

PROBLEMATIC ISSUES OF FORENSIC EXAMINATION APPOINTMENT IN CRIMINAL PROCEEDING AND SOLUTIONS

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Annotation. *The paper presents results of study focused on practice of forensic examination appointment in Ukraine. A set of problematic issues, related to implementation of this special knowledge use format, is outlined. Identified gaps and flaws hamper the forensic examination performance in full scope – as a result, plausible statements or ones claiming the absence of solutions are provided leading to investigation process delays.*

This paper is aimed to identify the typical errors emerging in the process of collecting and transferring the materials for expert study, as well as formulate relevant solutions. In particular, the following errors are characterized: incompliance of data in decree on forensic examination appointment and supporting letter, incompliance of actual study objects and ones identified in decree, presenting questions to experts which are prohibited by the Criminal Procedure Code of Ukraine, incompliance of forensic examination type, presented in the decree, and relevant tasks, incorrect packaging of the studied objects etc. Due to the abovementioned errors the process of forensic examination is suspended and expert files a motion on provision of additional materials, non-conformity acts, endorsement letters etc.

Methods to tackle the analyzed problematic issues are provided, as well as recommendations on correct processing of required documents and materials for full and impartial expert study as a result of the performed research. Emphasis is placed on use of regulatory documents related to the appointment and performance of forensic examinations and its significance. It allows one to correctly: determine the type of forensic examination subject to appointment to ensure the study of the discovered object, formulate the expert's task, select experimental samples for comparative study etc.

Keywords: *special knowledge, forensic examination, decree, expert examination object, question to expert, individual features of the study object, comparative samples.*

1. Problem statement.

Investigation of any criminal offence requires a set of investigative (search) actions to be taken along with other procedural actions and measures. One of these measures stipulates use of special knowledge – application of scientific and technical achievements to complete the tasks of criminal justice. Currently various formats of special knowledge use are available, enabling the pre-trial investigation parties to obtain significant information. Each of these is important for the process of evidentiary basis establishment. Forensic examination appointment and performance ensure that objects, extracted from the crime scene, are granted the status of physical evidence and this is a substantial argument for suspect's guilt to be proved or refuted. Unfortunately, certain problematic issues, related to implementation of this special knowledge use format, emerge in practice. Forensic examination process requires thorough collection and assignation of all necessary materials later handled by the expert – certain problems arise which are analyzed in this paper.

2. Analysis of latest studies and publications.

Many forensic science researchers dedicated their papers to development of special knowledge concept, its types and forms used in criminal procedures, including V. Abramova, V. Bernaz, V. Honcharenko,

I. Hora, H. Hranovskyi, N. Klymenko, Y. Lukianchykov, S. Petriaiev, I. Pyrih, M. Shcherbakovskyi, V. Shepitko, Y. Chornous etc. Modern forensic textbooks [1, 2, 3] and monographs [4, 5] also outline the use of special knowledge in pre-trial investigation.

Numerous researchers studied the procedure of forensic examination appointment in criminal justice, including Y. Antoniuk, V. Baraniak, A. Behma, N. Kravets, V. Kushpit, V. Maliarenko, Y. Makarenko, O. Nesimko, A. Paliukh, L. Patyk, A. Patyk, Y. Piliukov, M. Smuk, O. Khovpun etc. But in practice experts still detect multiple mistakes made by subjects initiating the appointment of forensic examination and have to suspend the performance of relevant activities up to the moment of error elimination.

3. Formulation of the aim.

This paper is aimed to identify the typical errors committed in the course of forensic examination appointment and provision of recommendations on its elimination.

4. Core material description.

Forensic examination appointment requires certain preparation as this process is time-consuming and results of specific study depend on the level of its quality. Traditionally appointment of forensic examination comprises several stages [1, p. 547], namely: 1) collection of necessary materials; 2) selection of examination appointment moment; 3) identifying the object of expert study; 4) formulating questions to expert; 5) selection of expert/institution. Academic literature contains all these actions thoroughly described with characteristics of step-by-step algorithm but in practice a set of deficiencies is detected which hamper the performance of forensic examination in full scope - as a result, plausible statements or ones claiming the absence of solutions are provided leading to investigation process delays.

After conversations with forensic experts from different sectors, having reviewed motions, non-conformity acts, endorsement letters, newsletters of Vinnytsia REFC of the MoI of Ukraine [6], where typical errors committed by staff of the National Police Headquarters while drafting the decrees on appointment of handwriting forensic examinations and relevant judicial documents are highlighted, we consider it necessary to introduce recommendations for the correct appointment of forensic examinations.

Before we start analyzing the errors per se, it should be noted that in case if any doubts emerge regarding the appointment of a certain forensic examination type, selection of relevant samples or the packaging of objects etc., one can always contact a specialist. This possibility (advisory, technical and other types of assistance) is stipulated by the Criminal Procedure Code of Ukraine (CPC). In particular, in accordance with Article 71(2) of the Criminal Procedure Code of Ukraine, a specialist may be involved by the criminal proceeding parties during a pre-trial investigation to provide direct technical assistance (for example, selecting samples for examination, etc.) [7]. Such actions will save significant amount of time and ensure the expected outcome of a specific forensic examination type.

We shall start with the fact that in order to conduct a forensic examination, it is necessary to provide appropriately prepared materials to the expert institution. One of these documents is a decree on the appointment of a certain forensic examination type (hereinafter referred to as the decree). This document must be properly drafted with all required details, contain information on the type of forensic examination, the name of institution conducting the study, clearly articulated expert's tasks etc. [8, p. 144].

Sometimes there are cases when the decree contains an incorrect name of forensic examination type or tasks (questions) are formulated for a certain examination type other than mentioned in the document. For example, structural (engineering) examination is appointed but the questions relate to expert evaluation. In order to avoid these errors it is necessary to set clear tasks under forensic examination and search the type of forensic examination ensuring the completion of tasks in the Guidelines on the Appointment and Performance of Forensic Examinations and Expert Study № 53/5 dd. 08.10.98 [9], indicate the name of this study in the appointment decree and formulate relevant questions for the expert (an indicative list is also introduced in this order).

We would like to stress on the fact that information regarding the type of forensic examination, the number of criminal proceedings, the number of studied objects, their names, etc. must correspond to the data in the appointment decree, the supporting letter and on the package containing these objects. This discrepancy indicates the dissimilarity of these documents, criminal proceedings per se, and the types of forensic examinations, which, of course, makes it impossible to perform a study.

In addition, special attention should be paid to indication of data about the study object in the appointment decree – full and correct name, individual characteristics (for example, stamp, date and document number, etc.), quantity and other data. If one digit is put incorrectly, it may already refer to another document or another object.

Special attention should be paid to the particulars of the analyzed objects. Decrees often contain generalized statements about the object of study. For example, when technical (computer) examination is appointed and it is noted only that one or several “Expert PC Ultimate” system units were provided for the expert study. This information is considered generic since each system unit is marked with unique number, therefore it will be correct to also specify, for example, this individual number “I10400F.16.H1S2.1650.A2762”; if two system units - two numbers and so on.

When multiobject examinations are appointed, one must specify the individual features of each object in the decree. For example, when the examination is appointed for excise duty labels, series and number of each label must be indicated (e.g., «AAAE596136 № 0033867056 with monetary equivalent 25.392»), or if bank notes are introduced for analysis – series and number of each (e.g., «one bank note equivalent to five hundred UAH, series and number ВД 85663408»), when the vehicle examination is appointed – registration number, its brand, type etc. When multiobject handwriting forensic examination is appointed, one should also indicate name (title), number and date of each document (e.g., «testament registered on 12.05.2019, № 3-94, 1 page»), if these documents are not attached to a criminal proceeding file – the page where document is placed shall be indicated (e.g., «consignment voucher № 276 dd. 14.05.2019, page 32 in the criminal proceeding file «14024397050000124 dd. 21.06.2020»). Non-conformity act (incompliance of quantity and the list of provided excise duty labels in the decree), drafted by the expert, is an example of such error [10]. And again it hampers the process of forensic examination with investigation terms extended.

Samples for comparative analysis are of significant importance for performance of forensic examinations. Therefore, “according to Article 245 of the Criminal Procedure Code of Ukraine, it is possible to obtain samples required for forensic examination. Part 2 of the abovementioned article outlines the procedure for sample extraction from items and documents, which is established in accordance with the provisions on temporary access to items and documents, and part 3 – extraction of human biological samples. Samples obtained for purpose other than comparison contain features confirming/refuting certain disease or specific physiological characteristics. Samples obtained for comparison contain features that confirm, prove the existence of a certain circumstance or refute it only when combined with the corresponding features of physical evidence” [8, p. 143-144].

In practice there are many problems with samples when it comes to clarification. Firstly, sample type depends on the object of study and, respectively, type of forensic examination one should appoint during the criminal offence investigation. For example, in order to perform the handwriting forensic examination samples for comparative analysis are distinguished into optional, provisionally optional and experimental. Each is given its essential role in the process of forensic examination. Unfortunately, when these types of forensic examinations are appointed, in some cases these sample forms are incorrectly identified, one is not aware of the quantity required for provision or of proper extraction technique. It must be understood that any material provided as a sample to expert shall be compared with the studied object. It is tightly connected to authenticity of samples which are under the responsibility of person initiating the examination, not the expert. This issue has been studied in another paper [11], therefore it is not feasible to outline it again. Secondly, subjects initiating the forensic examination often get confused with the sample titles, can't understand why optional samples must be searched if experimental can be extracted etc. This issue has also been thoroughly analyzed in our report [12], therefore it is not necessary to give the details but it is worth mentioning that the stage of sample selection for comparative analysis is important and the result of examination directly depends on the quality of samples, its sufficient quantity and how diverse the provided ones are.

We recommend to distinguish clearly these types of samples and indicate that expert must be provided with an envelope with the following content:

- the object of study (name (title), date, series etc);
- optional samples of handwriting (indicate the name (title) of document and its particulars, line with the person's signature);
- provisionally optional samples (indicate the name (title) of document and its particulars, number of pages);
- experimental samples (first and family name of person subject to extraction and number of pages).

If provisionally optional sample are provided, attached to criminal proceeding file, one should indicate the numbers of pages where the relevant samples are placed. For example, «provisionally optional samples of signature from V. Onishchuk: original protocol of witness (V. Onishchuk) interview, dd. 23.03.2020, 3 pages (p. 58–60 in criminal proceeding file «12024587080000167 dd. 18.03.2020»).

Also there are original samples of documents kept in expert center (experts are granted access to these items), therefore it is not necessary to introduce, for example, excise duty label, Ukrainian bank note, US or Ukrainian citizen passport as these are stored in specific collections.

Unfortunately, sometimes low-quality samples are provided. For example, low-quality fingerprint cards are introduced for dactylographic examination (card prints are to be compared with prints of papillary lines found at the crime scene). Quality is considered to be low if essential and specific features of papillary lines are not visible and expert is not able to perform an examination, drafting the motion on provision of relevant fingerprint card samples. For example, the motion of expert from Vinnytsia REFC of the Mol of Ukraine № 565 dd. 20.22.2020 [13]. That is why one must follow the rules and standards, outlined in forensic textbooks, while selecting the papillary line samples [14, p. 542].

Other cases are recorded when fingerprint cards are introduced as comparative samples for dactylographic examination – grammatical errors in person's details which lead to non-conformity of presented materials and ones mentioned in the decree. Even one letter changed in person's family name already indicates another subject. For example, the motion of expert from Vinnytsia REFC of the Mol of Ukraine № CE-19/102-21/4436-Д dd. 23.03.2021 [15]. Therefore one should be careful while registering all types of samples for comparison.

In case if: the content of envelope with objects, given to the expert, does not comply with details (type, quantity, weight, volume etc) written on it (e.g., when examination is appointed for materials, substances and items) or details in decree and supporting letter; no access is granted to objects of examination (e.g., when structural (engineering) or vehicle examination is appointed); no additional data or description is provided (e.g., to perform the merchandising examination) – expert is not able to perform examination and drafts a non-conformity act, endorsement letter or motion. All these documents have fixed enforcement deadlines (e.g., motion shall be enforced within 45 days from the drafting date), which are often dropped by the subject initiating a forensic examination and expert is forced to submit materials without enforcement or provide a plausible statement or one claiming the impossibility to answer the prepared questions – for example, due to absence of sample quantity, required for comparison.

Occasionally practitioners come across an issue regarding the clarity of tasks set for the expert, namely the formulation of questions in the decree. Unfortunately, expert centers still receive decrees with incorrectly formulated questions or ones falling beyond the scope of specific examination type or those of purely legal nature. Thus, Article 101(4) of the CPC of Ukraine envisages that questions to expert and one's statement (opinion) regarding these shall not go beyond expert's special knowledge. According to Article 242(1) of the CPC of Ukraine examinations shall not be performed to clarify purely legal matters [7].

Also there are cases when expert gets too many additional questions, unnecessary objects or ones not related to the criminal offence. For example, rocks are presented for material/substance/item examination in a bag with organic substance; elements of darts game are sent for ballistic examination. Expert has to waste time to describe these items, as well as reagents for examination.

Quite often the procedure of forensic examination appointment is violated due to failure to comply with the rules for objects and samples packaging. The integrity of packaging may be compromised when sharp objects are put in it and cause damage, which may result in potential unauthorized access. Usually these objects are returned without enforcement. That is why it is crucial to use strong and durable packaging to ensure the integrity and safe storage of examined objects.

5. Conclusion.

In order to summarize we should note that there are numerous problematic issues we attempted to highlight and introduce relevant recommendations on possible solutions. But we formulated general recommendations. In our opinion the following ways can be chosen to solve the identified problems, related to forensic examination appointment and performance: 1) oral consultation with a forensic expert (full-time employee in each local unit of National Police); 2) oral consultation with expert tasked to perform the relevant examination; 3) enforcing Guidelines on appointment and performance of forensic examinations № 53/5 dd. 08.10.98 during the appointment of forensic examinations as these contain information on the majority of forensic examination forms, list of relevant tasks, types and peculiarities of sample extraction for comparison and indicative list of questions to expert; 4) sessions on procedure and specificity of forensic examination appointment and performance as a part of service training.

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