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Involvement of the Expert by the Defendant for an Examination during the Investigation of the Murder

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■ **Abstract.** The purpose of the study is to investigate the possibilities and mechanisms of engaging an expert by the defence counsel in criminal proceedings on murder; to highlight the possibilities of the defence counsel to engage an expert during mandatory examinations in the process of investigating murders; to formulate recommendations to the defence counsel on granting the expert, who is involved in the examination on the basis of the request, objects and samples for expert research. The article uses a set of scientific methods, namely: terminological, system-structural, formal-logical, and comparative-legal. In criminal proceedings on murder, the defence may obtain expert evidence independently on the basis of an agreement with an expert or an expert institution and submit it to the pre-trial investigation body or court to substantiate its legal position. At the same time, it is established that the defence counsel cannot initiate forensic medical and forensic psychiatric examinations on a contractual basis before an expert or expert institution due to legal conflicts between the norms of the Criminal Procedure Code of Ukraine and the provisions of by-laws regulating the procedure for appointing these types of forensic examinations. The recommendation to the defender to engage or consult a specialist in this procedural action was formulated for the purpose of obtaining samples for examination. In criminal proceedings on murder, the possibility of the defender engaging an expert to conduct an examination concerns the appointment of mandatory and optional examinations. For mandatory examinations, such as forensic medical and psychiatric examinations, the defence counsel shall apply for their initiation to the investigator or prosecutor, and submit a corresponding request to the investigating judge in case of refusal. The inability of the defence counsel to initiate forensic medical and forensic psychiatric examinations on a contractual basis before an expert or expert institution violates the equal opportunities of the parties to criminal proceedings to submit evidence to the court and prove their credibility before the court. For the examination in the criminal proceedings on murder to be possible, the defender requesting it submits to the investigator, prosecutor or investigating judge a petition on the need to obtain specific objects and samples or receives (requests) them independently. When receiving samples for examination, the participation of the defender who initiated the examination in the presence of appropriate samples is mandatory

■ **Keywords:** defender; expert; expert involvement; murder; forensic medical examination; forensic psychiatric examination

■ Introduction

The Constitution of Ukraine recognises human life and health as the highest social value. Obviously, the cases of unlawful deprivation of human life must be properly investigated to identify the perpetrators, impose a fair punishment on them, and

ensure compensation for damages, including moral damage to the victim's family and friends.

The criminogenic environment in Ukraine remains negative. It is “fueled” by the prevailing economic, political, environmental, energy and demographic issues. The current situation is aggravated by the hostilities in the East of Ukraine, and the oversaturation of illegal trafficking of weapons, explosives and devices, including those of criminal origin. This leads to an increase in the level of violent crime and the number of cases involving assassinations of competitors or government officials as a means of achieving super-profits associated with

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illegal or semi-legal activities. Every year the number of crimes against individuals increases significantly. Therefore, it is necessary to conduct a thorough and qualitative examination of physical evidence and objects based on cumulative analysis, forensic science, and expert research [1].

It is necessary to enhance the application of forensic means and methods by law enforcement agencies, wide application of analytical tools in combating violent crime, removal of obstacles to a fair trial of criminal proceedings, in particular, murders. Obviously, the application of legal norms and the performance of actions of legal significance by the court should be based on the circumstances of a particular case and ensure effective protection of rights, freedoms and legitimate interests [2; 3]. These factors are fundamentally important for improving the activities of lawyers who act in the interest of protecting the rights and freedoms of murder suspects to comprehensively and impartially consider the materials of criminal proceedings and make informed decisions. The lawyer is assisted in this activity by the possibility of using the special knowledge of competent persons. The engagement of specialists in procedural actions, and conducting forensic examinations provides evidence that has a scientific and technical basis, and is distinguished by the transparency of the process of detection, research, evaluation and use in criminal proceedings.

The purpose of the study is to highlight the legislative regulation of the possibility of involving an expert by a defender in criminal proceedings and to identify the specifics of initiating forensic examinations by a lawyer during the investigation of murders. To achieve this goal, the authors set the following tasks: to outline the mechanism for initiating the involvement of an expert in criminal proceedings by the defender; to explore the possibilities of the defender to involve an expert during mandatory examinations during the investigation of murders; to highlight the issue of providing the expert, who was involved in the examination on the basis of the defender's request, with objects and samples for expert research.

In criminal proceedings on murder, the defence may obtain expert evidence independently on the basis of an agreement with an expert or an expert institution and submit it to the pre-trial investigation body or court to substantiate its legal position. At the same time, it is established that the defence counsel cannot initiate forensic medical and forensic psychiatric examinations on a contractual basis before an expert or expert institution due to legal conflicts between the norms of the Criminal Procedure Code of Ukraine and the provisions of by-laws regulating the procedure for appointing these

types of forensic examinations. To obtain samples for examination, a recommendation was formed for the defender to engage a specialist in this procedural action or to receive consultations from a specialist.

■ Results and Discussion

According to Part 1 of Art. 47 of the CPC of Ukraine, the defender, who is a lawyer in accordance with Part 1 of Art. 45 of this Code, is obliged to use the means of protection (in particular, to collect evidence using the special knowledge of experts whose opinions are a procedural source of evidence) provided for by this Code and other laws of Ukraine to ensure the observance of the rights, freedoms and legitimate interests of the suspect, accused and clarify the circumstances that refute the suspicion or accusation, mitigate or exclude the criminal liability of the suspect, accused.

According to Part 1 of Art. 20 of the Law of Ukraine "On the Bar and Practice of Law", while practising law, an advocate has the right to receive written opinions of specialists, and experts on issues requiring special knowledge (paragraph 10) [4].

Article 7-1 of the Law of Ukraine "On Forensic Examination" stipulates that the basis for conducting a forensic examination is the relevant court decision or decision of the pre-trial investigation body, or an agreement with an expert or expert institution – if the examination is carried out by order of other persons.

Thus, Ukrainian legislation provides for the general right of the defender (attorney) to initiate forensic examinations in the proceedings where they represent the interests (defends) of the client.

Researchers rightly emphasize three possible options for the engagement of an expert by the defence party in criminal proceedings: by sending a substantiated request for an expert examination to the investigator or prosecutor, in case of their refusal – an appeal to the investigating judge, and independent engagement of experts on contractual terms for examination, including mandatory [5].

This article analyses the mechanism of conducting a forensic examination at the initiative of the defender in criminal proceedings, in particular during the investigation of murders.

According to Part 1 of Art. 242 of the CPC of Ukraine, the examination is carried out by an expert institution, expert or experts involved by the parties to the criminal proceedings or the investigating judge at the request of the defence in cases and in the manner prescribed by Art. 244 of the CPC if special knowledge is required to clarify the circumstances relevant to the criminal proceedings.

Article 93 of the CPC of Ukraine allows the defence counsel to file a petition to the investigator

to initiate the appointment of a certain examination with the questions defined by the defence counsel in the relevant petition. In accordance with Part 3 of this Article, the defence party collects evidence, in particular by obtaining expert evidence, initiating investigative (search) actions, covert investigative (search) actions and other procedural actions, and by performing other actions that can ensure the submission of proper and admissible evidence to the court. So, among the ways of collecting evidence by the parties to criminal proceedings listed in Article 93 of the Criminal Procedure Code of Ukraine are those that require the use of special knowledge, namely: requesting and obtaining expert opinions and conducting other procedural actions with the participation of a specialist. Moreover, an expert's opinion is an independent source of evidence [6].

The investigator and prosecutor are obliged to consider the request of the defence counsel for the appointment of a forensic examination within no more than three days from the date of submission and satisfy them if there are appropriate grounds. The defender is informed about the results of the consideration of the motion. A reasoned resolution on full or partial dismissal of the request shall be issued, a copy of which shall be handed to the lawyer who filed the relevant motion (Article 220 of the CPC of Ukraine).

For example, during the investigation of a murder committed by a group of persons, the defence counsel of one of the suspects filed a petition to the investigator of the Shevchenkivskiy Police Department of the Main Department of the National Police in Kyiv to initiate an investigative action, namely the appointment of a molecular genetic examination. The petition stated that the pre-trial investigation body had at its disposal all the necessary initial data for this examination – materials of the criminal proceedings, physical evidence (jewellery), samples of the buccal epithelium (of the suspect O.), therefore, in accordance with Part 2 of Art. 93 of the CPC of Ukraine, they initiated the involvement of an expert (or expert institution) in the relevant examination. The investigator in his ruling refused the defence counsel to engage an appropriate expert (expert institution) to conduct a molecular genetic examination. Later, the defence lawyer initiated a corresponding petition to the investigating judge [7].

Based on the practice of criminal proceedings, it is concluded that in most cases, investigators refuse to appoint examinations to defenders, while such issues can be positively resolved by investigating judges at the pre-trial investigation stage or by the court during the trial of murder proceedings.

According to paragraph 1 of part 1 of Art. 244 of the Criminal Procedure Code of Ukraine, the defence

has the right to apply to the investigating judge with a request for an expert examination if it is necessary to engage an expert to resolve issues that are essential to criminal proceedings, however, the prosecution did not involve the expert, either for the prosecution to resolve the issues raised by the expert involved by the prosecution, or there are sufficient grounds to believe that the expert involved by the prosecution, due to lack of necessary knowledge, bias or for other reasons, will provide or provided an incomplete or incorrect conclusion.

The motion of the defender for the examination shall contain: 1) a brief summary of the circumstances of the criminal offence in connection with which the motion is filed; 2) legal qualification of the criminal offence with an indication of the article (part of the article) of the Law of Ukraine on criminal liability; 3) summary of the circumstances justifying the arguments of the motion; 4) the expert to be involved or the expert institution to be entrusted with the examination; 5) the type of expert research to be conducted and the list of questions to be put to the expert. The motion is also accompanied by: copies of materials substantiating the arguments of the motion; copies of documents confirming the impossibility of independent involvement of the expert by the defence.

The motion is considered no later than within five days from the date of its submission to the court by the investigating judge of the local court within the territorial jurisdiction of which the pre-trial investigation is carried out.

The person who submitted the application is notified of the place and time of its consideration, but his non-arrival does not prevent the consideration of the application, except in cases when the participation of such a person is recognised by the investigating judge as mandatory.

The investigating judge, based on the results of the consideration of the petition, has the right to entrust the examination to an expert institution, expert or experts if the person who filed the petition proves the existence of the grounds mentioned above.

The conclusion of the expert engaged by the investigating judge shall be provided to the person at whose request the expert was engaged (Article 244 of the CPC of Ukraine).

Article 243 of the CPC of Ukraine stipulates that the defence party has the right to independently engage experts on contractual terms to conduct an examination, including mandatory. This possibility is also provided for by clause 10 of part 1 of Article 20 of the Law of Ukraine "On the Bar and Practice of Law", according to which during the practice of law, the advocate has the right to perform any actions not prohibited by law, the rules of professional

ethics and the legal aid agreement necessary for the proper performance of the legal aid agreement, in particular, to obtain written opinions of specialists, experts on issues requiring special knowledge [4].

For example, relevant cases may occur when it is necessary to investigate murders with the dismemberment of the corpse when particles of soil, seeds or plants are found on the corpse or its parts. Then soil and biological expertise can be appointed. Such material evidence plays an important role in the investigation of crimes and the identification of the offender. When preparing materials for expert examination, they must be presented on carrier materials, in packaging that ensures safety during transportation. It should be noted that microparticles of soil and plant origin can be used to determine the crime scene. The list of objects that can be the subject of biological expertise is quite diverse. These include plant particles, animal feed, animal hair, bird feathers and down, mosquitoes, fish scales, and more. The most important for such studies is the ability to establish the age of burial of the corpse and the time of finding certain objects at the crime scene [8]. In the context of the engagement of an expert by the defence party on the basis of a contract, it should be noted that the concept of “contractual terms” is not defined by criminal procedural legislation and provides for the use of civil law provisions on contractual obligations. In particular, if the defender initiates a forensic examination by the units of the Expert Service of the Ministry of Internal Affairs of Ukraine, payment for the services provided by the enterprises of the Ministry of Internal Affairs is made by transferring funds by the requestor through banks, post offices or self-service software and hardware complexes or through an electronic payment instrument in non-cash form. Confirmation of payment for services is a payment document (payment order, receipt) with a stamp of the bank, post office or transaction code [9].

At the same time, the question of the conclusion of the contract and whether a written statement of an individual or legal entity, a payment document, etc. can be considered as “contractual terms” remains unaddressed. It is clear that the application of an individual or legal entity is an acceptance of a public offer defined in such a resolution as a list of paid services. At the same time, there are certain problems regarding compliance with the form of the contract. Thus, the concept of “contractual terms” should be interpreted as the conditions agreed by the parties that are essential (type of expertise, its complexity, cost), and the content of which is specified in certain documents exchanged by the parties during the provision of the service [10].

When engaging an expert on contractual terms, the defence party must pay for their work. This is provided for in Part 4 of Art. 15 of the Law of Ukraine “On Forensic Expertise”, according to which forensic examinations, examinations and research in criminal proceedings by state-specialised institutions, forensic medical and forensic psychiatric institutions at the request of the suspect, accused, convicted, acquitted, their defenders, legal representative, victim, his representative is carried out at the expense of the customer [11].

However, if the suspect or his defence counsel are unable to engage an expert on their own, in particular, due to financial insolvency, the investigating judge may assist them in this upon the relevant petition. At the same time, the defence party must prove (and submit the necessary evidence) that it cannot engage an expert on its own due to lack of funds or for other objective reasons and motivate the need for his engagement (Part 6 of Article 244 of the CPC of Ukraine).

The issue of warning the expert of criminal liability for the knowingly false conclusion and for refusal without valid reasons to perform their duties remains uncertain. If the prosecution party has all the rights to warn the expert about such criminal liability, the defence party does not have the appropriate powers.

Instead, upon the positive decision of the investigating judge on the defender's request to engage an expert to conduct an examination, the investigating judge issues a ruling in which he states that the experts are warned of criminal liability under Art. 384, 385 of the Criminal Code of Ukraine.

During the investigation of murders, a wide variety of examinations can be appointed. Among them, the most common are forensic medical, forensic psychiatric, genotyposcopic (molecular genetic), ballistic, and forensic chemical. According to the nature of the crime (hanging, poisoning, traffic accident, industrial injury that led to death), the expert is asked a set of questions, among which the main ones are the cause of death, whether it is violent, how and under what circumstances the murder was committed [8].

In criminal proceedings on murder, according to Part 2 of Art. 242 of the CPC of Ukraine, examination of the following is mandatory:

- establishing the cause of death (paragraph 1);
- determining the severity and nature of injuries (paragraph 2);
- assessment of the mental state of the suspect in the presence of information that raises doubts about his sanity, and limited sanity (paragraph 3) [4].

To resolve these issues, forensic medical and forensic psychiatric examinations are appointed. The need for the defence counsel to engage a forensic

medical expert to investigate the severity of the injuries was highlighted by O.P. Babkina and V.V. Zosimenko, in particular, to determine the presence/absence, mechanism and limitation of occurrence, the severity of injuries, proper/improper provision of medical care to persons in places of detention, it is necessary to appoint forensic medical examinations to provide legal assistance [12]. Positive in this aspect is the foreign experience of creating a standardised checklist of physical health in forensic institutions [13].

In the documents on the appointment of forensic examinations, typical questions are indicated: what is the cause of death; what is the time of death; whether there are injuries on the corpse; if so, what is their nature, location, number, mechanism of formation, time of onset and severity; whether there is alcohol or drugs in the blood of the person, etc.

At the same time, the methods used by forensic experts in determining the statute of limitations for death may not always meet the needs of investigative authorities due to the rather significant period of time between death and the result of the examination. Among the modern methods that are currently being developed by specialists, it is necessary to distinguish methods using laser polarimetry that provides fairly accurate results [14].

The analysis of investigative and judicial practice confirms the effectiveness of molecular genetic examinations in criminal proceedings on murders to determine certain time characteristics. The study of human biological traces should be undertaken in different aspects to obtain objective information not only about the source of their origin (a specific person) but also about the correspondence of the time of formation of biological traces to the time of the crime [15].

The object of molecular genetic research can be DNA obtained from blood, sperm, buccal and other epithelium, hair (if there is a hair follicle with a vaginal sheath), and fragments of organs and tissues of the human body [16; 17].

The subject of forensic psychiatric examination in the investigation of murders is the study of the psyche of the suspect to establish possible deviations from the norm.

The forensic psychiatric examination is appointed in cases where there are doubts about the mental competence of the suspects in the murder. Such examination mostly prevents attempts of suspects, referring to their own mental inferiority, to avoid possible punishment, as well as to delay the investigation and conceal important circumstances for the proceedings. In some cases, the behaviour of the suspect in the investigation process, and his behaviour during the commission of the crime, may raise doubts about the adequacy, especially when during the commission of the crime there were signs

of pathological affect or other manifestations, raising doubts about the mental integrity of the person [8].

For example, having considered in an open court session in Kramatorsk the petition of the defender, the judge of the Pokrovsky District Court of Dnipropetrovsk region, in accordance with Art. 332 of the CPC of Ukraine, appointed an inpatient forensic psychiatric examination to determine the mental state of the accused, and entrusted its conduct to the department of forensic psychiatric examinations of the municipal institution "Dnipropetrovsk Regional Clinical Psychiatric Hospital". The accused, who suffered from organic schizophrenic disorder and paranoid syndrome, was sent for inpatient examination for a period of one month. The following questions were asked for the examination: "What mental illnesses does PERSON_2 suffer from?", "Could PERSON_2, due to his mental illness, be aware of his actions and control them at the time of the criminal offence?" [18]. These questions are typical of forensic psychiatric examinations in homicide investigations.

The defence party has the right to apply to the investigating judge during the pre-trial investigation with a relevant motion, including a motion to engage an expert and appoint an examination in cases where such an examination is mandatory, but the investigator has not appointed an examination. The decision of the investigating judge to refuse the defender to engage an expert or partially satisfy his request may be challenged on appeal. According to V.S. Mardoyan, the defender must motivate his disagreement with the court decision, substantiate the arguments, provide evidence in support of the defence position, indicating them in the complaint, otherwise a positive result will not be achieved, and the work of the defender can be assessed as ineffective [19].

On September 3, 2020, the Supreme Court, by a panel of judges of the Second Judicial Chamber of the Criminal Court of Cassation in case No. 752/1498/14, upheld the cassation appeal of the defender, since the court did not provide the defence with the opportunity to defend its position during the appeal proceedings. The Supreme Court stated: according to the materials of the criminal proceedings, the defence counsel during the trial in the court of the first instance in accordance with the requirements of Articles 93, 242, 243 of the CPC of Ukraine provided an expert opinion, which was conducted at the request of the latter. At the same time, the local court did not consider this, as it concluded that the defence counsel, in violation of Art. 242 of the CPC, did not apply to the court with a relevant petition, and the examination itself was not carried out on behalf of the court. However, the panel of judges of the Supreme Court determined that such a conclusion of the local court did not

meet the requirements of the procedural law, since, given the provisions of Article 5 of the CPC, at the time of the defence's appeal to the expert, part 1 of Article 242 of the CPC provided the defence with the opportunity to apply for an expert examination in criminal proceedings, while in the new version, which was in force at the time of the trial, this article provided that the examination was carried out by an expert institution, expert or experts, on the instructions of the investigating judge or court, granted at the request of a party to the criminal proceedings (as amended by the Law of Ukraine No. 2147-VIII "On Amendments to the Commercial Procedure Code of Ukraine, the Civil Procedure Code of Ukraine, the Code of Administrative Procedure of Ukraine and other legislative acts" dated October 3, 2017). The Court of Appeal did not consider the above and did not provide the defence with the opportunity to argue its position during the appeal proceedings. Thus, the Supreme Court overturned the decision of the court of appeal and appointed a new hearing in the Court of Appeal [20].

In accordance with Part 7 of Art. 244 of the CPC of Ukraine, the decision of the investigating judge on the commissioning of an expert examination shall include questions posed to the expert by the person who filed the relevant request. The investigating judge has the right not to include in the decision the questions posed by the person who filed the relevant motion, if the answers to them are not related to the criminal proceedings or are not relevant to the trial, justifying such a decision in the resolution. When satisfying the request to engage an expert, the investigating judge, if necessary, has the right, at the request of the person who applied for the engagement of an expert, to decide on the receipt of samples for examination in accordance with Art. 245 of the CPC of Ukraine.

For example, the investigating judge of the Industrial District Court of Dnipro, having heard the participants of the trial, and after studying the materials of the defence counsel's motion to engage an expert, and the materials attached by the prosecutor in the court hearing, concluded that the defence counsel's motion should be partially satisfied. The relevant decision contained a limited range of questions compared to those that the defender set out in his petition for the engagement of an expert [21]. In practice, however, there are some issues with the appointment of forensic medical and forensic psychiatric examinations by the defence in criminal proceedings on murder.

Paragraph 2.1 of the Instruction on forensic medical examination foresees that forensic medical examination is carried out in accordance with the decision of the person conducting the examination,

investigator, prosecutor, judge, as well as by court order [22]. That is, the Instruction does not provide for the examination at the request of the defender or on contractual terms.

The Law of Ukraine "Fundamentals of the Legislation of Ukraine on Health Care" does not define such a possibility, Article 71 of which stipulates that forensic medical and forensic psychiatric examinations are appointed by the person conducting the inquiry, investigator, prosecutor or court in the manner prescribed by law to address issues that require special knowledge in forensic medicine or forensic psychiatry [23].

That is, these norms of by-laws contradict the content of Part 2 of Art. 243 of the CPC of Ukraine on the involvement of an expert on contractual terms, in particular for a mandatory examination, which may be a forensic medical or forensic psychiatric examination, and does not allow exercising the defence right through the use of special knowledge of experts – forensic doctors and psychiatrists.

At the same time, the right of each party to criminal proceedings to present to the court an expert opinion based on scientific, technical or other special knowledge is provided for in Part 2 of Article 101 of the CPC of Ukraine. And the adversarial nature of the parties and the freedom to present their evidence to the court and prove their convincing nature before the court are defined in Article 22 of the CPC of Ukraine.

The defence party does not have the right to conduct investigative (search) actions, but the defence attorney has the right to file a petition to the investigator to conduct appropriate investigative (search) actions, the purpose of which will be to obtain and provide the defence party with comparative samples. In case of refusal on the part of the prosecution, the defence counsel may file a substantiated motion in this regard to the investigating judge [24].

Unlike the main objects of expertise, samples for comparative research are not related to the event being investigated and are not material evidence. When receiving them, the investigator or prosecutor must ensure the participation of the person's defence lawyer.

In the criminal proceedings under Part 1 of Art. 115 of the Criminal Code of Ukraine, the panel of judges of the Judicial Chamber for Criminal Cases of the Dnipro Court of Appeal, considering the appeal of the defender, found that biological samples were taken from Person_2 for expert research, namely, in the office of the police department from 10.00 to 10.20, subungual and hand palms swabs were taken. Given that the suspect has a defender, he should have been involved in the collection of biological samples and had the right to be present during this procedural action [25].

It is known that the comparative material for the forensic examination can be voluntary, conditionally voluntary, and experimental samples. In particular, during the appointment of trace examinations in the process of investigating murders, if ropes tied with complex knots were found, experimental samples of knots made by the suspect should be submitted for expert examination, and the expert should decide what type of knots belong to and whether they are not typical for a particular profession. The specifics of binding nodes often indicate the presence of professional skills, it can become a source of putting forward versions about the identity of the criminal [8].

According to A.V. Sidelnikov, sometimes lawyers and investigators are unjustifiably simplistic and even irresponsible in collecting comparative samples for examination. Often they do not consult a specialist who could provide the necessary assistance [26].

In May 2019, in criminal proceedings, the investigating judge of the Kramatorsk City Court of Donetsk region granted the request of the defender to appoint a fingerprint examination, entrusting it to the experts at Hon. Prof. M.S. Bokarius Kharkiv Research Institute of Forensic Examinations. The ruling stated the obligation of the senior investigator of the SU of the Main Department of the National Police in the Donetsk region to take fingerprint samples of PERSON_1 with the support of an expert [27].

In the process of preparing for the appointment of an expert examination, it is advisable for the defender to involve specialists or consult them on the possibility of an expert examination and the limits of its research.

There are cases where obtaining comparative samples for the examination by the defence does not cause difficulties.

For example, to identify an unknown corpse from photographs, a portrait forensic examination can be conducted. It is prescribed in cases where it is impossible to establish the identity of the deceased in any other way. Such examination is carried out only if there is a photo of the victim (lifetime image of the person). When assigning this type of expert examination, certain requirements are imposed on the materials provided for research, which guarantee the correctness and reliability of the expert's conclusions. In particular, the following objects are needed

for the study: a photo, a skull, and an X-ray [8]. The defender can obtain these materials independently or by requesting them from medical institutions.

■ Conclusions

In criminal proceedings on murder, the possibility of the defender engaging an expert to conduct an examination concerns the appointment of mandatory and optional examinations. To perform such mandatory examinations, which are forensic medical and forensic psychiatric examinations, the defence counsel shall file a motion to initiate this investigative (search) operation with the investigator or prosecutor during the pre-trial investigation, and in case of their refusal – with the investigating judge, submitting the relevant motion and indicating in it the refusal of the investigator/prosecutor and the reasons for their refusal. The conclusion of the expert engaged by the investigating judge at the request of the defence provides evidence that does not require any additional legalisation.

The defence party may obtain an expert opinion on issues requiring special knowledge (without applying to the investigator, prosecutor, or investigating judge) and then submit it to the pre-trial investigation body or court to substantiate its legal position.

Currently, the defender cannot initiate forensic medical and forensic psychiatric examinations on a contractual basis before an expert or an expert institution due to legal conflicts between the provisions of the CPC of Ukraine and the norms of by-laws regulating the procedure for appointing the relevant types of forensic examinations. At the same time, this violates the equal opportunities of the parties to criminal proceedings to submit evidence to the court and prove their credibility before the court.

The defender, who initiates this investigative (search) action, must provide objects and relevant samples or receive (request) them independently to ensure the possibility of conducting examinations in criminal proceedings on murder. He files a motion to the investigator, prosecutor or investigating judge on the need to obtain specific samples. To obtain samples for examination, it is advisable to involve a specialist or consult with one. During the relevant procedural action, the participation of the defender who initiated the examination, if there are appropriate samples, is mandatory.

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Залучення експерта захисником для проведення експертизи під час розслідування вбивств

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■ **Анотація.** Мета публікації – дослідити можливості й механізми залучення експерта захисником у кримінальному провадженні про вбивство; висвітлити можливості захисника щодо залучення експерта під час проведення обов'язкових експертиз у процесі розслідування вбивств; сформулювати рекомендації захиснику щодо надання експерту, якого залучено до проведення експертизи на підставі його клопотання, об'єктів і зразків для експертного дослідження. У статті використано комплекс наукових методів, а саме: термінологічний, системно-структурний, формально-логічний, порівняльно-правовий. У кримінальному провадженні про вбивство сторона захисту може самостійно на підставі укладеного договору з експертом або експертною установою отримати висновок експерта й подати його органу досудового розслідування чи суду для обґрунтування своєї правової позиції. Водночас встановлено, що захисник не може ініціювати перед експертом або експертною установою проведення на договірних засадах судово-медичних і судово-психіатричних експертиз у зв'язку з правовими колізіями між нормами Кримінального процесуального кодексу України й положеннями підзаконних нормативно-правових актів, що регламентують порядок призначення цих видів судових експертиз. З метою отримання зразків для експертизи сформульовано рекомендацію захиснику залучати до цієї процесуальної дії спеціаліста або отримувати в нього консультації. У кримінальному провадженні про вбивство можливості захисника залучити експерта до проведення експертизи стосуються призначення обов'язкових і необов'язкових експертиз. Для проведення обов'язкових експертиз, якими є судово-медичні й судово-психіатричні, захисник звертається з клопотанням про їх ініціювання до слідчого або прокурора, а в разі відмови – до слідчого судді, надавши відповідне клопотання. Неможливість захисника ініціювати перед експертом або експертною установою проведення на договірних засадах судово-медичних і судово-психіатричних експертиз порушує рівні можливості сторін кримінального провадження подавати суду докази й доводити перед судом їх переконливість. Для забезпечення можливості проведення експертиз у кримінальному провадженні про вбивство захисник, який їх ініціює, подає слідчому, прокурору або слідчому судді клопотання про необхідність отримання конкретних об'єктів і зразків або отримує (витребує) їх самостійно. Під час проведення отримання зразків для експертизи участь захисника, який ініціював експертизу за наявності відповідних зразків, є обов'язковою

■ **Ключові слова:** захисник; експерт; залучення експерта; вбивство; судово-медична експертиза; судово-психіатрична експертиза