

25. SPAIN

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Other administrative order

YES

I. Procedural rules in calling for an expert examination

I. 1) On the initiative of

It is up to the parties in a civil trial to add expert examinations to their grievances when scientific, artistic, technical or practical knowledge is necessary to evaluate relevant facts or circumstances on the case or to establish certainties from them.

In exceptional cases the law provides that the civil judge can appoint the expert: legal aid, procedure of parentage, paternity, maternity, disability, or when the parties jointly decide to ask the judge to appoint an expert.

I.2) Mandatory expert examinations

In disability trials, Article 759 LEC *in fine* does not allow the judge to render a decision without calling for medical expertise. The judge must request a medical expert's opinion whether or not the parties have appointed their own experts.

I. 3) Decision-maker

It is possible for expert examinations not to be taken into account by the judge if they are neither useful nor relevant nor necessary for the resolution of the trial in which they were included.

However the parties (lawyers) decide whether or not to present the expert's opinion with their initial court arguments.

I.4) Is a pre-trial expert examination possible?

The parties can ask the judge for a new deadline in which to present their report when there are new allegations by one party and the other considers that an expert examination is necessary based on new evidence.

In the same way, if within the deadline one of the parties has been unable to present its expert report, it can ask the judge for an extension, which is usually granted.

II. Choice and appointment of the expert(s)

II. 1) Register

For private expert opinions (most cases in civil law), there are no registers of legal experts, and lawyers can appoint experts registered on professional orders or in expert companies or associations.

For court appointments, in January of each year, specialised professional organisations (official orders or “colegios” of doctors, architects, etc. and private expert companies or associations as well as academic institutions) draw up a register of at least five members who have stated that they accept to be appointed as experts.

A first legal expert is appointed by random lottery from one of these registers (unless none of them corresponds to the necessary technical skill). Then the following experts are appointed by alphabetical order.

If there is no adequate official register, the court can appoint an unregistered expert. If need be, an expert can be appointed, even if he does not have a formal professional title, if all the litigants unanimously agree.

A civil servant can be appointed as expert, such as a university professor enrolled on his institution’s register.

A legal person can be an expert if its competence corresponds to the required specialty, such as a laboratory or a university department. It will have to appoint a liable person from among its members who will sign the report.

It is possible to have a corporate expert examination.

II. 2) Oath

Court-appointed experts take a written oath before the court registrar at the start of each mission. In private expert examinations, experts will have to take these oaths at the beginning of each hearing, and swear he will tell the whole truth, that he has acted or, if need be, will act, with the greatest possible objectivity, taking into account not only what could favour one of the parties as much as that which could harm them, and that he knows the penalties he could incur should he fail to accomplish his mission as an expert.

II. 3) Choice of the Expert

The parties choose the expert who will carry out the mission in support of their claims. If the expert is court-appointed, the judge must forward the request to the Court in charge of expertise (*Juzgado Decano*) for it to select a sworn expert from the register.

II. 4) Participation by the parties in the appointment process

In exceptional cases (Article 339.3 LEC), the parties can agree to ask the judge to call for a court-appointed expert because of additional allegations or claims permitted at the hearing. The judge considers the relevance of this request and its usefulness for the trial.

II. 5) Nationality

Most official orders allow for the integration of a foreign professional. There is no legal basis to his registration with the order he belongs to.

II. 6) Recusal by the litigant parties

Legal experts can be recused by a litigant if there are duly proven facts which could nurture doubt about his sincerity or objectivity. A testimony is accepted as form of evidence. The recusal is at the court's discretion.

Let us note that a litigant's expert cannot be recused, but can be contested by another litigant for the same reasons, which can divest his report of its probative value. The court rules over the rationale behind this contestation. Contrary to the legal expert's recusal, a litigant's expert recusal cannot rely on testimony.

The guarantee of the expert's impartiality are the oath sworn to tell the truth, the possibility of recusal when the the expert examination is ordered by a judge, and default for a party-appointed expert.

II. 7) Expert's withdrawal (refusal of a mission)

After being appointed by the court, the expert is notified very shortly (Article 342 LEC) and has two days to signify his acceptance or his refusal of the mission. The refusal should be motivated by a just cause, including if he is materially unable to carry it out.

II. 8) Possibility of adding another expert

There is no provision for a procedure to add another expert to assist or collaborate in an expert examination.

II. 9) Possibility of being assisted by a colleague

There is no provision for a procedure to add another expert to assist in an expert examination although if the expert considers he must be helped by a colleague, he can be, as long as his request is duly reasoned (chemical analyses of construction materials in an architect's expert examination, for example).

III. Definition of the expert's mission

III. 1) Who determines the mission?

The mission is determined by the party who has appointed him and by the judge. The expert must abide by it.

There is no text preventing the intervention of another expert, but the appointed expert is the only one liable for the good progress of his mission.

III. 2) Type of mission

All

IV. Progress of the expert's mission

IV. 1) Judge supervision

The judge supervises the good progress of the expert's mission, can set deadline and order expert examination measures.

IV. 2) Form of contradictory procedure

The expert must respect the contradictory procedure by telling the litigants of his proceedings according to procedures which will preserve their rights.

However, he does not have to call on the litigants for all his operations, unless they request it of the court, and it grants this request.

If a litigant hinders the good progress of the expert's mission, the judge can order him to end his obstruction.

The parties can intervene in the expert's proceedings (Article 345 LEC).

IV. 3) Participation in the hearing

The expert can be called in for a hearing by the court, confronted with the litigants' questions and with other experts, especially the litigants' experts.

V. Close of the expert examination

V. 1) Does conciliation put an end to the expert's mission?

UNSPECIFIED

V. 2) Form imposed on the report

Procedural law does not provide that the report be in a specific format. It must be submitted in written form and written in Castilian Spanish or in the language of the Autonomous Community of the jurisdiction in which the affair is being held.

It must include all the necessary intellectual and material elements necessary to the court's good understanding and the discussion with the litigants.

V. 3) Does the report put an end to the expert's mission?

The expert submits a written report which does not necessarily put an end to his mission. In any event, if the parties request it, the expert will have to go to the hearing to confirm and explain the content of his report (Article 347 LEC).

V. 4) Is there an imposed structure for the report?

NO

V. 5) Is a preliminary report mandatory?

NO

V. 6) Is the judge bound by the expert's conclusions?

The court is not bound by the expert's opinion, but must always argue any total or partial rejection of his conclusions. In order to follow or disregard an expert's findings, the judge must base himself on the principle of "healthy criticism" provided for in Article 348 LEC and duly reason his decision, most notably if there are several experts with the same opinion. "Healthy criticism" does not mean free or discretionary evaluation by the judge, but it does imply a duly motivated evaluation.

V. 7) Possibility of a second opinion

YES

VI. Funding for the expert examination

VI. 1) Security-Payment

Paid by the person requesting the expert examination. The expert requests a large part of his total final fees when he accepts a mission. If within 5 days the party requesting the judge for an expert opinion has not deposited the amount requested by the expert, the expert remains free from having to do his report (Article 342.3 LEC).

VI. 2) Determining the amount of payment due

The expert decides the amount of this initial payment and the court can later rule on the correction of this payment (in practice the Court hardly ever contests the expert's fees unless the amount is really excessively high). The Court can in certain cases increase the payment if the expert proves that new acts need to be carried out. The initial deposit is an advance on the final payment.

VI. 3) Possibility of additional payment

Yes, if the mission must be extended to include other issues.

VI. 4) Determining fees and costs

Fees are set by the expert and paid by the litigant who requested the expert's appointment.

When issuing its judgement, the court usually burdens the unsuccessful litigant with the fees, as long as the expert's intervention was considered useful, and within the limit of a third of the quantum of the damage for which compensation is attributed.

VI. 5) Possibility of contesting the fees

YES

VII. Expert liability within proceedings

VII. 1) Are there any laws governing expert examinations?

Civil procedure law of January 7 2000 (Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil ou « LEC »), art. 335 à 352.

The expert must respect the professional rules which regulate his specialty.

He must be honest and objective, which implies the absence of personal or economic ties to any of the litigants, which would compromise his impartiality and his independence.

There is no representative structure for legal experts as such.

The expert takes a written oath for each appointment and includes the corresponding formula into his report.

VII. 2) Expert liability

The expert may be held civilly liable in conditions of common law: existence of misconduct, prejudice, and causal tie between one and the other.

Intentional breach of the rule of honesty on the expert's part, when he has taken an oath, can lead to criminal penalty, which can also be complemented by a temporary disqualification of his professional title.

VII. 3) Mandatory insurance for the expert

No, although each order or association can oblige experts to take out civil liability insurance.

VIII. The expert's status

VIII. 1) Existence of selection criteria (accreditation)

NO

Automatic when one belongs to an institution or expert association.

VIII. 2) Classification of skills

Set by the institution to which the expert belongs.

VIII. 3) Required qualifications

Required qualifications, or in-depth knowledge when there is no specific academic title that validates the profession (Article 340 LEC).

Set by the institution to which the expert belongs or by the universities.

VIII. 4) Grant of accreditation

Automatically results from belonging to an expert institution or association.

VIII. 5) Possibility of accrediting a legal person

YES, possible appointment of a legal person but with a preference for renowned universities and / or scientific establishments.

VIII. 6) Validity period for the accreditation

Set by the institution to which the expert belongs.

VIII. 7) Regular assessment tests

NO

VIII. 8) Supervision of the expert's mission

There is no specific disposition for this case.

VIII. 9) Expert's activity report

NO

VIII. 10) Code of ethics

Yes, they are set by the institution to which the expert belongs.

VIII. 11) Good practice

Yes, set by the institution to which the expert belongs.

VIII. 12) Possibility of penalties

No, only by the institution to which the expert belongs.

Disciplinary penalties by the Court.

VIII. 13) Laws governing the expert's status

Civil procedure law of January 7 2000 (*Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil* ou « LEC »), art. 335 à 352.

IX. Bibliography

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www.cogiti.es = General Council of the Official Colleges of Industrial Technique Experts and Engi-
neers

www.cscae.com/uapfe = Union of the Legal Expert Architects of Spain

www.cgcom.org = General Council of the Official Colleges of Medical Doctors

www.refor.org = Register of Legal Expert Economists