
Defender Activities on Presenting the Opinion of Expert in Criminal Cases

Alexander Yuryevich Epikhin¹, Oleg Alexandrovich Zaitsev², Larisa Gennadievna Tatyana³, Andrey Viktorovich Mishin⁴

¹Professor, Doctor of Law, Professor of the Department of Criminal Procedure and Forensic Science, Kazan Federal University, Email: doc@epihin.ru

²Professor, Doctor of Law, Chief Researcher of the Center for Criminal, Criminal Procedure Legislation and Judicial Practice, Head of the Department for Training Law Enforcement Lawyers, Criminal Procedure, Human Rights Activities of the Institute of Legislation and Comparative Law under the Government of the Russian Federation, Honored Scholar of the Russian Federation, Honorary Worker of Higher Professional Education of the Russian Federation, Vice President of the Union of Criminalists and Criminologists, Email: oleg010663@mail.ru

³Professor, Doctor of Law, Head of the Department of Criminal Procedure and Law Enforcement, Udmurt State University, Email: larisa-lisa@mail.ru

⁴Associate Professor, Ph.D. in Law, Professor at the Department of Criminal Procedure and Forensic Science, Kazan Federal University, Email: av-mishel@mail.ru

**Corresponding Author:*

Abstract

The article deals with the issues of attracting an expert by a defender in the process of criminal case proving. The modern criminal process, taking into account the state of crime, involves the use of special knowledge in the process of crime detection, and investigation and a criminal case consideration. Given the adversarial nature of legal proceedings, the need to ensure the right to a fair trial, a defense party must have similar opportunities in the process of proving that the prosecution has, and therefore the ability of the defender to turn to an expert for assistance in the field of special knowledge is one of the guarantees of the right to defense. However, the current criminal procedural legislation of Russia provides for the participation as a defense counsel not only of a lawyer, but also other persons who are allowed by a court order, in connection with which the issues arise about the possibility of a defense counsel - another person seeking help from an expert, but the legislation left the specified issue unsettled. The international community has developed the documents that contain generally recognized legal norms in the field of lawyer assistance regulation. The legal approaches developed by the international community are interconnected and complement each other, while they serve as a certain guideline for bringing national legislation in line with international requirements. The implementation of the right to effective judicial protection ensures the observance of the rights of participants in criminal proceedings. Based on the analysis of international legal acts and decisions of the European Court of Human Rights, they revealed the features of the right to protection implementation during the administration of justice, depending on national legislation. Ensuring the right to defense through the involvement of a lawyer or other person as a defense counsel at the request (a petition) of an accused is a guarantee of the lawyer rights, allows for high-quality and efficient evidence in a criminal case.

Keywords: expert, right to defense, defender, lawyer, expert opinion, special knowledge, petitions, evidence, interest, competition

1. INTRODUCTION

The right to effective judicial protection is inextricably linked with the provision of qualified legal assistance to a person. The Final Document of the Vienna Meeting of the CSCE Participating States (15 January 1989) identifies the following remedies: the right of a person to appeal to the executive, legislative, judicial or administrative bodies; the right to a fair and public hearing within a reasonable time before an independent and impartial tribunal, including the right to present legal arguments and to be represented by a lawyer of one's choice; the right to be notified of a decision made on any appeal promptly and formally, including the legal grounds on which the decision was based (Final Document of the Vienna Meeting of the CSCE Participating States of January 15, 1989).

In order to exercise this right, an accused must be able to use the services of a defense lawyer whom he trusts and whose competence he does not doubt. In this regard, the legislator, having ensured the right to defense with the participation of professional lawyers, allowed the accused (the suspect) to apply together with another person for help, inviting him to participate as a defense attorney. Such an approach, although somewhat complicating the issues of interaction between the parties of the process, ensures the implementation of the right to defense, given that the powers of a defense counsel can be exercised not only by lawyers, but also by other persons admitted as a defense counsel.

The modern development of science and technology has attracted various information technologies, technical means, etc., to criminal proceedings, the use of which requires the presence of special knowledge, in connection with which the issue arises concerning the possibility of attracting an expert by defense lawyers to collect evidence, and develop their own position.

Certain issues of foreign experience in expert attraction as defense lawyers are the subject of attention in the studies of Russian scholars (Mole et al., 2001).

The issues of qualified legal assistance provision and attraction of experts to defense lawyers were the subject of research by many foreign authors, such as Mole N., and Harby K (Mole et al., 2001).

The right of the defender, when carrying out his activities to protect the interests of the accused, to use the help of experts to collect evidence and substantiate his position in a criminal case is considered unconditional. At the same time, the implementation of this right, which is a guarantee of the accused (defendant) right protection, raises many questions, which indicates the relevance of the stated topic study (Mole et al., 2001).

2. METHODS

Comparative legal; observation; the use of formal logic laws; comparative analysis; formal legal.

3. RESULTS

1) they established the existence of conventional international norm application in criminal cases of Russian criminal proceedings; 2) a trend has been established for the further use of an expert assistance when exercising the right to defense in criminal cases; 3) they noted main promising problems associated with the use of an expert assistance by a defense counsel in criminal proceedings, which are subject to research.

4. DISCUSSION

The use of special knowledge in criminal proceedings is one of the most effective ways of proving one's position by the parties, which is conditioned by several factors. The persons with special knowledge involved in criminal proceedings are initially presumed to be uninterested in its outcome, which allows them to conduct research and draw relevant conclusions without any personal interest. The conduct of research is associated with the use of established methods, which, when applied, lead to a single result; the allowed changes in the methodology can be established during repeated examinations, which is a guarantee of the study correct conduct.

The use of special knowledge through the involvement of specialists and experts in the production of procedural and investigative actions, as well as in the production of research and examinations, has always been the prerogative of the preliminary investigation bodies and the court. A defense counsel could file a petition for the appointment and production of expert examinations, consultations, interrogation of specialists and experts, but this petition was left to the discretion of an investigator or an interrogating officer who is in charge of a criminal case. There were no guarantees that a defense attorney's petition would be satisfied, the decision on the petition was made at the discretion of an investigator or an interrogator, who proceeded from the presence of evidence in a criminal case, the impact of possible results on them that could be obtained by satisfying the defense attorney's petition. Practice has shown that most often the requests of a defense counsel to involve specialists, appoint and conduct additional and repeated examinations were refused, which negatively affected the process of criminal proceedings as a whole.

The adoption of the Code of Criminal Procedure of the Russian Federation in 2001, which establishes a new type of evidence "conclusion and testimony of a specialist", was a definite breakthrough in the ability of defense lawyers to take part in the process of proving through the involvement of a specialist, and in the use of special knowledge. To a certain extent, it equalized in matters concerning the possibility of turning to defense and the prosecution experts (Grishina, 2015).

Initially, the provisions of the Code of Criminal Procedure of the Russian Federation on the possibility of obtaining a specialist's opinion were considered from the standpoint of implementing the principle of adversarial parties, both during the pre-trial and trial stages of the process, allowing you to contact a specialist directly by defense lawyers to obtain an opinion based on the use of special knowledge and submit this opinion to the bodies of preliminary investigation or a court to substantiate their position (Kuznetsov & Dadonov, 2003).

This position seemed justified, since it met the requirements of the Article 86 of the Code of Criminal Procedure of the Russian Federation, in which, according to the Part 3, the defense counsel was granted the right to collect evidence by obtaining objects, documents and other information, as noted by many authors (Lebedev, 1998).

However, the vagueness of the concept "defender" content raised certain questions in the implementation of the rights granted to him. In accordance with the Part 4 of the Art. 47 of the Code of Criminal Procedure of the RSFSR, in addition to a lawyer, the representatives of a trade union or other public association were allowed to act as a defense counsel upon presentation of the relevant protocol and an identity document, and the Part 5 provided for the participation of close relatives, legal representatives of an accused, as well as other persons as a defense attorney by a court order or a judge's order (Lebedev, 1998). Thus, one of the specified documents served as the basis for recognizing another person as a defense counsel: the minutes of the meeting, the decision of a judge or the court rulings. When adopting the Code of Criminal Procedure of the Russian Federation, a legislator still provided for the possibility of participation of other persons as a defender. As a defender he considers not only a lawyer, but allows for the possibility of involving a close relative and another person in the specified capacity, for whose admission the accused applies (Article 49 of the Code of Criminal Procedure of the Russian Federation). The basis for the admission of these persons as a lawyer is the court ruling or decision.

The legislator has not defined clear requirements for persons allowed to participate in the case as a defense counsel. The qualified nature of legal assistance involves the following features; compliance of protection activities with the law requirements; proportionality of actions to provide protection to the case circumstances and the rule of law; timeliness of assistance (Krysin, 2019). Therefore, we believe that in order to provide effective legal assistance, the defense counsel must be a specialist in the field of law, which will allow him to ensure high-quality protection of the represented person interests. The involvement of other persons may be carried out within the framework of obtaining characterizing material, providing public protection, but not professional assistance.

Thus, another person, having a court decision or rulings on his admission as a defense counsel in a criminal case, may exercise all the rights granted by the criminal procedure law to the defense counsel.

Despite the fact that these persons are allowed along with a lawyer (with the exception of the magistrate's court, where they can participate instead of a lawyer), the legislator has not established a relationship between a defense lawyer and a lawyer who is another person, respectively, these persons can carry out defense within the framework established by law for defenders, regardless of the position of a professional defense lawyer. Thus, the issues related to the collection, presentation of evidence, defense tactics can be solved independently by each defender, taking into account a client's position, but without taking into account the position of each other.

The conclusion of a specialist, as one of the types of evidence, is information, respectively, a defender has the right to receive it in the form established by the criminal procedure law. However, the legislator has not established a procedural procedure for a specialist opinion obtaining. Considering the activities of a defense lawyer, it should be noted that he, by virtue of paragraph 4, part 3 of the Art. 6 of the Federal Law No. 63-FL (May 31, 2002), has the right to engage specialists on a contractual basis to clarify the issues related to the provision of legal assistance (<http://www.consultant.ru>). Thus, a lawyer involved as a defender can seek help from a specialist, conclude an agreement with him for a consultation or research, having received the result, submit it to an investigator or a court. Another person admitted as a defense lawyer cannot use the powers of a lawyer established in Federal Law No. 53 of the Code of Criminal Procedure of the Russian Federation, that is, it has the right to collect and present evidence necessary for the provision of legal assistance in the manner of Part 3, Art. 86 of Criminal Procedure Code and involve a specialist in accordance with the Art. 58 of Criminal Procedure Code of the Russian Federation.

The involvement of a specialist by a defense attorney is conditioned by the need to use special knowledge that a defense attorney does not have, and therefore, quite often, specialists are involved to evaluate an expert's opinion (Sorokotyagin, 2007). We cannot agree with the opinion of the authors, who believe that it is not within the competence of a specialist to evaluate an expert's opinion (Semenov & Grishin, 2017). Indeed, neither a specialist nor a defender are among the subjects who evaluate the evidence when making a procedural decision,

but, studying an expert's opinion, a specialist gives his detailed opinion on it, based on the study of which the issue of the possibility of recognizing an expert's opinion as admissible evidence or the need to appoint a re-examination, etc. will be resolved subsequently. Before giving his opinion on an expert opinion, a specialist studies it, evaluates both the research methodology and the results obtained, that is, based on the analysis, he draws certain conclusions, which are an assessment of a studied document. It seems illogical to deny the implementation of an expert's opinion assessment by a specialist only because he is not among the subjects of the evidence assessment by virtue of the Art. 88 of the Criminal Procedure Code of the Russian Federation, since the defenders invite specialists for these purposes most often, since they do not have sufficient knowledge in various fields of science and technology that would allow them to draw a reasonable conclusion based on an expert opinion.

In this regard, the authors' proposal on the need to oblige an investigator to satisfy the request for interrogation of specialists who appeared on the call of defense lawyers to testify seems reasonable, also on the basis of the studied examinations.¹³ We believe that an investigator must satisfy a request to attach the submitted opinion of a specialist, regardless of whether he appeared for interrogation, since it can be difficult for a defense lawyer to ensure the appearance, especially when court hearings are postponed. An examination of a specialist's opinion by an investigator should entail either his interrogation, or an expert's interrogation, or the appointment of a second examination. A refusal to satisfy the stated request for attaching an expert's opinion and his interrogation without motives is an indicator of an investigator's non-professional activity.

When the defenders participating in the case file petitions for the involvement of various specialists, an investigator must consider the petitions, taking into account the circumstances of the case, make an informed decision, regardless of a person who filed the petition - a defense lawyer or another person involved as a defender.

5. CONCLUSIONS

A) We believe that during the implementation process of supranational standards, it is necessary to regulate the possibility of participation as a defense counsel of another person admitted by the court to the proceedings in a criminal case at the interstate level, at the request of an accused / a suspect.

B) It is necessary to establish the requirements that should be imposed on other persons allowed to participate in a criminal case as a defense counsel in order to ensure the guarantee of effective legal assistance.

C) It is necessary to regulate the procedure for engaging a specialist by a criminal defense counsel to substantiate the position of the defense. It is necessary to oblige the bodies of preliminary investigation and the courts to accept and attach the conclusions of a specialist presented by defense lawyers to the criminal case materials.

6. SUMMARY

Taking into account the foregoing, the right to use the assistance of a specialist by a defense counsel in an adversarial process should belong to any person who is involved as a defense counsel, which, on the one hand, makes it possible to ensure the adversarial nature of the criminal process; on the other hand, to ensure the right to defense.

When providing effective legal assistance, a person involved in a case as a defense counsel has the right to apply to a specialist on the issues that require special knowledge, also for giving a specialist opinion. The relationship between a specialist and a defender is based on a service agreement concluded between them. A specialist is not entitled to refuse to conclude the said agreement due to the fact that a defense counsel is not a lawyer, but another person admitted by the court to participate in the case as a defense counsel.

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