

THE APPLICATION OF SEPARATE CRITERIA FOR EVALUATING THE EXPERT CONCLUSION BY THE INVESTIGATING JUDGE AT THE PRE-TRIAL INVESTIGATION STAGE

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Annotation. *The article highlights that the final stage of forensic examination is evaluation of the expert conclusion by the investigating judge to determine the role and significance of the fact established by the forensic expert and, subsequently, to adopt a fair decision by the court.*

The Article Purpose is to specify evaluation criteria used by the investigating judge when evaluating the expert conclusion at the stage of pre-trial investigation of offenses. The authors have concluded that expert conclusions are subject to evaluation by the investigating judge on the basis of general grounds.

The article analyzes and provides a detailed description of individual criteria for evaluating expert conclusions (adequacy, admissibility, veracity, objectivity, legality, authenticity, completeness, etc.).

As a result of carried out research, the need to create a publicly available and legislatively established system of criteria for evaluating expert conclusions has been proven, since the criteria for evaluating the expert conclusion defined by procedural legislation are not exhaustive and do not allow the investigating judge to carry out a comprehensive evaluation not only of the expert conclusions but also of other sources of evidence at the pre-trial investigation stage.

Key words: *expert conclusion, forensic examination, investigating judge, conclusion evaluation, evaluation criteria.*

1. Formulation of the problem.

Let's emphasize that the final stage of the forensic examination is evaluation of the expert conclusion by the investigating judge in order to: determine the role and significance of the fact established by the forensic expert in proving the guilt or innocence of a person accused of a criminal offense; resolve the issue of proven or unproven certain circumstances of a criminal proceeding; at the end of the pre-trial investigation, it is the formation and adoption of final procedural decisions. At the same time, only those expert conclusions may serve as the basis for procedural decisions, which adequacy, sufficiency, veracity and substantial reasonableness were established during their evaluation by the investigating judge. However, the question of a detailed description of the above and other criteria for evaluating the expert conclusion remains open today.

2. Analysis of the recent research.

Evaluation of the expert conclusion as the final product of forensic examination carried out while investigation of offenses in various fields of human activity has been studied by such leading researchers as V.H. Honcharenko, N.I. Klymenko, V.K. Lysychenko, O.M. Moisieiev, I.V. Pyrih, M.Ya. Sehai, M.V. Saltevsykyi, E.B. Simakova-Yefremian, R.L. Stepaniuk, M.H. Shcherbakovskyyi, D.V. Viter and others. They covered the issue of specific expertise application in a criminal proceeding in the form of forensic examination. The analysis of research papers conducted by leading scientists demonstrates that expert conclusions are typically evaluated from two perspectives: scientific veracity of a conclusion and its evidentiary value.

For example, in his dissertation, D.V. Viter proposed the following: to evaluate expert conclusions according to the developed algorithm that also contains a component for evaluating the expert conclusion by all criteria (adequacy, admissibility, veracity, completeness, authenticity, objectivity, etc.); to study the expert conclusion along with other materials of a proceeding; to determine the possibility of using the expert conclusion as evidence in this proceeding [1, Pp. 151–175]. However, the process of evaluating expert conclusions by the investigating judge has received limited research attention and lacks comprehensive scientific justification. Furthermore, certain issues regarding the understanding and systematization of evaluation criteria for expert conclusions have remained unresolved, particularly when it comes to evaluation of expert conclusions by investigating judges.

The **Article Purpose** is to outline criteria used by the investigating judge when evaluating the expert conclusion at the stage of pre-trial investigation of offenses.

3. Presentation of the main material of the study.

The use of an expert conclusion as evidence and as a basis for procedural decisions represents an ideal evaluation process. After all, the evaluation of any evidence, as well as the expert conclusion, is a mental activity that is not directly documented in procedural records. However, analyzing the subsequent use of the expert conclusion, specifically the procedural decisions that are formalized and documented, is almost the only indicator which allows determining the place of established factual data within the system of available evidence in a specific criminal proceeding.

In the course of evaluating the expert conclusion by an investigating judge, it should be taken into account that general criteria for evaluating the expert conclusion are its adequacy, admissibility, veracity and relationship with other pieces of evidence in a criminal proceeding. These requirements must align with the requirements outlined in criminal procedural legislation, ensuring usability of the expert conclusion in proving offenses across various spheres of human activity.

Let's stress that in the process of evaluating the expert conclusion, the investigating judge must determine its adequacy. Certain researchers define adequacy of the expert conclusion as the capacity of factual data to contain information about circumstances that are part of the subject of proof, to serve as supporting arguments in the process of establishing the objective truth [2, p. 175]. In the research paper by V. M. Tertyshnyk, it was stressed that for this purpose it is necessary to clarify such points as: whether the facts for which establishment relevant factual data are considered are part of the subject of proof (main, intermediate or supportive facts); whether factual data which represent the content of evidentiary materials and possess information value are capable of establishing corresponding circumstances related to the subject of proof [3, p. 691].

Let's emphasize that when evaluating the expert conclusion concerning its adequacy, the investigating judge must primarily consider its content, and only then its form. Since adequacy of evidence is a subjective-objective property of evidence content, it is manifested in the qualitative ability of information, namely: the adequacy is seen in the connection between the evidential information and relevant circumstances of the investigated event, which must be essential and necessary. Under such conditions, adequacy of information manifests itself in the evident connection of their content with the subject of proof. It is important to note that the second follows from the first. Let's note that the expert's conclusion as a source of evidence is a combination of factual data as the expert's reasoning and the form of its expression as a procedural act.

The above necessitates to distinguish between the content and the form of the expert conclusion. The content includes the final conclusion as a justified result of the entire expert research based on the expert's specific expertise. The form, in turn, is associated with compliance of a conclusion as a source of evidence with requirements of procedural legislation. In a criminal proceeding, these two components are significant for recognition of the expert conclusion as evidence. Thus, if final results of expert research are recognized as unveracious (not based on scientifically grounded research), then the expert conclusion cannot be viewed as source of evidence. Conversely, even if the expert conclusion is objective and reasonable, non-compliance with its procedural form always leads to its non-recognition as a source of evidence, which must be taken into account by the investigating judge.

In view of the above, it is essential to distinguish between the investigating judge's evaluation of the facts established as a result of the expert research and reflected in the expert conclusion, and his/her direct evaluation of the expert conclusion as a procedural act. In the first case, the investigating judge must evaluate the data reflected in the expert conclusion by comparing them with other collected evidence; determine the degree of completeness of performed expert research and scientific validity of final conclusions; assess veracity of results obtained by the forensic expert; compliance with the procedural requirements for appointment and conduct of forensic examination is checked. In the second case, it is crucial to examine the expert conclusion independently from other materials of the specific proceeding and to assess the accuracy of the research conducted [1, p. 171].

When determining belonging of the expert conclusion, the investigating judge must use provisions of the procedural legislation, among which the following can be distinguished:

- general requirement of adequacy, outlined in Art. 85 of the Criminal Procedure Code, according to which evidence shall be deemed adequate where it directly or indirectly confirms the presence or absence of circumstances to be proved in a criminal proceeding, and other circumstances which are important for the criminal proceedings, as well as credibility or non-credibility, possibility or impossibility of using other evidence;
- among the entire list of circumstances to be proved (Article 91 of the Criminal Procedure Code) in criminal proceedings, the investigating judge must determine the relevance and significance of a circumstance for which forensic examination is ordered;
- the regulations of the Criminal Code of Ukraine reveal all circumstances that need to be established in a specific proceeding. Depending on the peculiarities of the investigation, the investigating judge determines which circumstances should be established as a result of investigation;
- cases of mandatory expert examination to establish specific circumstances of a criminal proceeding (clause 2 of Article 242 of the Criminal Procedure Code) [4].

Adequacy is expressed in confirming the connection between potential evidence and established facts of a proceeding. It can be direct or indirect. Direct adequacy of an expert conclusion exists when a fact directly related to the subject of proof is established. Indirect adequacy of a conclusion, compiled at the initiative of an expert, takes place when it is formulated as a response to an additional question and is necessary for resolving the main issue [1, p. 172]. Such a conclusion will be evaluated by the investigating judge during the pre-trial investigation in conjunction with the conclusion on the main question.

During the evaluation by the investigating judge, an expert conclusion may be recognized as irrelevant to a proceeding on a specific offense if inappropriate research objects were submitted for forensic examination. In other words, the provided set of materials does not allow the forensic expert to obtain answers to posed questions in advance.

The results of analyzing scientific papers [5, Pp. 135–146] allowed determining that in order to confirm the relevance of an expert conclusion, the investigating judge must establish the following: the existence of a connection between the factual data outlined in the expert conclusion and the circumstances to be proven, namely, the subject of proof; the correspondence of the informational content of the expert conclusion to the circumstances of a proceeding; the significance of information stated in the expert conclusion for confirming or refuting circumstances that are relevant to the case consideration and making a well-founded decision.

It should also be noted that a simplified understanding of the adequacy of the expert conclusion leads to unjustified appointment of forensic examination to establish circumstances that are not of significant importance to a specific proceeding. Additionally, it is essential for the investigating judge to verify the quality and sufficiency of the collected materials provided to the forensic expert for research, which is not always taken into account when appointing forensic examination. This becomes the reason why forensic experts may not be able to provide answers to all the questions posed for forensic examination.

An important aspect in evaluating an expert conclusion is assessing the accuracy of the materials provided to the forensic expert. The accuracy of the materials provided for forensic examination should be understood as the truthfulness of the submitted documents, objects, materials, etc. Specifically, it refers to the adequacy

of information to the actual existing circumstances and their correspondence to the information contained therein [6, p. 245].

It should be emphasized that when evaluating an expert conclusion, the investigating judge determines its clarity by assessing whether the expert's final conclusions are clear, concise, unambiguous, and accessible to the participants of a criminal proceeding. In other words, they should be formulated in a way that does not require specific expertise to understand their essence.

It should be noted that during the evaluation of an expert conclusion, just like other sources of evidence, the determination of its authenticity and completeness is also taken into consideration. During the overall evaluation by the investigating judge, the assessment of its authenticity holds a significant position, which largely depends on the reliability of the specific expertise possessed by the forensic expert, as well as the scientific validity of the methodology applied during the forensic examination. According to the requirements of the current legislation, during forensic examination an expert is obligated to use expert methodologies that have undergone approval, implementation, and are included in the State Register. Such methodologies ensure acquisition of accurate and veracious results. However, in judicial practice, there are occasional instances when scientific validity of the expert methodology is called into question by a participant in a process and becomes a subject of active discussion during the court hearing. Most frequently, this is associated with the use of unique or recently developed methodologies that have not yet gained widespread recognition. Doubts arise not regarding the scientific validity of the expert methodology, but rather concerning the lawfulness of its application in a specific forensic examination.

It should be emphasized that in order to confirm the authenticity of the expert conclusion, the investigating judge must establish the following: completeness of the description and execution of provisions of the expert methodology selected in accordance with the question posed for forensic examination and peculiarities of the object submitted for research; correspondence of the main features and characteristics of the examined object to the applied expert methodologies for the formulation of intermediate and final conclusions; correct determination by the forensic expert of the features that should be obtained in accordance with the conditions of application described in the methodological literature of the provided expert methodology.

During the evaluation of the validity of the expert conclusion, the investigating judge needs to verify to what extent the expert conclusion is supported by the conducted researches. It should be noted that this can be defined as the most challenging aspect of evaluating the expert conclusion, as individuals without specific expertise in the field of forensic examination find it difficult to assess data that the expert relied upon.

An important aspect of evaluating an expert conclusion is establishing its completeness. Completeness means that the forensic expert has addressed all the questions requiring resolution in the course of forensic examination, thoroughly examined and analyzed all the objects submitted for forensic examination, applied all the necessary available data from the ongoing proceeding or from his/her own arsenal of specific expertise, and exhaustively presented the process and results of the forensic examination in a conclusion. When assessing completeness of the expert conclusion, the investigating judge should analyze such factors as: the conformity of the expert conclusion with the research conducted by him/her; a thorough utilization of materials provided to the expert; application of various complementary research methods necessary for objectivity; the presence of answers to all posed questions in the expert conclusion; the scientific validity of answers to addressed questions; and a detailed description of the expert's work process in a conclusion.

Completeness of the expert conclusion is also determined by the level of detail in describing a conducted examination in conclusions. The expert must apply all necessary materials to provide an accurate conclusion. The expert conclusion should include answers to all questions raised for forensic examination or a reasoned refusal to answer certain questions (which may be due to insufficient materials provided for forensic examination, the expert's incompetence, lack of proper scientific basis to address a question, etc.). It should be separately noted that in order to determine completeness of the expert conclusion, the investigating judge needs to establish:

– whether the forensic expert has provided answers to all questions raised for examination. It should be taken into account that the number of final conclusions does not necessarily have to correspond to the number of questions in the order on appointing forensic examination as the expert may address questions formulated at her/his own initiative if the discovered facts are relevant to a proceeding;

- whether the expert conclusion which resolves part of forensic examination issues includes references to other conclusions that address different issues, in cases when the order on appointing forensic examination included questions related to different types of forensic examinations and a multidisciplinary examination was not appointed;
- whether the expert conclusion contains all the required elements and components;
- whether all the provided objects, materials, documents, or samples have been examined by the expert and are mentioned in the introductory part of the expert conclusion.

Overall, the status of evidence can be determined on the basis of an accepted expert conclusion; however, it is necessary to establish criteria for its application that do not go beyond the scope of derivative evidence. In other words, an acceptable expert conclusion itself can serve as the basis for a conclusive procedural decision, which, in conjunction with other pieces of evidence, unequivocally establishes the circumstances that require proof in a specific proceeding. It should be noted that in order to confirm the conformity of the expert conclusion to other pieces of evidence, the investigating judge must determine the following: the correspondence of validity of information on the research object, as indicated in the expert conclusion, to evidence, facts, and circumstances available in materials of a criminal proceeding; the presence or absence of contradictions between final conclusions of the forensic expert and materials of a specific proceeding. In the event of identifying contradictions that may be caused by errors made in the course of forensic examination or by the poor quality of other evidence, the investigating judge may order a re-examination.

It should be stressed that researchers have studied the issue of evaluating the expert conclusion and have determined the order of actions for the investigator [7, Pp. 92–111; 1, Pp. 4-5] which should be agreed upon and emphasized as advisable to be applied by the investigating judge. Furthermore, considering their findings, it is possible to propose a comprehensive process of evaluating the expert conclusion by the investigating judge at the pre-trial investigation stage through application of a specific action algorithm. According to this algorithm, the investigating judge should perform the following consistent actions:

- to analyze compliance with the procedural process of preparation, appointment, and conduct of forensic examination;
- to determine the conformity of the expert conclusion to the task assigned for forensic examination;
- to conduct an assessment of the qualifications and competence of an expert who conducted forensic examination;
- to evaluate completeness, quality, and sufficiency of materials submitted to the expert for examination;
- to determine scientific validity of the expert conclusion;
- conduct evaluation of the expert conclusion based on all criteria (adequacy, admissibility, veracity, completeness, authenticity, objectivity, etc.);
- to study the expert conclusion in conjunction with other proceeding materials;
- determine the possibility of using the expert conclusion as evidence in the current proceeding.

4. Conclusion.

It has been established that expert conclusions are subject to evaluation by the investigating judge on the basis of general grounds. An analysis has been conducted, and a detailed description of criteria (in particular, adequacy, admissibility, veracity, objectivity, legality, authenticity, completeness, etc.) for evaluating expert conclusions has been provided. The necessity of establishing a publicly accessible and legislatively established system of criteria for evaluating expert conclusions has been proven, as the evaluation criteria defined by procedural legislation are not exhaustive and do not allow the investigating judge to conduct a comprehensive evaluation not only of the expert conclusion but also of other sources of evidence during the pretrial investigation stage.

References:

1. Viter D.V. (2021). Vykorystannia sudovoi ekspertyzy pid chas rozsliduvannia zlochyniv u sferi finansuvannia sotsialnykh tsilovykh prohram [The Use of Forensic Examinations During the Investigation of Crimes in the Field of Funding Social Targeted Programs]. Dysertatsiia na zdobuttia naukovooho stupenia doktora filosofii za spetsialnistiu 081 «Pravo» (08 – Pravo) – Dissertation for the Doctor of Philosophy degree in specialty 081 “Law” (08 – Law). 258 [in Ukrainian].
2. Nazarov V.V., Omelianenko H.M. (2008). Kryminalnyi protses Ukrainy [Criminal Procedure in Ukraine]. Pidruchnyk – Textbook. 548 [in Ukrainian].
3. Tertyshnyk V.M. (2003). Kryminalno-protsesualne pravo Ukrainy [Criminal Procedure Law of Ukraine]. Pidruchnyk – Textbook. 1120 [in Ukrainian].
4. Kryminalnyi protsesualnyi kodeks Ukrainy vid 13.04.2012 r. № 4651-VI (zi zmin. ta dopov.) [Criminal Procedure Code of Ukraine No. 4651-VI dated 13/04/2012 (as amended and supplemented)]. URL: <https://zakon.rada.gov.ua/laws/show/4651-17#Text> [in Ukrainian].
5. Hrychyna O.V. (2015). Sudova ekspertyza v systemi protsesualnykh dii yak odne z dzherel sudovykh dokaziv v kryminalnomu, tsyvilnomu ta hospodarskomu protsesakh [Forensic Examination Within the System of Procedural Actions as One of the Sources of Forensic Evidence in Criminal, Civil, And Commercial Proceedings.]. Kriminalistika i sudebnaia ekspertiza – Criminalistics and Forensics. Vol. 60. 135–146. URL: https://digest.kndise.gov.ua/wp-content/uploads/2021/10/%D0%9A%D1%96%D0%A1%D0%95_2015_60_compressed.pdf [in Ukrainian].
6. Senchenko N.M. (2014). Otsinka vysnovku eksperta u kryminalnomu provadzhenni [Evaluation of the Expert Conclusion in a Criminal Proceeding]. Naukovyi visnyk Khersonskoho derzhavnoho universytetu – Scientific Bulletin of Kherson State University. Vol. 4. 243–247. URL: <http://ir.stu.cn.ua/123456789/5569> [in Ukrainian].
7. Sadchikova K.A. (2017). Vykorystannia spetsialnykh znan na stadii dosudovoho rozsliduvannia (protsesualnyi aspekt) [The Use of Specific Expertise at the Pre-trial Investigation Stage (Procedural Aspect)]. Dysertatsiia na zdobuttia naukovooho stupenia kandydata yurydychnykh nauk za spetsialnistiu 12.00.09 – kryminalnyi protses ta kryminalistyka; sudova ekspertyza; operatyvno-rozshukova diialnist (08 – Pravo) – Dissertation for the PhD in Law degree in specialty 12.00.09 – Criminal Procedure and Criminalistics; Forensic Examination; Crime Detection and Investigation (08 – Law). 233. URL: https://oduvs.edu.ua/wp-content/uploads/2016/06/Disertatsiya_Sadchikova-Katerina-Anatoliyivna.pdf [in Ukrainian].

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