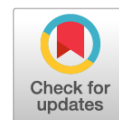


DOI: <https://doi.org/10.17816/RJLS629892>



# Procedural Conditions for the Admissibility of an Expert's Opinion as Evidence in a Criminal Case

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## ABSTRACT

The proposed work examines the issues of the admissibility of such type of evidence as an expert opinion, which are traditional for any country with a continental European legal system.

The appeal to this issue is not accidental due to the rather rapid development of science and technology in recent years, the course of global digitalization processes in the human environment.

Objectively, it is necessary to discuss the issue of adjusting the procedural conditions for admission of expert opinions as evidence in a criminal case, especially those that are carried out in actively developing areas of application of special knowledge.

**Keywords:** expert opinion; evidence; admissibility of evidence; procedural form.

## To cite this article

Timoshenko AA. Procedural conditions for the admissibility of an expert's opinion as evidence in a criminal case. *Russian journal of legal studies*. 2024;11(1):81–85. DOI: <https://doi.org/10.17816/RJLS629892>

Received: 11.01.2024

Accepted: 17.02.2024

Published: 30.03.2024

УДК 344.653

DOI: <https://doi.org/10.17816/RJLS629892>

# Процессуальные условия допустимости заключения эксперта в качестве доказательства по уголовному делу

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## АННОТАЦИЯ

В предложенной работе рассматриваются традиционные для любой страны с континентально-европейской правовой системой вопросы допустимости такого вида доказательств, как заключение эксперта.

Обращение к данной проблематике является не случайным ввиду достаточно бурного развития науки и техники за последнее время, протекания глобальных процессов цифровизации в окружающей человека действительности.

Объективно требуется обсудить вопрос о корректировке процессуальных условий допуска в качестве доказательств по уголовному делу заключений эксперта, особенно тех, что выполнены в активно развивающихся областях применения специального знания.

**Ключевые слова:** заключение эксперта; доказательство; допустимость доказательств; процессуальная форма.

## Как цитировать

Тимошенко А.А. Процессуальные условия допустимости заключения эксперта в качестве доказательства по уголовному делу // Российский журнал правовых исследований. 2024. Т. 11. № 1. С. 81–85. DOI: <https://doi.org/10.17816/RJLS629892>

Рукопись получена: 11.01.2024

Рукопись одобрена: 17.02.2024

Опубликована: 30.03.2024

The use of specialized knowledge in the course of establishing guilt or innocence in criminal cases is impermissible unless it is considered in the context of the general procedural framework. The following circumstances provide compelling evidence in support of this conclusion:

- An expert opinion is considered “ordinary” evidence, which, as is well known, should not have a predetermined influence according to Article 17 of the Criminal Procedure Code of the Russian Federation (hereinafter, the RF CPC).
- In light of the accelerated pace of scientific and technological advancement, it is becoming increasingly more difficult to identify an expert who is a recognized authority in their field and whose conclusions cannot be deemed erroneous a priori.
- At present, the notion of entrusting the fate of the accused to artificial intelligence has not gained significant traction within the legislative sphere in Russia. However, in certain countries, these concepts are being actively explored and tested in practice, with notable examples including the sentencing of repeat offenders in the United States<sup>1</sup>.

In any case, the decision regarding the results of the evaluation of this type of evidence is made by a judge, taking into account the materials submitted by the investigator and the prosecutor in accordance with the procedure established by criminal procedure law.

From a psychological perspective, it is more dependable to trust a specialist (in particular, one who holds an academic title and possesses specialized knowledge in the field of medicine) [2, pp. 26–27] than a witness who may not recall events accurately and often lacks awareness of the fundamental rules of social conduct.

Nevertheless, we will endeavor to examine the matter in an impartial manner, emphasizing the pivotal procedural conditions that ensure the appropriate conduct of participants authorized to make procedural decisions in the criminal justice process.

First, we should not overlook the ritualistic aspect of appointing an expert and reaching an appropriate conclusion.

Chapter 27 of the RF CPC details the formal requirements for the procedures for delegating and conducting forensic examinations and familiarization with their results.

In general, the pertinent procedures are distinguished by the following characteristics:

- The expert is appointed by an investigator or an official authorized to conduct a preliminary investigation (in the pre-trial stages), or in accordance with the procedure established by a court (in the judicial stages of the process).

- Prior to the appointment of the expert, the defense is afforded the opportunity to participate in the formulation of questions that the expert will be asked.
- The expert should be informed of an independent block of their rights and duties. They should be warned about criminal liability for torts that affect the reliability of their conclusions.
- The inquiry is carried out in accordance with methods that are not explicitly specified in the relevant legislation and have not been approved in accordance with the aforementioned legislation.
- It is recommended that the expert’s opinion be made available to the interested parties in the criminal proceedings, affording them the opportunity to request a repeat or additional inquiries or to challenge the expert’s conclusions in other ways, including by recognizing the need to exclude the opinion from admissible evidence.

It is evident that any violation of the aforementioned provisions should be duly noted in the production of such inquiries. However, the procedural law of the Russian Federation allows for the possibility of deviating from such a rigid rule. Only violations that are deemed inadmissible are recognized. Such violations clearly entail an unconditional infringement of the rights of parties in criminal proceedings on the part of the defense without the possibility of ensuring correction in subsequent stages of the proceedings (see, for example, Articles 226.8 and 389.15 of the RF CPC).

Second, it is necessary to consider the legal definition of “expert opinion” as set forth in the relevant legislation.

In accordance with Article 80, Section 1 of the RF CPC, the expert’s opinion is defined as the written content of the research on and conclusions about the issues presented to the expert.

For purposes of comparison, Article 95 of the CPC of the Republic of Belarus defines an expert’s opinion as a procedural document that certifies the fact and the course of the expert’s study of materials and objects of expertise submitted by the body that conducts the criminal proceedings. The document contains conclusions about the questions put to the expert based on the expert’s special knowledge in the field of science, technology, art, crafts, and other spheres of activity. Consequently, the legislation of our nearest neighbor more precisely defines the nature of such research. It is conducted taking into account the knowledge accumulated in a certain field.

Accordingly, considering the legal definition of this phenomenon, an expert’s opinion should be based on research conducted by a single expert (or commission of experts) on issues presented by an authorized individual. Without recognizing the expert’s work as research, it is problematic to recognize the resulting evidence as valid.

Nevertheless, the current legislation does not include a legal definition of the term “research” within the scope of procedural regulations.

<sup>1</sup> Machine Bias. There’s software used across the country to predict future criminals. And it’s biased against blacks / J. Angwin, J. Larson, S. Mattu et al. // ProPublica. URL: <https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing> (Accessed on 22.01.2024).

In the field of doctrinal literature, research is defined as a purposeful cognitive process of understanding reality. The results of this process are expressed in the form of a system of concepts, laws, and theories which serve as the foundation for developing new scientific knowledge. Research is a type of cognitive activity that is characterized by objectivity, reproducibility, evidence, and accuracy [3, p. 8].

As previously stated, in addition, it is necessary to employ a methodology for conducting the research.

Given the legal ambiguity surrounding this category in practice, there is an urgent need to distinguish expert research from pseudoscientific research that exists outside the framework of generally accepted approaches to the use of expert knowledge in criminal cases.

It is also worth noting the specific stipulations of Article 231 of the RF CPC, which requires that, in the event that an expert opinion is obtained from an external source, the investigator must ensure that the expert in question possesses the requisite competence.

Unfortunately, the law does not provide criteria for the requirements for the professional qualifications of an expert.

In summary, the preceding analysis leads to the following conclusions: the law of criminal procedure does indeed acknowledge the need to employ specialized knowledge in the process of proving criminal cases. It therefore provides a knowledgeable individual with the opportunity to respond to an investigator's questions on the basis of available methodological recommendations for the production of specialized research on the occurrence of various kinds of events in the pertinent reality.

Nevertheless, the legislation does not stipulate the standards that should be met by such studies. Furthermore, there is no indication that professional participants in criminal proceedings are obliged to evaluate expert conclusions in conjunction with the correctness of the application of the techniques used.

In practice, these circumstances result in a distorted understanding of the essence of the use of expert opinions in proving criminal cases. This, in turn, may give rise to the emergence of forensic errors.

The dangers of this kind may be distinguished here as follows:

- A methodology that lacks the requisite scientific substantiation is presented as an expert procedure. The conclusion regarding the existence of damage is reached by examining a list of accounting documents or photographs of the capital construction object without elucidating the essence of the contractor's omissions.
- The approaches that have been considered were previously employed but subsequently deemed to be ineffective.
- The expert's conclusions can be readily disproven in a court of law by cross-examination of a specialist in the same field.

These circumstances are undoubtedly important in correctly resolving a case and should be taken into account when reforming criminal procedural legislation. This could be achieved through the introduction into criminal procedure law of a special blanket provision that establishes the possibility to conduct state-controlled validation of expert methods and disqualification of untrained experts.

The practice of the Supreme Court of the Russian Federation is commensurate with the recognition of the established unscientific nature of certain methods. It is sufficient to cite the definition of the Judicial Board for Criminal Cases of the Supreme Court of the Russian Federation, dated September 26, 2023, No. 4-UD23-42-A1<sup>2</sup>, which states that scientifically grounded methods for determining the reliability of a person's testimony with the help of a polygraph are absent. Consequently, the results obtained through such methods cannot be used as evidence in a legal proceeding.

In accordance with Paragraph 15 of the Resolution of the Plenum of the Supreme Court of the Russian Federation No. 28, dated December 21, 2010, "On Forensic Expert Analysis in Criminal Cases"<sup>3</sup>, an expert's conclusion may be considered unreasonable if the expert's opinion is not sufficiently reasoned, if the necessary methods and techniques of expert research are not applied or are incorrectly applied, or if the expert's conclusions are unsupported by the evidence.

Arbitrary denial of a motion to verify the validity of the methodologies applied by the expert is not permissible<sup>4</sup>.

In light of ongoing developments in global science and technology, it becomes increasingly plausible to consider the formulation of interstate standards for the quality of expert activity, which is already being recognized in certain regions of the world.

It is, however, important to note that any reform of criminal procedure law which aims to increase the transparency and accessibility of the rules that govern the evaluation of evidence in general and the content of individual evidence in particular should be designed to enhance its efficacy.

<sup>2</sup> Consultant Plus Legal Reference System.

<sup>3</sup> Consultant Plus Legal Reference System.

<sup>4</sup> Definition of the Constitutional Court of the Russian Federation dated September 28, 2023 № 2655-О "On Refusal to Accept for Consideration the Complaint of Citizen Piskarev Maxim Vladimirovich on Violation of His Constitutional Rights by Parts One and Two of Article 61, Part Four of Article 65, Part Three of Article 195, Part Two of Article 207, and Chapter 47.1 of the Criminal Procedure Code of the Russian Federation". Consultant Plus Legal Reference System.

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