

Relationship of Prosecutors and Expert Witnesses in Legal System of Bosnia And Herzegovina: Forensic Expertise – an Evidence that is in the Ascendant?

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Abstract

In the focus of this paper is the analysis of the relationship between the primary and auxiliary subject of the criminal procedure – prosecutor and expert witnesses in context of the B&H's criminal procedural laws with aim of presentation of limitations of the prosecutor's evaluation of facts that are obtained through application of scientific and expert knowledge. Furthermore, authors explore the perception of the forensic expertise in theory and judicial practice as a possible deviation from the fundamental legal principle of free evaluation of evidence, resulting with establishment of the forensic expertise as evidence of utmost evidentiary value and strength that is rarely disregarded by the prosecutor and the court.

Keywords: expert witness, forensic expertise, prosecutorial evaluation of evidence

1. Introduction

Legal system of the Bosnia and Herzegovina (B&H) is multilayered as a reflection of constitutional division of the sovereign power between the state and two entities: the Federation of Bosnia and Herzegovina (FB&H) and Republic of Srpska (RS), which have character of federal units.¹ Within the complex state organization Brčko District (BD B&H) has special status as self-governing administrative unit, and it is subjected only to the state control.² This complex state structure is manifested in the legislation regulating the criminal justice system - there are currently four material and procedural criminal laws in force in B&H: the Criminal Law of B&H (CL B&H),³ the Criminal Law of FB&H (CL FB&H),⁴ the Criminal Law of RS (CL RS),⁵ the Criminal Law of BD B&H (CL BD B&H);⁶

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¹ See the Constitution of Bosnia and Herzegovina (available at: http://www.ccbh.ba/public/download/USTAV_BOSNE_I_HERCEGOVINE_engl.pdf); the Constitutions of the FB&H ("Official Gazette of FB&H", no. 1/94); the Constitutions of the RS ("Official Gazette of RS" no. 28/94).

² See the Statute of the Brčko District of Bosnia and Herzegovina ("Official Gazette of BD B&H", no. 3/07).

³ "Official Gazette of B&H", no. 3/03, 32/03, 37/03, 54/04, 61/04, 30/05, 53/06, 55/06, 32/07, 8/10, 47/14, 22/15, 40/15

⁴ "Official Gazette of FB&H", no. 36/03, 37/03, 21/04, 69/04, 18/05, 42/10, 42/11, 59/14, 76/14, 46/16, 75/17.

⁵ "Official Gazette of BD B&H", no. 33/13.

⁶ "Official Gazette of RS", no. 64/17.

the Law on Criminal Procedure of B&H (LCP B&H),⁷ the Law on Criminal Procedure of FB&H (LCP FB&H),⁸ the Law on Criminal Procedure of RS (LCP RS)⁹ and the Law on Criminal Procedure of BD B&H (LCP BD B&H).¹⁰

In accordance with the established legal framework, exclusive competence of the prosecutor encompasses detection and prosecution of the criminal offences perpetrators within which it has right to conduct procedural actions and to investigate and establish all relevant facts against and in favor of accused¹¹ (Krapac, 2007; Sijerčić – Čolić, 2008). Comprehensive and careful evaluation of existence of the substantiated probability founded on the facts from which results reasonable suspicion that a certain person committed certain criminal offence must be performed by prosecutor in every case (Lakić, 2013:22). Reasonable suspicion as a legal condition for indictment entails level of certainty of cognition of existence of the facts established on the basis of objective criteria (Glušac, 2014:209). Prosecutor's decision regarding the existence of the certain facts must be derived from the content of the obtained evidence (of every evidence individually and in relation to other evidences) and it is not restricted with formal evidentiary rules (*principle of free evaluation of evidence*).¹² This implies that there are no formal legal rules on predetermined value of certain evidences or that certain facts may only be proven with certain evidence. Nevertheless, in criminal procedural law and judicial evidence, forensic expertise is traditionally perceived as an evidence of utmost evidentiary value and strength provided that the testimony (finding and opinion) is given in accordance with the best knowledge or skill of the expert who has been appointed as an expert witness, and in accordance with the fundamental principles of science or profession whose rules and methods are applied in concrete expertise (Halilović, 2010:43). Specific position of the expert witness as an auxiliary procedural subject awarded with specific rights and responsibilities in criminal procedure is regulated by the provisions of the previously mentioned criminal procedural laws (LCPs) and laws on expert witnesses in force in entities¹³ and the Rulebook on the conditions, manner and procedure for admission to the list of judicial expert witnesses in BD B&H.¹⁴ Having in mind previously stated about the specific position of forensic expertise in evidentiary system, in this paper authors analyze relationship between prosecutor and expert witnesses in context of the B&H's criminal procedural laws in order to investigate perception of the forensic expertise/expert witness testimony as a possible deviation from the fundamental legal principle of free evaluation of evidence resulting with establishment of this evidence as an evidence of utmost evidentiary value and strength that is rarely disregarded by the prosecutor and the court.

⁷ "Official Gazette of B&H", no. 3/03, 32/03, 36/03, 26/04, 63/04, 13/05, 48/05, 46/06, 76/06, 29/07, 32/07, 53/07, 76/07, 15/08, 58/08, 12/09, 16/09, 93/09, 72/13.

⁸ "Official Gazette of FB&H", no. 35/03, 37/03, 56/03, 78/04, 28/05, 55/06, 27/07, 53/07, 9/09, 12/10, 8/13, 59/14.

⁹ "Official Gazette of BD B&H", no. 33/13.

¹⁰ "Official Gazette of RS", no. 53/12, 91/17.

¹¹ See for example: Article 293(3) of the LCP B&H; Article 308(3) of the LCP FB&H; Article 293(3) of the LCP BD B&H; and Article 299(3) of the LCP RS.

¹² For more on principles of criminal law see: Pudovochkin and Adrianov (2016).

¹³ "Official Gazette of FB&H", no. 49/05, 38/08. "Official Gazette of RS", no. 74/17.

¹⁴ "Official Gazette of BD B&H", no. 38/16.

2. Relationship of prosecutors and expert witnesses

In the context of criminal procedural law, institute of forensic expertise represents procedural action within which an expert witness as an impartial individual with a particular scientific or professional knowledge or skills, applies that knowledge, skills and certain scientific methods on appropriate, questioned facts in given criminal matter. Involvement of expert in criminal procedure is focused on establishment of important facts through implementation of particular professional knowledge or skill.

According to the provisions of the LCPs, forensic expertise shall be ordered when the findings and opinion of an individual possessing the necessary specialized knowledge are required for establishment or evaluation of certain important fact.¹⁵ If scientific, technical or other specialized knowledge may assist the prosecutor in evaluating the evidence or clarifying the questioned facts, an expert as a special kind of witness may testify by providing his/her findings on the facts and opinion that contains evaluation of the facts.¹⁶

Forensic expertise is determined by the prosecutor that manages the procedure. Written order for forensic expertise is issued by the prosecutor¹⁷ and in this order all facts subjected to the expertise must be stated.¹⁸ Prosecutor may entrust forensic expertise both to the expert individual or to the specialized institution or state body¹⁹ depending on the kind and complexity of the expertise. Although forensic expertise in judicial practice is usually entrusted to the individual expert witness, provisions of criminal procedural laws suggest priority of the specialized institution or state body since they explicitly prescribe that if there is specialized institution for performance of the particular kind of expertise or if expertise may be performed by the state institution/body, such expertise, and especially when it is has intricate nature should, as a rule be assigned to that institution or the body.²⁰ Such institution or body shall name

¹⁵ Article 95 LCP B&H; also: Article 109 LCP FB&H, Article 95 LCP of BD B&H, Article 160 of the LCP of RS.

¹⁶ *Ibidem*. Sijerčić – Čolić (2008:433) concludes that forensic expertise may be undertaken in different phases of criminal procedure: prior to the investigation during the investigation, within the judicial insurance of evidence (during the investigation and accusation procedure), and on main hearing/main trial.

¹⁷ As well as court. Authorized official may order forensic expertise as an urgent investigative action (with exception of medical examination, an autopsy and exhumation of the corpse). See: Article 221 of the LCP B&H; also: Article 236 of the LCP FB&H, Article 221 of the LCP BD B&H, and Article 229 of the LCP RS). Furthermore, at the main hearing, forensic/expert witness also may be employed by the accused and his/her counsellor. See: Article 269(1) of the LCP B&H, Article 284(1) of the LCP FB&H, Article 269(1) of the LCP BD B&H; and Article 284(1) of the LCP RS.

¹⁸ Article 96(1) of the LCP B&H; also: Article 110(1) of the LCP FB&H, Article 96(1) of the LCP BD B&H, Article 160(1) of the LCP RS.

¹⁹ According to the provisions of the LEW, the entity, canton, city or municipality or other legal or natural person may establish company for performance of forensic expertise in accordance with the provisions of relevant company law. This company may be registered in the Register of the legal entities for conducting forensic expertise if it has a team of professionals that fulfill the requirements and appropriate technical means for performance of those tasks. Company must perform the forensic expertise entrusted by the court or other body that manages procedure if object of expertise is within its professional activity.

²⁰ Article 96(2) of the LCP B&H; also: Article 110(2) of the LCP FB&H, Article 96(2) of the LCP BD B&H, Article 160(2) of the LCP RS.

one or more experts²¹ to perform expertise.²² The prosecutor shall warn the institution or the body performing forensic expertise, about the exemptions of persons on the basis of the Article 98 of the LCP B&H and on other legal basis.²³

The ability to be expert witness requires cumulative fulfillment of two types of conditions: professional and legal (Krapac, 2007:424). Professional condition is only implied by provision contained in Article 95 of the LCP B&H, which stipulates that possession of professional knowledge is necessary for identification or evaluation of certain important facts.²⁴ Legal conditions for appointment of expert witness are prescribed in negative form by LCPs as a list of persons who may not be appointed as an expert witness: a person who may not testify as a witness;²⁵ a person who is exempt from the duty to testify;²⁶ and the person against whom the criminal offence was committed - injured person.²⁷ If such person is appointed resulting judicial decision may not be based on his/her testimony (findings and opinion).²⁸ Furthermore, laws exempts from forensic expertise: persons who are employed in the same body, company or other legal entity or by independent entrepreneur as the suspect, accused or injured person; persons who are employed by the injured or suspect or accused person; and person that was heard as a witness.²⁹ Beside the previously mentioned exemptions, on expert witnesses are also applicable general rules on exemption of judges (Articles 29-33 of the LCP B&H)^{30,31} The laws on expert witnesses specify conditions and procedure of their selection and appointment as an experts that will perform tasks in judicial procedures. As an expert witness in the FB&H may be appointed person which fulfills following requirements: citizenship of the B&H; appropriate experience and professional knowledge in particular area; appropriate degree; proven professional abilities and reputation of careful, objective and expeditious expert in particular area; and integrity and high moral qualities.³² In the RS are prescribed similar but not identical general and special requirements for appointment of forensic experts.³³ Testing of candidates is performed by the commission in written and oral form in order to determine their

²¹ They don't have to be judicially appointed forensic experts/expert witnesses.

²² Article 96(2) of the LCP B&H; also: Article 110(2) of the LCP FB&H, Article 96(2) of the LCP of BD B&H, Article 160(2) of the LCP of RS.

²³ Article 102(1) of the LCP B&H; Article 116(1) of the LCP FB&H, Article 102(1) of the LCP of the BD B&H, Article 167(1) of the LCP of RS.

²⁴ Further professional qualifications are not specified in the provisions of the LCPs.

²⁵ Article 82 of the LCP B&H; Article 96 of the LCP FB&H; Article 82 of the LCP BD B&H; and Article 147 of the LCP of RS.

²⁶ Article 83 of the LCP B&H; Article 97 of the LCP FB&H; Article 83 of the LCP BD B&H; and Article 148 of the LCP of RS.

²⁷ Article 98(1) of the LCP B&H; also: Article 112(1) of the LCP FB&H, Article 98(1) LCP of the BD B&H, Article 163(1) of the LCP of RS.

²⁸ *Ibidem*.

²⁹ Article 98(3) of the LCP B&H; also: Article 112(3) of the LCP FB&H, Article 98(3) of the LCP BD B&H, Article 163 (2) and (3) of the LCP of RS.

³⁰ Articles 39-43 of the LCP FB&H; Articles 29-33 of the LCP of the BD B&H, and Articles 37-41 of the LCP of RS.

³¹ Article 34(1) of the LCP B&H; also: Article 44(1) of the LCP FB&H, Article 34(1) of the LCP of the BD B&H, Article 42(1) of the LCP of RS.

³² Article 3 of the LEW FB&H.

³³ Article 3 of the LEW RS also Article 5 of the Rulebook on the conditions, manner and procedure for admission to the list of judicial expert witnesses in BD B&H (Rulebook on judicial expert witnesses in BD B&H).

capabilities in regard to the following criteria:³⁴ professional knowledge and work performance; demonstrated professional ability based on previous career results, including participation in organized forms of education; ability proven through published scientific papers and through activities in professional associations; work ability and ability to professionally and clearly explain provided finding; the ability to perform expert tasks impartially, conscientiously, diligently, decisively and responsibly; conduct out of office, integrity and reputation.³⁵ On the suggestion of the commission expert witness is appointed by the entities ministers of justice and registered on the official list of judicial expert witnesses. Nevertheless, the published list of judicial expert witnesses is not mandatory for the prosecutor unless otherwise provided by the regulations governing the rules of procedure.³⁶ The expert witness is appointed for a period of six years and may be reappointed.

Activities of expertise in the entities may be performed by the expert witnesses from the entire territory of B&H. Exceptionally, if there is no expert witness of the necessary profession in Bosnia and Herzegovina, or there are other legal or factual reasons due to which experts from Bosnia and Herzegovina may not perform expertise in the particular case, expertise tasks in the Federation may, in specific cases, be performed by an expert from another country, which fulfills the conditions for carrying out the expertise in accordance with the law of that country.³⁷

As previously mentioned, forensic expertise is generally ordered by prosecutor when findings and opinion of person who has professional knowledge are necessary for determination or evaluation of certain important facts. Therefore, when it will be ordered, generally depends on the assessment of the prosecutor. However, there are few exemptions, specific situations prescribed by laws when forensic expertise is mandatory.³⁸

Generally, performance of forensic expertise entails preparation of findings and opinion and their presentation before the court in form of the testimony. Before commencement of forensic expertise, expert witness is invited by the prosecutor to carefully review the object of the forensic expertise, to correctly state everything that she/he observes and identifies and to impartially present his/her opinion in accordance to rules of science or expertise. Expert witness must be expressly cautioned that false expert testimony is criminal offence.³⁹ Process of forensic expertise is managed by the prosecutor that ordered it. As a part of the management process, at the beginning prosecutor should indicate the object of forensic expertise and asks relevant questions, which should be within limits of scientific, technical or other professional knowledge of expert witness (Sijerčić – Čolić, 2008: 434). During the performance of forensic expertise on the object, forensic witness will rely on the evidence indicated by the prosecutor. Forensic witness may suggest possible evidence or obtaining of certain

³⁴ Article 7 of the LEW FB&H, Article 7 of the LEW RS.

³⁵ Article 9 of the LEW FB&H. In the RS procedure of qualification testing is prescribed by the Rulebook adopted by Minister of justice of RS.

³⁶ Article 11 of the LEW FB&H and Article 10(5) of the LEW RS.

³⁷ Article 45 of the LEW FB&H and Article 34 of the LEW RS.

³⁸ See Articles 103, 110, 107, 108 of the LCP B&H.

³⁹ Article 99(1) LCP B&H; Article 113(1) of the LCP FB&H; Article 99(1) of the LCP BD B&H; and Article 164(1) of the LCP of RS.

objects and information relevant for the presentation of his/her findings and opinion.⁴⁰ If expert witness is present at crime scene investigation, reconstruction of events or other investigative action, he/she may suggest to the prosecutor clarification of certain circumstances or that person that is being heard is asked certain.⁴¹ Also clarifications may be given to the expert witness and he/she may be allowed to review the files. During the procedure of forensic expertise, expert witness examines objects at place where they are stored, unless forensic expertise involves extended examination or if examination is conducted in the institution or body or if that is requested by ethical reasons.⁴² In case when analysis of certain substance must be performed during the expertise, only a portion of that substance shall be available to the expert witness, and remainder of substance shall be saved in the required amount for the event of subsequent analysis.⁴³

Expert witness is obliged to deliver his/her report to the prosecutor who appointed him/her, which must contain: evidence examined, tests performed, the findings and opinion reached, as well as any other relevant information considered necessary for a fair and objective analysis.⁴⁴ The expert witness shall provide a detailed explanation of how he/she formed particular opinion.⁴⁵ In addition to the findings and opinion, expert witness also delivers to the prosecutor working material, sketches and notes. However, it should be noted that written findings and opinion of the expert witness are admissible as an evidence material only if she/he testifies at the hearing.⁴⁶ According to the LEWs, supervision of the work of the expert witness is assigned to the prosecutor who may submit its observations, objections and imposed fines to the competent minister of justice and propose establishing experts' responsibility in accordance with the law.⁴⁷

From the previously elaborated procedure of forensic expertise, particular entitlements of expert witness are evident in the relationship with the prosecutor: right to request to carefully examine object of expertise; right to request clarifications and assess files; right to suggest possible evidence or propose obtaining the objects and information important for presenting his/her findings and opinion; right to suggest clarification of certain circumstances or suggest particular questions for person who is being heard (when expert witness is present at a crime scene investigation, reconstruction or other investigative action). Furthermore, expert witness enjoys (Sijerčić-Čolić, 2008: 439): freedom of the testimony – prohibition of the impermissible pressure or extortion of testimony; right to use his/her own language; and right to

⁴⁰ Article 99(3) LCP B&H; Article 113(3) of the LCP FB&H; Article 99(3) of the LCP BD B&H; and Article 164(3) of the LCP of RS.

⁴¹ *Ibidem*.

⁴² Article 100(1) of the LCP B&H; Article 114(1) of the LCP B&H; Article 100(1) of the LCP FB&H; Article 100(1) of the LCP BD B&H; and Article 165(1) of the LCP of RS.

⁴³ Article 100(2) of the LCP B&H; Article 114(2) of the LCP B&H; Article 100(2) of the LCP FB&H; Article 100(2) of the LCP BD B&H; and Article 165(2) of the LCP of RS.

⁴⁴ Article 97 of the LCP B&H; Article 111 of the LCP FB&H; Article 97 of the LCP BD B&H; and Article 162 of the LCP of RS.

⁴⁵ *Ibidem*.

⁴⁶ Article 270(5) of the LCP B&H; Article 285(5) of the LCP FB&H; Article 270(5) of the LCP BD B&H; and Article 258(5) of the LCP of RS.

⁴⁷ Article 19 of the LEW FB&H and Article 14 of the LEW RS. Also, other parties or parties' representatives, as well as expert associations and expert associations may submit observations on the work of expert witnesses to the competent ministers of justice at entity level.

reward – right to reimbursement of cost and right to protection in case of evidence before the court of another country.

Previously stated rights of forensic expert are balanced with specific responsibilities: submission to the prosecutor of the report (findings and opinion), as well as working material, sketches and notes;⁴⁸ cautious review of the object of the forensic expertise, correct account of everything that was observed and identified, and impartial and truthful presentation of findings and opinion in accordance with scientific or expert rules; maintenance of confidentiality in regard to those facts or information that are learned in the course of conducting criminal procedure, and for which there are stipulated requirements for determination of their secrecy⁴⁹ (Sijerčić – Čolić, 2008:439).⁵⁰ In the subsequent phases of the criminal proceedings, forensic witness has other appropriate responsibilities: attendance at the trial;⁵¹ taking an oath or giving a statement prior to presenting testimony, respecting the order and the dignity of the court during the main hearing.⁵²

Although legal theory and practice distinguish many types of expertise (see: Pavišić and Modly, 1999:240-293; Halilović, 2010:171), the criminal procedural laws in B&H specifically regulate: forensic expertise in case of suspicious death;⁵³ toxicological expertise;⁵⁴ forensic expertise of physical injuries;⁵⁵ psychiatric forensic expertise in case of suspicion of exclusion or reduction of accountability,⁵⁶ audit of business books⁵⁷ and DNA analysis.⁵⁸ From the aforementioned forensic expertises mandatory expertises⁵⁹ are:

⁴⁸ Article 97 of the LCP B&H; Article 111 of the LCP FB&H; Article 97 of the LCP BD B&H; and Article 162 of the LCP of RS. The report must contain: evidence examined, tests performed, the findings and opinion reached/gained, and any other relevant information considered necessary for a fair and objective analysis. Moreover, a detailed explanation of how particular opinion was formed must be provided.

⁴⁹ Article 33 of the LEW FB&H, Article 25 of the LEW RS, and Article 21 of the Rulebook on judicial expert witnesses in BD B&H.

⁵⁰ Article 99(1) of the LCP B&H; Article 113(1) of the LCP FB&H; Article 99(1) of the LCP BD B&H; and Article 164(1) of the LCP of RS.

⁵¹ Article 249(1) and (2) of the of the LCP B&H; Article 264(1) and (2) of the LCP FB&H; Article 249(1) and (2) of the LCP BD B&H; and Article 264(1) and (2) of the LCP of RS. If an expert was duly summoned but fails to appear and does not justify his absence, the judge or the presiding judge may order that expert is be brought in, and may discipline the expert, with fine an amount up to 5.000 KM.

⁵² Article 242(3) of the LCP B&H; Article 257(3) of the LCP FB&H; Article 242(3) of the LCP BD B&H; and Article 257(3) of the LCP of RS.

⁵³ Articles 103-106 of the LCP B&H; Articles 117-120 of the LCP FB&H; Articles 103-106 of the LCP BD B&H; and Articles 168-171 of the LCP of RS.

⁵⁴ Article 107 of the LCP B&H; Article 121 of the LCP FB&H; Article 107 of the LCP BD B&H; and Article 172 of the LCP of RS.

⁵⁵ Article 108 of the LCP B&H; Article 122 of the LCP FB&H; Article 108 of the LCP BD B&H; and Article 173 of the LCP of RS.

⁵⁶ Article 110 of the LCP B&H; Article 124 of the LCP FB&H; Article 110 of the LCP BD B&H; and Article 175 of the LCP of RS.

⁵⁷ Article 111 of the LCP B&H; Article 125 of the LCP FB&H; Article 111 of the LCP BD B&H; and Article 176 of the LCP of RS.

⁵⁸ Articles 112-115 of the LCP B&H; Articles 126 -129 of the LCP FB&H; Articles 112-115 of the LCP BD B&H; and Articles 177-180 of the LCP of RS.

⁵⁹ Categorization of expertise as obligatory/mandatory indicates that law explicitly prescribes that certain fact in procedure must only be determined or clarified through performance of certain type of forensic expertise.

examination and autopsy;⁶⁰ toxicological expertise;⁶¹ forensic expertise of physical injuries;⁶² and psychiatric forensic expertise.⁶³

3. Evidentiary value of the forensic expert's testimony

Testimony of expert witness enjoys reputation of credible evidence, with almost unquestionable evidentiary value and strength as is continuously presented in judicial practice in the sense that judges in vast majority cases accept findings and opinions of expert witness (Pavišić and Modly, 1999:300, Bojanić, 2010; Kavazović, 2015; Bajraktarević Pajević, Kavazović, Lučić – Čatić, 2017, etc.). In theory, this evidence is in criminal procedure evaluated in conformity with the principle of free evaluation of evidence, which implies that court appraises presented evidence on the grounds of its logical and physiological analysis (Sijerčić-Čolić *et al.*, 2005) or its free belief (Halilović, 2010) and it is not constrained with legal rules on predefined value of certain evidence. However, testimony of expert witness unlike other evidences evades the rules of experience and logic due to its nature – it is subjected to the rules of specific profession or expertise and hence it is argued that court is actually bound with it. Krapac (2007:427) points out the viewpoint that forensic expertise represents an exception from the principle of free evaluation of evidence and thus forces court to always determine the facts as they result from findings or opinion of an expert witness. The very fact that the expert's testimony is obtained by applying scientific and expert knowledge (with the application of process norms) is a cause why it enjoys a high degree of evidentiary value and, at the same time, reason why its free evaluation by the court is only formally present, while in fact significantly limited or even non-existent.

Although this opinion is not generally accepted within the theory of criminal procedural law, from the current case law is evident that actual abilities of the court in regard to the evaluation of forensic expertise are smaller than in relation to the other evidence (Sijerčić-Čolić, 2010:445) and thus is argued that it must show greater carefulness in its work and deduction (Dimitrijević, 1971:191) in regard to this evidence. Sijerčić-Čolić (2010:445) urges that the court must especially pay attention to the following: whether the expert witness has remained within the limits of delegated expertise and within the limits of his/her profession and knowledge; whether expertise is based on objectively established facts; was there enough material for the expertise; and whether the methods used by the expert witness are generally recognized and accepted.

Even though courts rarely decide not to accept this evidence, there are various reasons for dispute of testimony of forensic expert and consequent refusal: incompleteness and qualitative deficiencies of the substances at disposal of the expert; the absence of convincing arguments that would support of the expert's conclusion; doubts about the and completeness of the findings and accuracy of opinion insufficient

⁶⁰ Article 104 of the LCP B&H; Article 118 of the LCP FB&H; Article 104 of the LCP BD B&H; and Article 169 of the LCP of RS.

⁶¹ Article 107 of the LCP B&H; Article 121 of the LCP FB&H; Article 107 of the LCP BD B&H; and Article 172 of the LCP of RS.

⁶² Article 108 of the LCP B&H; Article 122 of the LCP FB&H; Article 108 of the LCP BD B&H; and Article 173 of the LCP of RS.

⁶³ Article 110 of the LCP B&H; Article 124 of the LCP FB&H; Article 110 of the LCP BD B&H; and Article 175 of the LCP of RS.

development of the relevant branch of professional knowledge; inadequate formal qualifications of expert witness; and violation of the provisions of the LCPs in the procedure of expertise (Dimitrijević, 1971:192, Pavišić and Modly, 1999:303). In any of the following cases the court is obliged to thoroughly explain its disagreement with opinion of the forensic expert.

4. Prosecutor's evaluation of forensic expertise

The LCPs discard the formal evidentiary rules on the quality and quantity of specific evidences as they prescribe that evaluation of existence or non – existence of facts by the court, prosecutor and other bodies in criminal proceeding mustn't be bound or limited to special formal evidentiary rules⁶⁴ and thus accept the free evaluation of the evidence as a fundamental basis of criminal proceeding system. This principle is applied during the entire criminal proceedings in regard to all decisions that are made. Consequently, free evaluation of the evidence is not only performed by the court, but also by the prosecutor, authorized persons and other bodies involved in the procedure (Sijerčić -Čolić *et al.*, 2005:76). Prosecutor has right and obligation to provide evidence (Dimitrijević, 1971), and evaluation (qualitative as well as quantitative) of obtained evidence is essential part of its decision making: to indict or discontinue from the further proceeding (Halilović, 2010:33). Namely, prosecutor's due diligence (comprehensive and detailed examination) regarding the evaluation of probability is based on the facts from which stems grounded suspicion that certain person committed certain criminal offence (Lakić, 2013:22). So, evaluation of evidence has a diagnostic role in making decision on the substantiation or not substantiation of certain material facts whose existence or non-existence the subject of proving (Halilović, 2010:58). Prosecutor is the only one competent for analysis of the investigative subject in the context of the formal and material content related to the question existence of the conditions for indictment crucial for the transition from investigation to the phase of main criminal procedure (Glušac, 2014). When during the course of the investigation prosecutor concludes that circumstances in relevant subject matter are sufficiently clarified for indictment, investigation ends and indictment is prepared and submitted to the judge for preliminary hearing. For indictment is necessary standard of proof, which consists in the existence of sufficient evidence for a reasonable suspicion that the suspect has committed the criminal offence.⁶⁵ Reasonable suspicion is higher degree of suspicion based on the obtained evidence that refers to the conclusion on perpetration of criminal offence (Sijerčić – Čolić *et al.*, 2005:610). Moreover, Glušac suggests that reasonable suspicion is a fixed degree of certainty of knowledge about the existence of these facts, in a sense that conviction is more likely than acquittal, and those prospects result from the obtained evidence on which suspicion grounded (2014:209). Subsequently, quality of indictment – determines the result of entire criminal procedure (see: Lakić, 2013:22).

The prosecutor has obligation to correctly, completely and impartially establish all relevant fact and circumstances regarding the criminal offence and its perpetrator, and

⁶⁴ Article 15 of the LCP B&H; Article 15 of the LCP FB&H; Article 15 of the LCP BD B&H; and Article 15 of the LCP of RS.

⁶⁵ Article 226 of the LCP B&H, Article 241 of the LCP FB&H, Article 226 of the LCP BD B&H and Article 241 of the LCP RS.

after establishing such factual situation guided with principle of truth, which obliges prosecutor in the same way as a court, makes the prosecutorial decision (Glušac, 2014:211). This involves comprehensive assessment of all aspects of obtained evidences and especially those that direct the following actions of preparation and laying the indictment. Even though, the LCPs don't stipulate obligation to provide in indictment evidence in favor of the suspect,⁶⁶ the prosecutor must review all the facts and circumstances including the ones in in favor of the suspect in order to form clear picture about the strength of evidences of the future indictment (see: Krapac, 2007).

As previously stated, in evaluation of existence or nonexistence of the facts prosecutor is not tied by the formal rules,⁶⁷ which in advance determine evidentiary value of certain evidence or that certain fact may only be proven with certain evidence.⁶⁸ However, it couldn't be considered that this means that the process of forming the prosecutor's conviction on existence or non-existence of certain facts is entirely unrestricted,⁶⁹ because intersubjective validity in the criminal proceedings may be achieved only by factual findings that are free from arbitrariness (Krapac, 2007:392). Objective rules based on common human opinion and experience such as: specific and complete elaboration which facts and on the what ground are taken for proven, and meticulous evaluation each evidence individually and in conjunction with other evidence (especially if there is contradiction), should be followed by prosecutor in order to rationalize formation of its conviction on existence of certain facts. Furthermore, it should be stated that prosecutor's evaluation of evidence is in practice (but not formally) limited with expected judicial evaluation of evidence.

Free evaluation is especially questionable when it comes to evidentiary value of scientific evidence (see: Pavišić and Modly, 1999:300-301). As previously stated, forensic expertise shall be ordered when the findings and opinion of an individual possessing the necessary specialized knowledge are required for establishment or evaluation of certain important fact.⁷⁰ To be more precise, if scientific, technical or other specialized knowledge may assist the prosecutor in evaluating the evidence or clarifying the questionable facts, an expert as a special kind of witness may testify by providing his/her finding on the facts and opinion that contains evaluation of the facts.⁷¹ However, this assistance must be restricted to the establishment of facts, while application of legal norm is excluded. In the theory of criminal procedural law and judicial evidence, forensic expertise is traditionally perceived as an evidence of utmost evidentiary value and strength (see Halilović, 2010:38-39) that is rarely disregarded by the prosecutor and the court as demonstrated by the judicial practice.

According to results of the research on use of questioned document expertise in judicial practice in B&H (Canton Sarajevo), within which a sample of total 95 court cases

⁶⁶ See: Article 227(1) of the LCP B&H, Article 242(1) of the LCP FB&H, Article 227(1) of the LCP BD B&H and Article 242(1) of the LCP RS.

⁶⁷ Article 15 of the LCP B&H; Article 15 of the LCP FB&H; Article 15 of the LCP BD B&H; and Article 15 of the LCP of RS.

⁶⁸ With certain exceptions: Articles 103(1), 107(1) or 110(1), 327(2) and 328(2) of the LCP B&H.

⁶⁹ This is not case even when the court is concerned, because limitlessness generates danger of judicial arbitrariness.

⁷⁰ Article 95 of the LCP B&H; also: Article 109 of the LCP FB&H, Article 95 LCP of the BD B&H, Article 159 of the LCP of RS.

⁷¹ *Ibidem*.

in period 2002-2007 were analyzed (Kavazović, 2017:11).⁷² In analyzed sample, 94,34% presented opinions within the written finding of forensic experts were in accordance with the final judgement of the court. In the remaining number of court cases, a total of four experts' findings were not in accordance with the final judgement (3, 77%). Furthermore, in one analyzed court case five questioned document expertises were performed on the same sample of expertise by the three different judicial expert witnesses (Kavazović, 2017:11). Having in mind previously stated, it is clear that an only small number of judgements were in discord with presented findings and opinions of certain forensic experts.

Results of another research on forensic expertise conducted in B&H by Bajraktarević Pajević, Kavazović and Lučić – Čatić (2017) verify accuracy of theoretical standpoints in regard to the prominent evidentiary value of the forensic expertise. In this research focused on the analysis of financial crime cases heard before the Court of B&H, prominence of forensic expertise in financial crime proceedings⁷³ was valued through the two criteria: incidence of forensic expertise in this type of criminal proceedings and its assessment by the court conducting the proceedings. In regard to first criteria, in sample of analyzed judgements forensic expertise was used in 74, 45% of judgements and thus confirms prominence of forensic expertise in financial crime proceedings is courts assessment of this evidence (Bajraktarević Pajević, Kavazović and Lučić – Čatić, 2017:82). In order to determine the court's assessments of this evidence and to establish the evidentiary significance of forensic expertise in financial crime proceedings before the Court of B&H, authors examined explanations of judicial decisions (judgements). Results show that forensic expertise was basis for courts decisions in 70% judgments (Bajraktarević Pajević, Kavazović and Lučić – Čatić, 2017:83). Furthermore, in sample authors found that forensic expertise undeniably had a decisive influence on the court's decision. Namely, in 75,71 % of judgements forensic financial expertise was admissible evidence out of which 96,22% judgements resulted with conviction. It is important to note that in analyzed sample, in all judgements in which financial forensic expertise was admissible evidence, it was evidence presented by prosecutor. This also applies to the results regarding the questioned document expertise: when it was used it was admissible and it was evidence presented by prosecutor (Bajraktarević Pajević, Kavazović and Lučić – Čatić, 2017:83).

Analogous conclusions were reached in research on the role of forensic expertise in forming judicial decision in cases of sexual criminal offences (see: Bojanić, 2010).

All evidence in criminal procedure including the forensic expertise should be evaluated in conformity with the principle of free evaluation of evidence, which implies absence of legal rules on predefined value of certain evidence. However, testimony of expert witness unlike other evidence evades the rules of experience and logic due to its subjection to the rules of specific profession or expertise and hence it is argued that even the court is bound with it. Given this, expert testimony may be regarded as a peculiar deviation from the principle of free evaluation of evidence, because possibility of prosecutor's evaluation of the facts that are obtained through application of scientific and expert knowledge is scarce, so he/she principally accepts the facts as they result

⁷² The higher number indicates that in certain cases were performed repeated and additional forensic expertises.

⁷³ For more information on the role of forensic accounting and forensic audit in the South Eastern European countries see: Mojsoska and Dujovski (2015).

from findings or opinion of an expert witness. Privileged treatment of expertise by the prosecutor and consequently by the court indicates dependence on the findings and opinion of expert witness, and acceptance of forensic expertise without critical evaluation and comparison to other material and personal evidence (Bajraktarević Pajević, Kavazović and Lučić – Čatić, 2017) may result in expert witness deciding about the fate of the criminal case. This urges for greater carefulness in regard to the forensic expertise, and prosecutor should pay attention to the evaluation of following aspects of the forensic expertise (Pavišić and Modly, 1999:303): the level of expert witness compliance with the procedural provisions during the process of forensic expertise; whether the expert witness has remained within the limits of delegated expertise and within the limits of his/her profession and knowledge; whether expertise is based on objectively established facts and are some important facts neglected; authenticity of the subject of expertise, and also suitability and adequacy of the substance in terms of quantity and quality in order to obtain correct conclusion; whether the methods used by the expert witness are generally recognized and accepted and whether the scope of expertise is satisfactory; compliance of the findings and opinion of expert witness with other evidences; value of the conclusion in regard to identicalness and whether is clear, understandable and logical.

Notwithstanding the problems regarding the evaluation of forensic expertise, this evidence should be disregarded by the prosecutor in the case of: incompleteness and qualitative deficiencies of the substances at disposal of the expert;⁷⁴ absence of convincing arguments that would support of the expert's conclusion; doubts about the and completeness of the findings and accuracy of opinion insufficient development of the relevant branch of professional knowledge; inadequate formal qualifications of expert witness; and violation of the provisions of the LCPs in the procedure of expertise (see: Dimitrijević, 1971).

Concluding remarks

Relationship of the prosecutor and expert witness, shaped through the provisions of LCPs, is built on the need of the latter for scientific or professional knowledge or skill in order to establish and evaluate of certain important facts in given criminal matter. Even though, prosecutor is not tied by the legal rules in the process of evaluation of existence or nonexistence of the facts, researches of judicial practice in B&H indicate that there is in fact rule that guides conduct of prosecutors: preference of the forensic expertise over other material and personal evidences. This specific form of deviation from the fundamental legal principle of free evaluation of evidence shouldn't be ignored and greater carefulness in regard to the evaluation of forensic expertise should be performed.

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⁷⁴ On specifics of typical shortcomings of forensic science and other expert evidence see: Roberts (2015).

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