounts.

