



A Theoretical Review of the Multiple Ways “Persons with Specialized Knowledge” Are Used in Criminal Court Proceedingsⁱ

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Summary: In order to ensure that the role of “persons with specialized knowledge” (“有专门知识的人”) ⁱⁱⁱ in court proceedings does not conflict with China’s official forensic assessment system, the Criminal Procedure Law has strictly limited how “persons with specialized knowledge” may be used when they appear in court. In practice, however, they have been used more widely. This is due to the increasingly strong adversarial nature of Chinese court proceedings, the poor operation of the system for correcting forensic assessment errors, the low rate of court

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ⁱⁱⁱ Translators’ note: “person with specialized knowledge” (“有专门知识的人”) does not have an official definition in China. Traditionally, China’s forensic examiners are licensed by the government and are the persons certified to author forensic reports, which are codified as one of the nine types of evidence in China’s Criminal Procedure Law. “Persons with specialized knowledge” are not necessarily forensic examiners, and could be anyone with special expertise that is relevant to a question raised in trial.

appearances by forensic examiners, and improper limitations placed on what it means to do a forensic examination in practice. To a certain extent, the multiple uses of “persons with specialized knowledge” fits into the structural development of China’s criminal procedure. However, it also shows that China’s inquisitorial forensic assessment system can no longer fully meet the practical needs of the Chinese criminal justice system as it develops. China should appropriately expand the authorized functions of “persons with specialized knowledge” and strengthen their role by vetting their expertise, requiring them to appear in court, and allowing them to participate in the forensic assessment process.

Key Words: “Person with specialized knowledge,” appearance in court, inquisitorial forensic assessment

In 2012, the Criminal Procedure Law (CPL) established a system for “person(s) with specialized knowledge” to appear in court in criminal trials. Implementation of this system has been facilitated through a series of normative documents issued by the relevant judicial agencies.¹ However, with the growth of this system in practice, the number of ways “person(s) with specialized knowledge” have been used has gradually expanded beyond the legislative authorization, which is limited to “providing opinions on reports produced by forensic examiners.” This has prompted a heated debate within the academic community about the litigation status of “person(s) with specialized knowledge,” and whether and how they should be subject to cross-examination and whether they should be considered expert assistants or expert witnesses.² However, through this intense academic debate, we find that the current academic research has not yet clearly explained some basic theoretical issues about the appearance of “person(s) with specialized knowledge” in court, such as: why the legislation limits their functions, why their functions have nevertheless multiplied in practice, and what impact such an expansion of their use will have on the official forensic assessment system. Because the “person(s)

¹ For example, *People’s Court Rules for Handling Courtroom Investigation in First-instance Criminal Trials Under the Ordinary Procedures (Provisional)* issued by the Supreme People’s Court in 2017 provided details about “person(s) with specialized knowledge” participating in trials. In 2018, the Supreme People’s Procuratorate issued *Provisions on Many Issues Concerning Appointing and Hiring People with Specialized Knowledge to Participant in Handling Cases*. In addition, some local courts and procuratorates in such as Zhejiang Province, Shandong Province and Ningxia Hui Nationality Autonomous Region, publicized their own documents on issues related to “person(s) with specialized knowledge” testifying in court.

² See Zhang Baosheng, Dong Shuai, *Zhongguo Xingshi Zhuanjia Fuzhuren Xiang Zhuanjia Zhengren De Juese Zhuanbian*, Chinese Journal of Law (2020), Issue 3, p. 169.

with specialized knowledge” system is rooted in the forensic assessment system, the answer to the above questions should come from the forensic assessment system itself, and the multiple ways “person(s) with specialized knowledge” have been used should be understood from the perspective of the forensic assessment system. In view of this, this paper will analyze the manifestation and institutional reasons why litigants have used “person(s) with specialized knowledge” for many different purposes from the perspectives of how and why the legislation limits their function, and from there provide a theoretical review and reflection on this development.

I. Legislative Limitations on the Role of “Person(s) with Specialized Knowledge”

A. Limitations in the CPL on the Role of “Person(s) with Specialized Knowledge”

The notion of “person(s) with specialized knowledge” is not a brand-new concept introduced by the 2012 CPL. It was already used in the 1979 CPL, which provided that a “person with specialized knowledge” could participate in a forensic assessment, inquest and inspection.³ However, a system for “person(s) with specialized knowledge” appearing in court was established in 2012. Article 197, paragraph 2 of the amended CPL provides that “person(s) with specialized knowledge” may appear in court “to present opinions on the forensic reports produced by the forensic examiners.” Nonetheless, from the text of this article, the legislation has a strict limit on the role of “person(s) with specialized knowledge” in court. To put it specifically:

³ See Articles 71 and 88 of the Criminal Procedure Law (1979).

First, the legislation limits the role of “person(s) with specialized knowledge” in court to “presenting opinions.” The expression, “presenting opinions,” is widely used in the CPL, and the subjects who present opinions include not only the litigants, defense lawyers, litigation representatives, and duty lawyers, but also the prosecutors, and the scope of opinions can range from the opinions of the litigants, defenders, or litigation representatives to the opinions related to adjudication such as opinions of correcting adjudicative errors, excluding illegal evidence, and so on. However, from the viewpoint of approved categories of evidence, these opinions do not belong to any of the statutory types of evidence. The CPL has special terms for the providers of evidence or persons with knowledge of relevant facts to appear in court to testify about the evidence. It is called “testifying” for a witness appearing in court, “clarifying forensic analysis” for a forensic examiner, and “explaining the situation of inquest and inspection” for an investigator. Therefore, “opinions” presented by “person(s) with specialized knowledge” do not fit in any of the categories of evidence provided by statute, but are only comments based on relevant facts or evidence. This also means that the opinion presented to the court by “person(s) with specialized knowledge” cannot be used as the basis for a verdict since it does not belong to any statutorily recognized category of evidence.

Secondly, the legislation limits the object of the comments from “person(s) with specialized knowledge” to forensic reports. According to paragraph 2 of Article 197 of the CPL, “person(s) with specialized knowledge” can only give an opinion on the forensic reports produced by the forensic examiners. Although the specialized issues in a case can be solved not only through forensic analysis, but also through inquest and inspection, the CPL limits the scope of opinions from “person(s) with specialized knowledge” to forensic reports.

Thirdly, the legislation limits the meaning of the kind of opinion that may be given in court by a “person(s) with specialized knowledge” to an opinion challenging the official forensic examination report. How should the word “opinions” in “presenting opinions on forensic reports” as provided in the CPL be interpreted? It seems that literally the meaning of “opinions” should include affirmative opinions, negative opinions, or challenging opinions. However, the *Interpretation of the Criminal Procedure Law of the People’s Republic of China* construed Article 197 of the CPL regarding “Person(s) with specialized knowledge” in-court opinions as follows: “presenting opinions itself is not a forensic re-appraisal, but raises challenging opinions about forensic reports from a professional point of view to provide a reference for the judge to scrutinize the evidence.”⁴ Therefore, the opinions presented by “person(s) with specialized knowledge” in court should be opinions that challenge the official forensic examination report.

B. The Institutional Reasons for Legislative Limitations on the Role of “Person(s) with Specialized Knowledge”

There are practical reasons for the legislation to strictly limit the in-court function of “person(s) with specialized knowledge,” such as preventing the re-emergence of multiple and duplicate forensic assessments, and maintaining a delicate balance between the partisanship of such persons and the impartiality of their professional judgment.⁵ In addition to the above-mentioned

⁴ Wang Aili, *Zhonghua Renmin Gongheguo Xingshi Susongfa Shiyi*, Law Press (2018), p. 420.

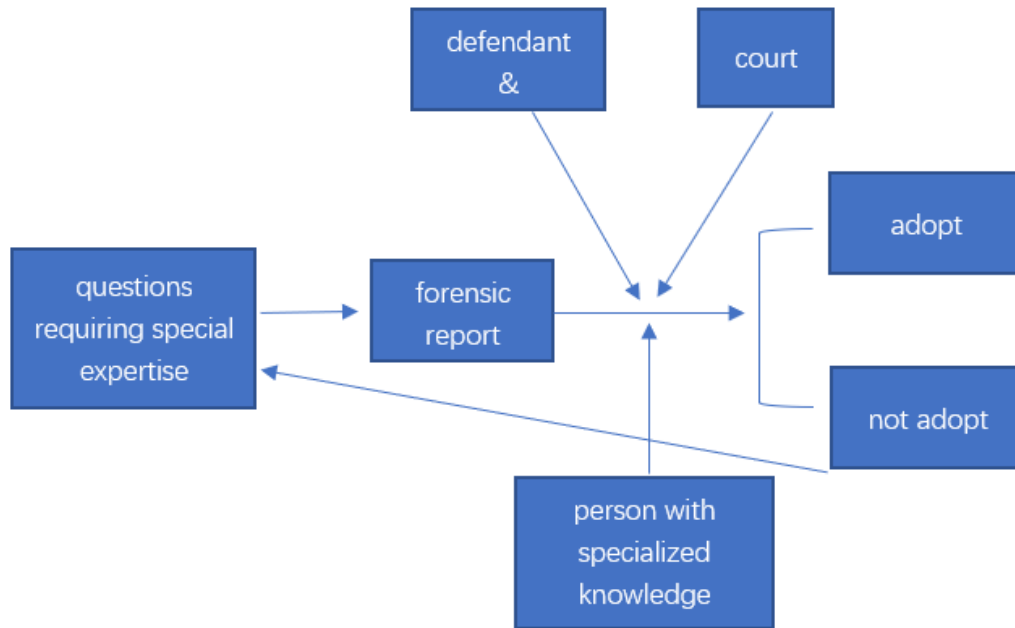
⁵ See Wu Hongqi, *Xingshi Susong Zhong De Zhuanjia Fuzhuren: Zhidu Biange Yu Youhua Lujin*, Journal of Criminal Science (2018), Issue 5, p. 80.

practical reasons, there are deep-seated institutional reasons. Because as a system rooted in China’s traditional inquisitorial forensic assessment system, the presence of “person(s) with specialized knowledge” in court must be consistent with the inquisitorial nature of China’s forensic assessment system. Otherwise, it would undermine the internal logical of the official forensic assessment system and cause operational chaos. Therefore, the institutional reasons for the legislative limitation on the in court functions of “person(s) with specialized knowledge” is to ensure that it is compatible with the inquisitorial forensic appraisal system.

First, China’s CPL established a single mechanism to resolve specialized issues that need to be assessed through forensic assessment. This mechanism excludes “person(s) with specialized knowledge” from offering opinions on questions that could require special expertise in a case, separate and apart from issues addressed in forensic assessment reports. It is inevitable that courts will encounter questions that require special expertise in administering criminal justice, and judicial officials, who are often not technical experts, may face a difficult situation due to their lack of sufficient knowledge to resolve those questions. Therefore, Article 146 of the CPL provides that “when it is necessary to resolve certain questions that require special expertise in a case in order to ascertain the facts of the case, a person with specialized knowledge shall be assigned or hired to conduct an appraisal.” It is worth noting that the use of “certain questions that require special expertise” in this article also means that not all questions that require special expertise need to undergo a forensic examination. There may be two interpretations of this wording: one may be that due to the restrictions on the qualifications of forensic examiners and the scope of forensic examinations, some questions that require special expertise cannot be subject to a forensic examination. The other interpretation may be related to the necessity of a forensic examiner, because some

questions that require special expertise can be resolved by directly relying on the case-handling officers’ experience or investigation methods such as inquest and inspection, etc., and therefore do not need to be subjected to a forensic examination. Since Article 146 of the CPL has not been revised since 1979, and the 1979 CPL did not yet contain any limitations on forensic examiners’ qualification or the scope of examination, the wording here of “certain questions that require special expertise” should mainly refer to questions that need to be forensically examined. In other words, as long as the case-handling officers believe that the questions require special expertise and need to be examined, according to the language of “... shall be assigned or hired ...” in Article 146 of the CPL, these questions can only be resolved through forensic examination and not by other means. In order to adapt to the single mechanism of using forensic assessments as the solution to questions that require special expertise, the CPL also stipulated supporting mechanisms, such as the forensic report review system in Article 195, and the re-assessment system in Article 196. The above-mentioned provisions build a closed cycle for solving questions that require special expertise in our criminal proceedings through the forensic assessment system (see the chart below), excluding other mechanisms from entering the procedures to solve those questions. As a new system outside of the forensic assessment system, “person(s) with specialized knowledge” cannot materially intervene in the forensic assessment system, and can only play a very limited role in the established assessment system. Therefore, some scholars believe that “person(s) with specialized knowledge” are only involved in criminal trials through the avenue of cross-examination.⁶

⁶ See Pan Guangjun, Chen Zhe, Hu Ming, *Zhuanjia Fuzhuren Zhidu De Xianzhuang, Junjing Yu Gaishan Jianyi - Yi Zhejiang Sheng Weili De Shizheng Fenxi*, Journal of Evidence Science (2014), Issue 6, p. 719.



Secondly, in the institutional context of the state monopoly on the right to initiate a forensic assessment, the in-court function of “person(s) with specialized knowledge” can be limited to only questioning the opinions contained in forensic reports. According to the relevant provisions of the CPL, China established the mechanism of the state monopoly on the right to initiate a forensic assessment. For example, Article 146 of the CPL provides how to initiate a forensic assessment in the investigation phase, which is by “assigning or hiring a person with specialized knowledge to conduct a forensic assessment.” Although this provision does not specify the subject of the assignment or employment, since this provision is located in the chapter of investigation, the assessment provided here should be considered as an investigative method. Therefore, the assigner or the employer naturally should be the investigative agency. Furthermore, Article 148 and 197 of the CPL stipulate that, at the investigation and trial phases, when suspects, defendants and victims refuse to accept the forensic reports, they can only apply to

the investigative agency or the court to initiate another forensic assessment and cannot directly initiate it by themselves. Therefore, the right to initiate a forensic assessment in criminal procedures is monopolized by the state, and the parties to a case have only the right to apply to the relevant state agency to initiate an assessment. Although such state monopoly has been criticized by many scholars,⁷ it is an important prerequisite for understanding the role of “person(s) with specialized knowledge” in criminal trials. Since the questions that require special expertise in a case can only be resolved through a forensic assessment, the only remedy for a person who disagrees with a forensic report is to apply for a supplemental or new assessment. In the institutional context of state monopoly on the initiation of forensic assessments, the key to initiate a supplemental or new assessment is to make the court doubt the original forensic report. However, considering the strong scientific and objective nature of the opinions in forensic reports, the court usually holds a high degree of trust in the opinions, especially those concerning DNA testing,⁸ and it is very difficult to initiate a supplemental or new assessment. Nevertheless, in order to prevent misapplication of forensic reports, it is essential to ensure that any doubts in the reports are removed. The participation of “person(s) with specialized knowledge” in criminal trials is intended to make up for inadequate challenges to forensic reports. Therefore, the opinions of “person(s) with specialized knowledge” on forensic

⁷ *Id.* 5.

⁸ For example, some scholars found in their research that jurors generally hold very high confidence in scientific evidence before a trial starts. They believe that the accuracy for DNA evidence is 89.95%, and it is 89.26% for bitemark evidence, 88.15% for fingerprint evidence, 78.53% for blood-type evidence, and 65.18% for document forensics as the lowest accuracy. Gianni Ribeiro, Jason M. Tangen, Blake M. McKimmie, *Beliefs about error rates and human judgment in forensic science*, 297 *Forensic Science International* 138, 143 (2019)

reports should be mainly challenging opinions. Moreover, because there is now a system requiring forensic examiners to provide testimony in court, examiners’ live explanation in court and the presence of “person(s) with specialized knowledge” assume the roles of supporting and challenging forensic reports, respectively, which also improves the efficiency of court trials. Therefore, the institutional design of the state monopoly on the right to initiate a forensic assessment limits the role of “person(s) with specialized knowledge” in court.

II. Multiple Ways “Person(s) with Specialized Knowledge” are Used in Practice

Although the CPL strictly limits the functions of “person(s) with specialized knowledge” in criminal trials in order to make them fit into China’s forensic assessment system, in practice, their in-court functions have expanded, and their participation in criminal trials has gone beyond the legislative limit.

A. Manifestation of Multiple Ways “Person(s) with Specialized Knowledge” are Used

In addition to providing challenging opinions on forensic reports, as stipulated by the legislation, “person(s) with specialized knowledge” also provide supporting opinions and supplemental opinions on forensic reports, and live testimony on certain questions that require special expertise.

First, “person(s) with specialized knowledge” appear in court to provide supporting opinions on forensic reports. Article 197 of the CPL provides that “person(s) with specialized knowledge” may appear before the court to “give opinions on forensic reports produced by forensic examiners.” Although the Legal Affairs Commission of the National People’s Congress has restrictively

interpreted “opinions” here as challenging opinions, this legislative opinion is not strictly followed in practice. It is not uncommon that “person(s) with specialized knowledge” provide supporting opinions on forensic reports in court. The *People’s Court Rules for Handling Courtroom Investigation in First-instance Criminal Trials Under the Ordinary Procedures (Provisional)* issued by the Supreme People’s Court to some extent established this practice. Article 26 of this document provides that “the prosecution and defense may apply to the court to notify persons with specialized knowledge to take the stand to assist the party of their side to examine forensic reports.” As the party producing and presenting forensic reports, the prosecution calling “person(s) with specialized knowledge” “to assist the party of their side to examine forensic reports,” naturally means “person(s) with specialized knowledge” providing supporting opinions on forensic reports. Of course, in practice, having “person(s) with specialized knowledge” provide supporting opinions in court may be to substitute for forensic examiners to testify in court,⁹ or may be to support the conclusions of forensic examination reports.¹⁰ But either case goes beyond the in-court functions of “person(s) with specialized knowledge” provided by the legislation.

⁹ See Tu Shun, *Xingshi Zhuanjia Fuzhuren De Zhibu Zaiqiao - Jiyu Jiancha Jiguan De Yanjiu Shijiao*, Journal of Evidence Science (2018), Issue 6, p. 760.

¹⁰ For example, in the case of Nanjing Shengke Water Company, Zheng Qiaogeng et al., who were prosecuted for environment pollution, both the prosecution and the defense called their “person(s) with specialized knowledge” to testify in court, and the court also called its own “person(s) with specialized knowledge.” The “person(s) with specialized knowledge” called by the court explained his opinions on issues involving the credentials of the forensic examiner, the appraisal procedure, the feasibility of the remedy plan proposed by the defendants, and the severity of pollution. See Case Number (2018) Su0102XingChu68.

Second, “person(s) with specialized knowledge” appear in court to provide supplemental opinions on forensic reports. In practice, some “person(s) with specialized knowledge” participate in the trial to put forward supplemental opinions on forensic reports, and these opinions are sometimes recognized by the court. For example, in the Hu Cuicui traffic accident case, the conclusion in the forensic examination report for the cause of death of the victim was severe cranial injury, without analyzing whether and how another factor, the victim’s underlying disease (diabetes), may have contributed to her death. So the prosecution supplemented the forensic examination report with the written opinion of a “person with specialized knowledge” and suggested that the traffic accident contributed 75% to the victim’s death. Eventually the court also took the written opinion of the “person with specialized knowledge” as the basis for a verdict.¹¹ In this case, the opinion of the “person with specialized knowledge” went beyond the content of the forensic report and was ultimately adopted by the court. Therefore, this person’s opinion actually played a role in supplementing the forensic reports. By participating in criminal trials this way, “person(s) with specialized knowledge” go beyond the legislature’s intent to limit their role to “providing opinions on forensic reports.”

Third, “person(s) with specialized knowledge” appear in court to provide professional opinions on certain questions that require special expertise. If we consider the above two types of expansion of the role of “persons with specialized knowledge” as still centered on forensic reports, the third type completely exceeds the scope of forensic reports and allows “person(s) with specialized knowledge” to provide professional opinions on certain questions that require

¹¹ See Case Number (2018) Wan0221Xingchu153.

special expertise. For example, the Shandong Provincial High People’s Court and other local state agencies jointly issued *Regulations on the Appearance of Investigators, Forensic Examiners and Persons with Specialized Knowledge in Court (Provisional)*, which includes “the need to explain and clarify questions in dispute that require special expertise” and “where there is disagreement in the forensic report or the inspection report” as circumstances where the court may direct “person(s) with specialized knowledge” to give their opinion in court. The Tianjin High People’s Court and other local state agencies jointly issued *Regulations on Certain Issues of the Appearance of Forensic Examiners and People with Specialized Knowledge in Court in Criminal Procedures (Provisional)*. Article 4 provides that “the parties and their legal representatives, defenders, litigation agents, who have objections to forensic reports or consider there is necessity, may apply to the people’s court to direct the forensic examiners or ‘persons with specialized knowledge’ to appear in court.” These local normative documents also exceed the provisions in Article 197 of the CPL, extending the role of “person(s) with specialized knowledge” to providing general specialized knowledge.

B. Analysis of the Reasons for the Expansion of the Role of “Person(s) with Specialized Knowledge”

There are several possible reasons for the expansion of the role of “person(s) with specialized knowledge.”

First, with China’s criminal procedural reform strengthening the adversarial nature of the relationship between the prosecution and the defense, the role that “person(s) with specialized knowledge” may play has attracted attention from the prosecution, the defense, and the court. The reason why China’s forensic assessment system maintains its inquisitorial nature is closely related to the overall inquisitorial character of China’s criminal proceedings. Under a

litigation structure with such character, the adversarial feature of the prosecution and the defense is very limited, and the court is responsible for moving the trial forward and for finding out the facts of a case. With such a structure, it is very unrealistic to rely entirely on the prosecution and the defense to produce and examine evidence to find out the facts. This requires the state authority to play a leading role in all aspects of the forensic assessment system, and to achieve objectivity and neutrality from the forensic examiners by establishing mechanisms concerning examiners’ qualifications and recusal, as well as the requirement to take an oath to tell the truth.¹² However, under an adversary litigation structure, the prosecution and the defense drive the trial process and have the ultimate responsibility to ascertain the facts of a case, with the judge simply playing the role of “gatekeeper” of scientific knowledge. Once the judge has completed the threshold scrutiny of the expert testimony, examining whether the expert testimony is scientifically valid primarily relies on in-court cross-examination. Therefore, the methods of ensuring the truthfulness of forensic reports are not quite the same in these two litigation models. China’s 1979 CPL established an inquisitorial model of criminal procedure but the 1996 CPL amendments introduced aspects of an adversarial model that reinforced the prosecution’s burden of proof and sharpened the confrontation between the prosecution and the defense in the courtroom. Although the 2012 CPL intentionally avoided developing “person(s) with specialized knowledge” into expert witnesses as in the Anglo-American legal system,¹³ in the context of reinforcing the adversarial nature of the trial, there were more and more arguments about forensic reports

¹² See *German Code of Criminal Procedure*, translated by Zong Yukun, Intellectual Property Publishing House (2013), p. 37-38.

¹³ *Id.* 4, p. 419.

and questions that require special expertise in cases, and the prosecution, the defense, and the court had greater expectations for “person(s) with specialized knowledge” to assume a greater role.

For example, the *Supreme People’s Court’s Interpretation on the Application of the People’s Republic of China Criminal Procedure Law* (CPL Interpretation) issued in 2012 still limited the in-court presence of “person(s) with specialized knowledge” to “providing opinions on forensic reports.” Article 26 of the *People’s Court Rules for Handling Courtroom Investigation in First-instance Criminal Trials under the Ordinary Procedures (Provisional)* issued in 2018 clearly states that “person(s) with specialized knowledge” may “provide opinions on questions that require special expertise in a case.” Although their opinions shall be limited to questions that require special expertise related to forensic reports,¹⁴ the wording indicates that the Supreme People’s Court has noticed the practice that “person(s) with specialized knowledge” may give opinions on questions that require special expertise in some cases. In some places, the newly promulgated regulations on the appearance of “person(s) with specialized knowledge” in court completely exceed the scope of forensic reports, allowing them to give opinions on general questions that require special expertise.¹⁵ It can be seen that China’s criminal

¹⁴ See Tu Shun, *Zhuanjia Fuzhuren Zhidu De Gaijin Ji Pingxi - Jiyu “Renmin Fayuan Banli Xingshi Anjian Diyishen Putong Chengxu Fating Diaocha Guicheng (Shixing)” De Yanjiu*, Chinese Journal of Forensic Sciences (2020), Issue 4, p. 18.

¹⁵ For example, the provisional regulation co-issued by the Shandong Provincial High Court et al. provides that “person(s) with specialized knowledge” generally shall be present in court to provide explanations on disputed specialized issues. The provisional regulation co-issued by the Zhejiang Provincial High Court et al. also provides that with the court’s permission, “person(s) with specialized knowledge” may question the parties, forensic examiners and other litigants, and that “person(s) with specialized

procedural reform that brought about reinforced adversarial features in the courtroom is an important reason for “person(s) with specialized knowledge” to assume an expanded role in court.

Secondly, the poor function of the remedial mechanism under China’s inquisitorial forensic assessment system, to a certain extent, makes “person(s) with specialized knowledge” assume the role of remedying erroneous forensic assessments. Under the inquisitorial forensic assessment system, a party can only apply for a reassessment or a supplemental assessment if they disagree with the forensic report. A forensic report issued by a forensic examiner retained by a party is not considered to have any evidentiary capacity in criminal procedure. Excluding parties from participating in the inquisitorial forensic assessment system not only brings issues like hardship in overturning a forensic report and other problems, but also conflicts with the requirements of procedural openness and procedural participation that have been put in place by modern criminal procedures. Therefore, in recent years, countries and regions that have adopted the inquisitorial forensic assessment system have been strengthening the right of the parties to participate in the initiation of forensic assessment and procedural remedies, in order to achieve a more effective check on state power. For example, the German criminal procedure law provides that the forensic examiner is selected by the judge, but the prosecutor’s office, the complainant, and the accused have the right to reject the court selected appraiser. Furthermore, the judge has the obligation to clarify. Under this rule, failure of the judge to hire a forensic examiner to fulfill this obligation is a ground for initiating a retrial.¹⁶

knowledge” may provide explanations or comments on specialized issues in forensic reports and inspection reports.

¹⁶ *Id.* 12.

The forensic assessment system in China still does not allow the participation of the parties, and the assessment remedial mechanism does not operate smoothly. For example, it is difficult for the parties to apply for a reassessment or a supplemental assessment. Some police and judicial organs ignore or passively handle the right of the parties and their counsels to request a reassessment.¹⁷ Especially because the error rate of forensic reports is not insignificant, the poor operation of the forensic assessment remedial system also seriously affects the scrutiny of forensic reports. For example, a researcher analyzed the technical evidence accepted for review by 26 provincial and municipal procuratorates from 2011 to June 2014 and found that 5.32% of the forensic evidence were questionable. Another researcher found that the error rate of forensic reports in certain local procuratorates reached about 20%.¹⁸ Therefore, when there are certain error rates in forensic reports and it is difficult to initiate the appraisal remedial mechanism, the parties can only reach relief by commissioning a new appraisal by themselves, or hiring “person(s) with specialized knowledge,” and trying to use these expert opinions as an important basis to request the state authority to initiate a reassessment. Therefore, the poor operation of the remedial system for forensic assessments is also an important reason for “person(s) with specialized knowledge” to assume an expanded role in criminal cases.

Third, the low rate of appearance of forensic examiners in court leads to “person(s) with specialized knowledge” assuming part of the examiners’ duties. The principle of presenting live testimony

¹⁷ See Chang Lin, *Chongxin Jianding Wenti Yanjiu*, Journal of Shanxi University (2015), Issue 4, p. 91.

¹⁸ *Id.* 9.

and trial in court is a bedrock principle of criminal procedure in countries and regions with continental law traditions. This principle requires forensic examiners to testify in court. At the same time, the role of the examiners in court are manifold. Not only can they provide an explanation of their forensic reports, but they can also provide expert opinions on general questions that require special expertise. For example, in German criminal litigation practice, forensic examiners will assist the court in at least three ways: 1) they provide the court with general experience and knowledge; 2) they use their unique expertise to enhance comprehension of and judgment on certain facts and provide the court with specialized knowledge; and 3) they use the factual determination obtained from their professional knowledge and inspection to reach a conclusion through deductive reasoning.¹⁹ However, China has not established the principle of presenting live testimony at trial. In practice, forensic examiners usually only submit a written forensic report to the court and occasionally take the stand. An empirical study found that in many courts, fewer less than 1% of forensic examiners and “person(s) with specialized knowledge” appear in court, and many of them were reluctant, afraid to, or unable to testify in court.²⁰ The absence of forensic examiners in court not only means that the prosecution and the defense cannot examine forensic reports through questioning examiners, but also defeats the purpose of having examiners provide the court with general expertise and expertise relevant to certain facts. This also forces the court to obtain relevant expertise through other means, such as by including

¹⁹ Clause Roxin, *German Code of Criminal Procedure*, translated by Wu Liqi, Taiwan San Min Book Co., Ltd (1998), p. 297.

²⁰ Zhang Yong & Qian Yan, *Jianding Ren, You Zhuanmen Zhibi De Ren Chuting Zhidu Goujian - Yi Tianjinshi Fayuan Xitong Shijian Tansuo Wei jichu*, National Judge College Law Journal (2018), Issue 19, p. 56.

expert people’s assessors in the collegial panel, or by the judge privately consulting persons with expertise.²¹ Therefore, when the 2012 CPL established the system of having “person(s) with specialized knowledge” appear in court, “person(s) with specialized knowledge” also became an important avenue for the court to obtain specialized knowledge. For example, the CPL only generally stipulates the circumstances in which the prosecution and the defense may apply for the in-court live testimony of “person(s) with specialized knowledge,” but Article 14 of the *People’s Court Rules for Handling Courtroom Investigation in First-instance Criminal Trials Under the Ordinary Procedures (Provisional)* provides more details. It stipulates the circumstances in which the court may directly call the “person(s) with specialized knowledge” to take a stand without applications from the prosecution or the defense. Given that the rules continue to limit the role of “person(s) with specialized knowledge” to provide challenging opinions on forensic reports when they appear in court, when the court has doubts about the forensic reports, it can call either the forensic examiners or the “person(s) with specialized knowledge” to appear before the court. Consequently, the infrequency of in court testimony in China’s criminal trial practice has expanded the role of “person(s) with specialized knowledge” as expert witnesses, who have assumed some of the duties of forensic examiners.

Fourth, the misinterpretation of the qualification requirements for forensic examiners provided in the CPL strictly limits the functions of forensic assessment and makes “person(s) with specialized knowledge” undertake part of the responsibilities that should be borne by examiners. Forensic assessment is used to solve questions that require special expertise in a case, and should performed by

²¹ See Liu Zhenhong & Hao Xingjun, *Jianding Jielun Rending Zhong De Nengdong Sifa*, People’s Court Daily, September 21, 2011, p. 5.

forensic examiners. Then must an expert be registered to be qualified as a forensic examiner? According to Article 146 of the CPL, the review of the qualifications of forensic examiners is limited only to whether they have specialized knowledge. Moreover, the text of this provision was stipulated in the 1979 CPL, and was not in any way revised when the CPL was amended in 1996, 2012 and 2018. Although the CPL itself does not impose any additional requirements on the credentials of forensic examiners, China has gradually strengthened their management since 1998. In 2005, the Standing Committee of the National People’s Congress issued the *Decision on the Administration of Forensic Assessments* (“DAFA”), which sets out the requirements for forensic examiners and forensic agencies in Articles 4 and 5. However, the DAFA only provides that forensic agencies and examiners in the disciplines of medico-legal examination, physical evidence, and audio and video data analysis must register with the Ministry of Justice or local justice departments. It does not have provisions concerning forensic agencies and examiners in other disciplines. Article 9 of the DAFA makes it clear that only examiners involving the above three disciplines need to be selected from a roster of examiners. Therefore, other questions could require special expertise outside of these three disciplines could still be solved by “person(s) with specialized knowledge” assigned or hired by the investigation organ, according to Article 147 of the CPL. The nature of work performed by “person(s) with specialized knowledge” under this circumstance should certainly belong under the rubric of forensic assessment. However, it is misinterpreted in practice that forensic examiners must be those who are registered to obtain the legal credentials, and performance provided by those who are not registered to solve questions that require special expertise does not fall within the scope of forensic assessment activities and shall not be used as the basis for a verdict. The consequence of such a restrictive interpretation of the scope of forensic assessment is that in judicial practice some of the activities needed to solve questions

that require special expertise are excluded from the scope of forensic assessment. It is also in this context that the CPL Interpretation created the system of inspectors, a channel for professional activities conducted by unregistered experts or agencies to enter the administration of criminal justice.²² Similarly, when the system of “person(s) with specialized knowledge” emerged, it became a new channel for specialized knowledge provided by these people to enter the courtrooms. When scholars discuss the significance of “person(s) with specialized knowledge,” it is commonly mentioned that they can improve the forensic assessment system because sometimes there are no qualified forensic examiners to assess certain questions that require special expertise.²³ Therefore, the misinterpretation of the credential requirements for forensic examiners in practice has also brought about the expansion of the role of “person(s) with specialized knowledge.”

III. Theoretical Reflections on the Expansion of the Role of “Person(s) with Specialized Knowledge”

In order to maintain the logical consistency of China’s inquisitorial forensic assessment system, the legislation restricts as much as possible the form and substance of the opinions “person(s) with specialized knowledge” can provide, that is, to challenge forensic reports. However, this view has not been fully recognized in practice, and the in-court functions of “person(s) with specialized

²² See Chen Ruchao, *Zhuanjia Canyu Xingshi Sifa De Duoyuan Gongneng Ji Qi Tixi Hua*, Chinese Journal of Law (2020), Issue 2, p. 97.

²³ See Li Xuejun & Zhu Mengni, *Zhuanjia Fuzhu Ren Yanxi*, The Jurist Journal (2015), Issue 1, p. 150.

knowledge” has been expanded to various degrees. Of course, the reason why judicial practice recognizes the expansion of their in-court functions is inseparable from the appealing practical effects. For example, from the practical point of view, such expansion not only did not cause disorderly court hearings, but also better served the needs of the police, the prosecution, and the court to verify facts in a case.²⁴ The expansion works well in practice, and we should be prompted to further reflect the rationality of legislation’s strict limitation on “person(s) with specialized knowledge” and the legitimacy of China’s inquisitorial forensic assessment system.

First, China’s inquisitorial forensic assessment system completely excludes the parties from participating in forensic assessment proceedings in criminal cases. This exclusion conflicts with certain principles in modern criminal procedure, which emphasize due process, procedural participation and others. As mentioned previously, the legislation strictly limits the in-court function of “person(s) with specialized knowledge” to make it fit within the inquisitorial forensic assessment system. China’s forensic assessment system in criminal justice was established in the 1979 CPL and has not been significantly modified since then. The super inquisitorial procedural structure established in the 1979 CPL profoundly affects the forensic assessment system, which does not allow the participation of the parties. For example, according to Articles 146 and 148 of the CPL, the parties do not have the right to opine in advance on the selection of examiners or the determination of the examination samples. They can only give their opinions after the completion of the assessment by reviewing the forensic reports. However, from the experience of other countries and regions with the inquisitorial tradition, such a complete exclusion of party participation has been abandoned, and their

²⁴ *Id.* 5.

inquisitorial forensic assessment systems have been mixed with some elements of the adversarial system. In addition, allowing the parties to participate in the assessment process can help ensure the accuracy of the forensic reports and prevent errors from occurring. Although China’s legislation constantly emphasizes that the court retains the power to make the final decision on questions that require special expertise, in practice, the forensic reports are usually adopted by the court as the basis for a verdict. Therefore, it is extremely difficult to overturn a forensic report by reviewing it afterwards. On the one hand, the early intervention of the parties in the forensic assessment process can achieve the full supervision of the entire process. On the other hand, it allows the parties to opine in advance to enhance the accuracy of the report. Therefore, for reasons such as due process and concerns about the accuracy of the forensic assessment process, the practice of completely prohibiting the participation of the parties in the assessment process has been abandoned by the legislations of many inquisitorial countries and regions.

Second, the expansion of the role of “person(s) with specialized knowledge” in court is in line with the transformation of the way the fact-finding process in Chinese courts is evolving. The fact-finding model of adjudicators differs under different procedural structures. For example, under the inquisitorial model, the judge dominates the criminal trial process, and the factual determination is more dependent upon on the judge’s professional judgment and common sense to determine the truth. Whereas under the adversarial procedural model, the judge is passive and neutral, and the process of fact-finding shifts from confirming the evidence as true to allowing challenges that seek to show the evidence is false

or unreliable.²⁵ In China, the traditional criminal procedures put special emphasis on the leading role of the judge in fact-finding, and the fact-finding mechanism is based on verification, emphasizing that the judge should rely on professional experience and the laws of logic to determine the facts. However, as criminal trials are becoming more adversarial in China, and the arguments between the prosecution and the defense over evidence and facts are becoming fiercer, the judge’s fact-finding process has also shifted from the path of verification to that of determining what evidence is true and what evidence is not. Take the shift in the judge’s power to investigate evidence as an example. In order to ensure the formation of the judge’s inner conviction, most inquisitorial jurisdictions give judges full power to investigate evidence, such as provided in Article 244 of the *Code of Criminal Procedures* of Germany and Article 310 of the *Code of Criminal Procedures* of France.²⁶ China’s 1996 CPL restricted the court’s power to conduct evidentiary investigations, stipulating that only in special circumstances may the court collect evidence on its own beyond the scope of evidence presented by the prosecution and the

²⁵ See Shi Pengpeng, *Zhiquan Zhuyi Yu Shenwen Zhi De Luoji - Jiaocha Xunwen Jishu De Yinru Ji Kenengxing Fansi*, *Journal of Comparative Law* (2018), Issue 4, p. 64.

²⁶ Section 244 (2) of the *German Code of Criminal Procedure* provides, “in order to establish the truth, the court shall, proprio motu, extend the taking of evidence to all facts and means of proof relevant to the decision.” *Id.*12, p. 193. Article 310-1 of the *French Code of Criminal Procedure* provides, “The president is vested with a discretionary power by which he may, upon his honor and his conscience, take any measure he believes useful for the discovery of the truth. He may, if he deems it appropriate, refer to the court which rules as provided for by Article 316.” *French Code of Criminal Procedure*, translated by Luo Jiezheng, China Legal Publishing House (2006), p. 237.

defense.²⁷ This provision made the formation of the judge’s inner conviction more dependent on the evidence production and examination performed by the prosecution and the defense, and carved out some space for establishing the “falsification”^{*} approach to factual determination. The expansion of the role of “person(s) with specialized knowledge” reflects the demand for the theory of “falsification,” through which unreliable evidence can be suppressed by the strengthened evidence examination process conducted by the prosecution and the defense. Moreover, the “falsification” approach, which leads to a certain skepticism of the evidence, is also more in line with the methods applied to the review and verification of scientific evidence. The fact-finding model built on the theory of verification actually relies on accumulating evidence to strengthen the fact-finder’s inner conviction, but scientific evidence is usually already highly trusted in judicial proceedings, and it is difficult to find possible problems with this type of evidence by applying the theory of verification. In contrast, the theory of “falsification” is a better fit with the rules of review and verification of scientific evidence. It suppresses erroneous scientific evidence through proving its falsity so as to achieve an adequate review of scientific evidence. Therefore, the functional expansion of “person(s) with specialized knowledge” fits to a certain extent the transformation of the fact-finding models in China’s criminal procedures.

²⁷ See Gao Tong, *Woguo Faguan Tingwai Diaochaquan De Cunfei Yu Shiyong*, Journal of Shandong Police Academy (2013), Issue 4, p. 66.

^{*} Translator’s Note: “Falsification” theory was developed by the Austrian-British philosopher Karl Popper and is a way of demarcating science from non-science. It suggests that for a theory to be considered scientific it must be able to be tested and conceivably proven false.

In addition, while expanding the use and role of “person(s) with specialized knowledge” to a certain extent fits the transformation of China’s criminal procedure structure and the fact-finding model, it may also bring some risks to the rule of law in China’s criminal procedures due to reasons such as an obvious pragmatic orientation and lack of regulation. First, expanding the role of “person(s) with specialized knowledge” may intensify the conflict between the “person(s) with specialized knowledge” system and China’s inquisitorial forensic assessment system. For example, “person(s) with specialized knowledge” providing expert opinions on general questions that require special expertise has clashed with the single mechanism of having questions that require special expertise be solved by forensic assessments, because it has broadened the court’s access to specialized knowledge beyond forensic examiners. Another example is that when the court adopts supplemental opinions provided by “person(s) with specialized knowledge” with respect to forensic reports, or forensic reports directly provided by “person(s) with specialized knowledge” retained by the defense, these activities conducted by “person(s) with specialized knowledge” undermine the state’s monopoly on the right to initiate a forensic assessment. This conflict is likely to intensify as the role “person(s) with specialized knowledge” play is further expanded. In the context that China has not yet abandoned the inquisitorial forensic assessment system, it requires our attention in future research and systemic reforms regarding how to better cope with the conflict between the expanding role of “person(s) with specialized knowledge” and the inquisitorial forensic assessment system.

Second, the efforts to make trials more meaningful may be offset by expanding the use of “person(s) with specialized knowledge.” This is highlighted by the issue of calling on “person(s) with specialized knowledge,” instead of forensic examiners, to testify in court. In order to strengthen the review of forensic reports, China’s

2012 CPL established a system for forensic examiners to appear in court, providing that the forensic report prepared by a forensic examiner who should have testified in court upon notification by the court but failed to do so shall not be used as the basis for a verdict. However, the practice of calling “person(s) with specialized knowledge” to appear in court in place of examiners may greatly undermine the above efforts. That is because “person(s) with specialized knowledge” are not involved in the forensic assessment process, and their in-court opinions are closer to a type of comment on the forensic reports based on their specialized knowledge. They cannot provide explanations of the many decisions an examiner made during the assessment process, and the defense cannot adequately cross-examine the examiner. This practice not only greatly reduces the effectiveness of the examiner’s testimony in court, but also violates the defense’s right to confrontation. Moreover, a “person with specialized knowledge” in criminal procedures is not unique and can be replaced at any time. When a “person with specialized knowledge” appears in court in place of a forensic examiner, the provision that “the forensic report prepared by a forensic examiner, who shall take the stand in court upon notice but refuses to do so, shall not be adopted as the basis for a verdict” becomes useless, and it undermines the procedural safeguards that ensure the presence of forensic examiners in court. Therefore, the practice of calling “person(s) with specialized knowledge” to take the stand instead of forensic examiners may undermine the effect of the judicial reform to make trials more meaningful.

IV. Adjusting the Procedural Status of “Person(s) with Specialized Knowledge” and Reforming the Process for Their Use

A. Procedural Status Adjustment for “Person(s) with Specialized Knowledge”

The above analysis illustrated that it is necessary to strengthen the role of “person(s) with specialized knowledge.” However, the transformation of “person(s) with specialized knowledge” system into an expert witness system conflicts with China’s inquisitorial forensic assessment system. Hence, we can moderately expand the status of “person(s) with specialized knowledge” in criminal trials, in order to make it fit the needs of China’s inquisitorial appraisal system and the development of the criminal procedural structure. Specifically, the “person(s) with specialized knowledge” system should assume at least the following three functions.

First, “person(s) with specialized knowledge” assumes the role of expert assistants by giving opinions that challenge forensic reports. Having “person(s) with specialized knowledge” provide this type of opinion is the main reason why the “person(s) with specialized knowledge” system was established in China, and it is also the primary function of “person(s) with specialized knowledge” in criminal trials. In addition, there is a question about the evidentiary status of their opinions. Since the role of “person(s) with specialized knowledge” is limited to challenging the forensic reports under this function, their opinions should be treated as a kind of impeachment evidence, and therefore should not directly serve as the basis for the court to determine the facts of a case.

Second, “person(s) with specialized knowledge” may appear in court to assume the role of expert witnesses by providing explanations of specialized knowledge on general questions that require special expertise other than matters that require forensic

assessment. The scope of the opinions of “person(s) with specialized knowledge” should not be limited to forensic reports. They could also provide certain specialized knowledge. This function is in line with the development trend of China’s criminal procedure structure. When “person(s) with specialized knowledge” make explanations based on certain specialized knowledge, their opinions should be given evidentiary effect, and in this circumstance “person(s) with specialized knowledge” take on the role of expert witnesses. However, in order to avoid excessive conflict between the “person(s) with specialized knowledge” system and the inquisitorial forensic assessment system, it is appropriate to limit the scope of specialized knowledge proposed by “person(s) with specialized knowledge” to expertise beyond the matters that require an official forensic assessment. That is, the court may consult “person(s) with specialized knowledge” on questions that require special expertise but that do not necessarily require forensic assessment. As mentioned earlier, a hallmark of the inquisitorial forensic assessment system is that specialized questions requiring forensic assessment can only be resolved through the forensic assessment system. Moreover, in addition to providing a forensic report on questions that require special expertise, the definition of forensic examination should also include an explanation to the court about the scientific knowledge and specialized knowledge of general questions on which the forensic report is based. Therefore, the scope of forensic assessment under the inquisitorial forensic assessment system is very broad. As long as the assessment system in China is still fundamentally inquisitorial, the solution for questions that require special expertise should rely primarily on the official forensic assessment system. Of course, not all questions that require special expertise need to be solved through the assessment system. An assessment is only necessary for the questions that require special expertise, to which the judge owes an obligation to clarify, and such obligation will not be fulfilled without a forensic assessment. For other questions that

require special expertise that are not necessary to be forensically assessed, the court can solve them through judges’ own scientific knowledge or by consulting “person(s) with specialized knowledge.” It is in this sense that the Italian technical advisors play a role to supply technical consultations. But these advisors can only provide technical advice to the court on matters other than those that require forensic assessments, and this technical advice is not a substitute for forensic assessments as the basis for a verdict. Therefore, “person(s) with specialized knowledge” providing opinions on questions that require special expertise other than matters that require forensic assessment would not affect the logical consistency of the forensic assessment system, and would instead broaden the court’s access to specialized knowledge.

Thirdly, the forensic reports issued by a “person with specialized knowledge” hired by the defense under certain circumstances should be used as evidence in criminal trials. In this situation, the “person with specialized knowledge” should assume the status of a forensic examiner. Even if the practice allows the prosecution to assign or hire “person(s) with specialized knowledge” to provide supplemental forensic opinions, neither the legislation nor the practice recognizes the evidentiary value of forensic reports prepared by “person(s) with specialized knowledge” who are hired by the defense. But with the deepening of involvement of “person(s) with specialized knowledge” in criminal procedures, the complete exclusion of the defense from hiring them to provide forensic reports has been questioned. For example, on the one hand, we require “person(s) with specialized knowledge” to provide opinions based on facts and science, and often reject their opinions on the ground that they are not involved in the forensic assessment and do not know the details of the case. But on the other hand, the evidentiary value of forensic opinions put forward by “person(s) with specialized knowledge” based on facts and science are not recognized. This contradictory approach is not only detrimental to

fact-finding in the case, but also brings a great waste of judicial resources. Therefore, countries and regions with inquisitorial traditions recognize to a certain extent the evidentiary value of the forensic reports issued by forensic examiners retained by the defense. China can also refer to the above-mentioned legislative examples, by partly recognizing the evidentiary value of the forensic reports issued by “person(s) with specialized knowledge” hired by the parties. Particularly in the circumstance below, the law should provide that the court may adopt the forensic report as the basis for a verdict: it is issued by “person(s) with specialized knowledge” retained by the parties; the conclusion of the report is in favor of the parties; the prosecution does not contest the conclusion; and the court after review holds that the report meets the requirements for a forensic assessment report. This legislative proposal on the one hand takes into account the parties’ right to accept evidence, so the prosecution may voluntarily recognize the evidentiary value of forensic reports produced by the defense; on the other hand, it does not change the basis of China’s inquisitorial forensic assessment system, because questions that require special expertise in a case are still primarily solved by state organs through forensic assessment. However, “person(s) with specialized knowledge” hired by the defense should not take any compulsory measures, and should obtain the consent of the person being assessed or the holder of the objects being assessed when an examination is conducted. This is because according to Article 43 of the CPL, the defense shall obtain the consent of the person from whom the evidence is taken, and the defense hiring an examiner is the exercise of the right to investigate and obtain evidence. In fact, countries and regions with inquisitorial traditions providing for a state monopoly over forensic assessment do so because of the mandatory feature of forensic assessment. An assessment is a compulsory investigative measure because it involves the restriction or deprivation of the interests of the person and the

owner of the object to be assessed,²⁸ and compulsory investigative measures should be exercised only through the state monopoly. Therefore, “person(s) with specialized knowledge” hired by the defense do not have the right to gather evidence through compulsory measures, and they must obtain the consent of the person to be assessed.

B. Procedural Reforms for “Person(s) with Specialized Knowledge”

In order to accommodate the moderate expansion of the role of “persons with specialized knowledge,” the procedures for their participation in criminal trials should also be improved in the following aspects.

First, the court should strengthen the scrutiny of the expertise of “person(s) with specialized knowledge.” It is not appropriate to set a credential as a prerequisite for them to give an opinion. The current legislation does not provide any credential limitations on “person(s) with specialized knowledge,” as long as they have specialized knowledge on the assessed matters.²⁹ However, it also brings about issues such as variations of levels of expertise, inability to effectively challenge the forensic reports, and even damage to the credibility of the trial. Hence, some scholars advocate for putting appropriate credentials in place for “person(s) with specialized knowledge.”³⁰ The author does not agree with this approach of setting credentials for “person(s) with specialized

²⁸ See Morikazu Taguchi, *Criminal Procedure Law (7th edition)*, translated by Zhang Ling & Yu Xiufeng, Law Press (2019), p. 54.

²⁹ *Id.* 4, p. 421.

³⁰ See Tu Shun, *Xingshi Zhuanjia Fuzhuren Zhidu Shizheng Yanjiu*, Journal of Sichuan University of Science & Engineering (2020), Issue 1, p. 59.

knowledge” as a way to scrutinize their expertise. First of all, the reasons for credential requirements for forensic examiners cannot be simply transplanted to “person(s) with specialized knowledge” because they have different roles in criminal procedure. The main reason for the legislation to set credentials and qualifications as a threshold mechanism for examiners is to solve the practical problems like multiple assessments, duplicate assessments and poor quality in assessments.³¹ And the reason for limiting multiple assessments and duplicate assessments is that it is hard for the court to substantively review these assessments, which will cause difficulty in fact finding. But the presence of “person(s) with specialized knowledge” in court is mainly to provide challenging opinions to forensic examiners’ reports. Proposing such opinions does not require rigorous reasoning, other than being self-justified and coherent. Therefore, there is no need for qualification credentials for “person(s) with specialized knowledge.” Second, the level of expertise of some individuals with specialized knowledge may even exceed that of a forensic examiner. Although examiners need to be registered and qualified to perform forensic assessments, they do not necessarily represent the highest level of expertise. As some studies have shown, forensic examiners with limited knowledge of clinical medicine or forensic pathology often do not have experience in specific sub-disciplines of clinical medicine.³² Therefore, the idea of limiting the opinions of “person(s) with specialized knowledge” through legislation is debatable. However,

³¹ See Zhang Yuxiang & Zhang Li, *Jianding Ren Zige Guanli Zhidu: Shuli, Pingxi Yu Shexiang - Jian Jiedu* “Guanyu Sifa Jianding Guanli Wenti De Jueding,” *Journal of China Forensic Assessment* (2005), Issue 6, p. 7.

³² Chen Bangda, *Yiliao Sunhai Jianding Bu Xinren Wenti Yanjiu - Yi Shanghai Shi “Yiyuanhua” Musbi Weili*, *Law Journal of Jiaotong University* (2019), Issue 2, p. 98.

there is an exception to this, that is, when a “person with specialized knowledge” is hired by the parties themselves and the forensic report prepared by this person is recognized by the prosecution. Because in that situation, the “person with specialized knowledge” has taken on the duties of a forensic examiner, and therefore should be required to have the credentials regulated by law. Although the legislation should not generally require “person(s) with specialized knowledge” to obtain forensic examiners’ credentials, the court should have the right to scrutinize their professional background as one factor in reviewing their forensic reports, in order to enhance trial efficiency, and to verify the scientific nature and efficacy of their opinions. The specific content of the review may include formal and substantive elements. Formal elements may include the name, educational background, professional experience of the “person with specialized knowledge,” while substantive elements may include the degree of mastery of professional knowledge, which can be examined through the scope of his knowledge, achievement of academic research or practice and the relevance of the field of expertise to the assessed matter.³³

Secondly, there should not be a generalized provision on whether “person(s) with specialized knowledge” can provide opinions depending upon whether they appear in court. Article 197 of the CPL provides circumstances where “person(s) with specialized knowledge” appear in court to give opinions on forensic reports. However, sometimes “person(s) with specialized knowledge” may not appear in court when giving their opinions, such as through submitting written opinions or having the prosecution and the defense present the relevant opinions on their behalf. In this situation, can the opinions of “person(s) with specialized

³³ See Liu Xin & Wang Yaomin, *Lun Zhuanjia Fuzhu Ren De Zige Shencha*, Evidence Science (2014), Issue 6, p. 713-714.

knowledge” be used as the basis for the court to review the forensic reports? There are views that “person(s) with specialized knowledge” should take the stand in court in order to provide opinions. But the author believes that the requirements for “person(s) with specialized knowledge” to appear in court should vary in correspondence with their different roles in criminal trials. First, when they provide opinions to challenge the forensic report, their presence in court should not become a prerequisite for submitting their opinions. When they provide this type of opinion, the core of their functions is to strengthen the court’s review of the forensic report to discover possible flaws in the report. However, the purpose of requiring “person(s) with specialized knowledge” to appear in court is to strengthen the review of their opinions.³⁴ Although the court needs to review their opinions, examining their credentials and their opinions should not be the focus of the trial, because their opinions are used to check against the forensic reports, not as the basis for a verdict. If too much effort is devoted to reviewing the opinions of “person(s) with specialized knowledge,” it will cause excessive delay in trial proceedings.³⁵ Therefore, so long as their opinions are sufficient for the court to raise doubt on the truthfulness of the forensic reports, their opinions may be adopted by the court, and their presence in court shall not be treated as a prerequisite for the adoption. Of course, the court may require them to appear in court to provide opinions as it considers necessary. Secondly, “person(s) with specialized knowledge” should appear in court when they provide opinions to the court on specialized knowledge beyond the scope of forensically examined matters, or when they assume the duties of a

³⁴ *Id.* 23.

³⁵ See Wang Jinxi, *Construed U.S. Federal Rules of Evidence (2011 edition)*, China Legal Publishing House (2012), p. 172.

forensic examiner under special circumstances. In both cases, the opinions of “person(s) with specialized knowledge” exceed the constraints of a forensic report, and may be adopted and used as the basis for a verdict by the court. However, given the big difference between “person(s) with specialized knowledge” and forensic examiners in credentials, qualifications, neutrality, or the level of formality in assessments and other aspects, the court needs to do a more complete review of the background of “person(s) with specialized knowledge” and their opinions. Therefore, under the above two circumstances, “person(s) with specialized knowledge” should appear in court to present their opinions and be subject to examination and cross-examination from the defense and the prosecution before their opinions can be used as the basis for a verdict.

Thirdly, “person(s) with specialized knowledge” should give their opinions truthfully. Being hired by the prosecution or the defense, “person(s) with specialized knowledge” will, of course, be psychologically biased toward the hiring party, and may even make arbitrary “tailoring” of their specialized knowledge to meet the requirements of the hiring party, i.e., the so-called “partisanship” problem.³⁶ Understandably, “person(s) with specialized knowledge” have their own preferred point of view. But they should still be required to provide a truthful opinion because the purpose for witnesses, forensic examiners, or other participants to participate in a criminal trial is to ascertain the facts of a case, and that process depends on these participants to provide objective explanations or assessments. Therefore, the legislation places the obligation of truthfully giving testimony on witnesses, forensic examiners, and other participants except for criminal suspects and

³⁶ See Chen Bangda, *Meiguo Fating Pingqing Zhuanjia Zhengren De Shijian Yu Qishi*, Evidence Science (2017), Issue 6, p. 702.

defendants. Violation of this obligation will subject these participants to legal liabilities. Even the defense lawyers retained by the suspects or the defendants should defend on the basis of law and facts, and should otherwise bear the corresponding legal liabilities. Furthermore, similar to witness testimony and forensic reports, the opinions of “person(s) with specialized knowledge” have an impact on the judge’s inner conviction³⁷ and may mislead the court if they are allowed to arbitrarily provide false or erroneous opinions. Therefore, “person(s) with specialized knowledge” should truthfully provide opinions based on scientific knowledge. However, truthfully providing opinions does not preclude them from consciously “tailoring” the relevant information or focusing on the aspects that benefit the party that hired them. As long as they do not violate the ethical requirements for the scientific community or intentionally provide false information, “person(s) with specialized knowledge” should not be held legally responsible for giving a wrong opinion.

Fourth, we should strengthen the right of “person(s) with specialized knowledge” to participate in the process of forensic assessments. The CPL does not provide such rights for them and they cannot participate in the forensic assessment process, which also makes it difficult for them to raise valuable challenging opinions on forensic reports. Therefore, unless there is an obvious error in the forensic report and the assessment process, the opinions proposed by “person(s) with specialized knowledge” can easily be rejected by the court due to reasons such as failure to meet

³⁷ See Hu Ming, *Jianding Ren Chuting Yu Zhuanjia Fuzhu Ren Juese Dingwei Zhi Shizheng Yanjiu*, Chinese Journal of Law (2014), Issue 4, p. 207.

objective requirements or insufficient examination conditions.³⁸ Certainly, the law not only prohibits the participation of “person(s) with specialized knowledge” in the judicial forensic assessment process, but this prohibition also applies equally to the defense and the prosecution.³⁹ However, as mentioned earlier, a system that completely prohibits the participation of the prosecution and the defense in the forensic assessment process not only prevents them from fully examining the forensic reports, but also makes these reports much less acceptable to them. Therefore, China should give the prosecution and the defense, especially the defense, the right to participate to a certain extent in the assessment process. Considering the limited scientific knowledge of the parties, the substantial participation of the parties in the assessment process is mainly realized through “person(s) with specialized knowledge.” Specifically, the participation right of the parties and their retained “person(s) with specialized knowledge” should include the following aspects.

First, the right to be informed before an assessment takes place. Article 148 of China’s CPL only provides that the investigative

³⁸ See Chen Ruchao&Liu Zhu, *Xingshi Zhuanjia Fuzhu Ren Zhidu De Fansi Yu Chonggou - Jiyu Dangqian Xingshi Jianding Zhengyi Leixing Fenbu De Yanjiu*, Chinese Journal of Forensic Sciences (2014), Issue 4, p. 79.

³⁹ For example, according to provisions about investigative measures stipulated in China’s Criminal Procedure Law, the procuratorate may send a representative to participate in police re-inspection and re-inquisition. Except this, no other provisions stipulated about the prosecution’s participation in police investigation. In the *Prosecutorial Reform Work Plan (2018-2022)*, it only stated that procuratorates should “promote to establish the system where police take advice and suggestions from the prosecution in major and complex cases,” without addressing any details about the prosecution’s participation in police investigation proceedings.

agencies should inform the parties of the forensic report that will be used as evidence. Accordingly, the investigative agencies do not have the obligation to inform the parties of matters concerning whether an assessment is needed, or a forensic report that will not be used as evidence. But the right to be informed is the precondition for the parties to participate in an assessment, and also an important basis for the parties’ subsequent litigation activities. Therefore, to protect the participation right of the parties and “person(s) with specialized knowledge,” the first step is to protect their right to be informed of the matters to be assessed. Of course, for the assessments conducted before the suspect or the victim is identified, the investigative agencies do not need to inform the parties. But the parties should be informed after the suspect or the victim is identified.

Second, “person(s) with specialized knowledge” can be involved to assist the parties in the selection process of examiners and propose a list of recommended examiners. Due to the sufficient forensic assessment resources allocated inside of investigative agencies, China’s forensic assessment in criminal cases is mainly conducted by the examiners inside of the investigative agencies. Therefore, the selection of examiners is decided by the investigative agencies. However, this institutional design should not completely exclude the right of the parties and “person(s) with specialized knowledge” to participate in the selection process. The parties and their retained “person(s) with specialized knowledge” should not only have the right to apply for recusal of examiners, but also propose a list of recommended examiners to the investigative agencies.⁴⁰ Under the inquisitorial forensic assessment system, though the list of proposed examiners is not binding on investigative agencies, this right of suggestion to a certain extent could encourage these

⁴⁰ *Id.* 22.

agencies to pay more attention to the selection of examiners, and it could also strengthen forensic reports review in the subsequent procedures.

Third, the parties and “person(s) with specialized knowledge” should be allowed to observe the assessment process in some of the more controversial cases. Full participation in the assessment process is the prerequisite for the parties and “person(s) with specialized knowledge” to fully challenge the forensic reports. Different countries and regions have provided, in various degrees, the right of parties and persons with expertise to participate in the forensic examine process. While granting the parties and their retained “person(s) with specialized knowledge” the full right to be present at the assessment process will enhance their acceptance and review of the forensic reports, we should also comprehensively consider factors like the necessity to be present and the protection of some confidential investigations in order to achieve a balance between different values. Here, we could use the provision about investigative audio and video recording in Article 123 of the CPL for reference. It stipulates that in cases where life imprisonment or death penalty may be imposed or in other serious crimes, the parties and their counsels or “person(s) with specialized knowledge” hired by them should be notified to be present. In addition, considering that there are often significant disputes in cases where a re-assessment is conducted, we should allow the participation of the parties in the re-assessment process.