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From a Piece of Paper to Court Evidence: The Means Of Collection and Examination of Physical Documents in Ukrainian Criminal Justice

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Abstract The purpose of this article is to outline criminal procedural and forensic means of collection and examination of physical documents in Ukrainian criminal justice. The linguistic analysis, formal-legal, formal-logical, modeling, forecasting methods, as well as the praxeological approach in forensic science are used. The authors argue that a document, as a material object, must be obtained in a manner permitted by law and examined using the necessary forensic means in order to acquire evidentiary status and be suitable for use in criminal proceedings. It was established that the procedural status of a document depends on its internal and external features. If the content of the document carries evidentiary information, it is considered written evidence; if such information is carried by its external (material) features, it is physical (real) evidence. Procedural means of collecting documents are defined by Art. 93 of the Criminal Procedure Code of Ukraine and differ for the parties to the proceedings. Preliminary, judicial and expert examination of documents is distinguished. The main stages of the preliminary examination of documents and the necessary technical means are described. It is emphasized that Ukrainian judges avoid using their own special knowledge when examining documents. Some features of the appointment of forensic examinations of documents and evaluation of their conclusions are highlighted. The perspective of the study of methods of using documents as evidence has been established.

Index Terms evidence, criminal proceedings, documents, forgery of documents, forensic means

I. Introduction

In order to form various procedural sources of evidence, the subjects of proof must utilize specific means provided for by the criminal procedural law. The effectiveness of applying such means depends directly on the skillfulness of authorized individuals in utilizing technical, tactical, and methodological criminalistic (forensic) techniques, means, and methods for collecting, examining, and using evidence. These tools are selected and applied based on the specifics of the received forensically significant information and the characteristics of its original medium (source).

One of the oldest types of evidence are documents, which have been used, in fact, since the first prototypes of court proceedings appeared. As J. Ingram notes, documentary evidence and a written form of judicial proceedings were used in ancient Egypt around the 3rd millennium BC. At that time, judges considered only the written testimony of persons who were brought to justice, in order to avoid the influence of the oratory skill of the advocates and pity for the tears of the accused [1]. Today, documents are used as evidence in criminal proceedings for almost any criminal offense. They are of particular importance during the pre-trial investigation and trial of the production and use of counterfeit documents, illegal border crossing, fraud, human trafficking, illegal transplantation, economic and environmental crimes, etc.

However, before the document is used in criminal proceedings as evidence, it has to go a long way. The parties to the proof must collect (obtain) it in the manner prescribed by law and examine it using appropriate means of forensic techniques and tactics. Hence, the purpose of this article is to outline the criminal procedural and forensic means of collection and examination that must be applied to documents so that they acquire evidentiary value in Ukrainian criminal proceedings.

II. Methodology

Within the scope of the research, the authors applied a number of general and special methods of scientific research. The method of linguistic analysis allowed for the study of ev-

eryday, doctrinal, and legal definitions of a document. The requirements of the law regarding the procedure for collecting (obtaining) documents in Ukrainian criminal proceedings were analyzed using the formal-legal method. Based on a praxeological approach, the authors elucidated the significance of forensic techniques and tactics in ensuring the effectiveness of document examination. Using the formal-logical method, the features of applying criminalistic means within preliminary, judicial, and expert examination of documents were analyzed. Thanks to the application of modeling and forecasting methods, the authors have outlined further prospects for scientific developments in this field.

III. Results and Discussion

A. The Essence of Documents as Sources of Evidence in Criminal Proceedings under Ukrainian Legislation

The everyday, doctrinal (forensic), and legal (criminal procedural) understanding of a document differ. This difference is explained by the varying purposes of these definitions: in everyday usage, a document is understood in the broadest sense; the doctrinal (forensic) definition aims to reflect features essential for utilizing documents in investigative and judicial practices; the legal definition seeks to capture the legally significant features of documents.

At the everyday level, a document is understood as something written, inscribed, etc., which furnishes evidence or information upon any subject, as a manuscript, title-deed, tombstone, coin, picture [2]. In forensic science theory, a document is traditionally defined as a written act or specially made object that captures, through linguistic signs or specialized scientific and technical symbolic systems, specific expressions of will and information of a functional nature, the practical significance of which is determined by legal norms [3].

For a proper understanding of the evidentiary essence of documents in criminal proceedings, their modern legal definition is of key importance. In Part 1 of Article 99 of the Criminal Procedure Code of Ukraine (hereinafter referred to as CPC of Ukraine) a document, as a procedural source of evidence, is recognized as a material object, which was created specifically for conservation of information, and which contains the knowledge fixed by means of written signs, sound, image etc. that can be used as evidence of the fact or circumstance which is established during criminal proceedings [4]. Documents in this sense are also referred to as written documents – they have evidentiary significance solely due to their content [5].

According to Part 1 of Article 99 of the CPC of Ukraine, only material objects are recognized as documents [4]. However, in world practice, their electronic equivalents are traditionally also considered documentary evidence, including cell phone text messages, e-mail, computer-generated reports, etc [1]. Parts 3 and 4 of Article 99 of the CPC of Ukraine indicate that a document, as a source of evidence in criminal proceedings, can be electronic, which somewhat contradicts the content of Part 1 of this norm [4]. As a result, the issue of the status of electronic documents in the criminal procedural legislation of Ukraine remains unresolved. At the same time, in the scientific literature, this issue is resolved relatively unambiguously: Ukrainian scholars mostly propose recognizing electronic documents as a separate digital form of evidentiary information [6]–[8].

Given the above, we consider it appropriate to divide documents into two types based on criteria of the method of information representation and the nature of its connection with the data medium. The first type, physical documents (or documents on physical data medium), is characterized by the fact that the information they contain exists in a form suitable for human sensory perception and is inseparably linked to its physical data medium. Such documents cannot be fully reproduced in nature; only copies (photocopies, extracts, compilations, etc.) can be created, which cannot replace the original. The second type, electronic (digital) documents, is characterized by the fact that the information exists in a form intended for processing, transmission, and interpretation by computer devices (and cannot be perceived by human sensory organs); the information is contained in special memory devices, and can be transferred (copied) from the original data medium without alterations. In this article the authors omit the issue of electronic (digital) documents, whose nature and methods of examination significantly differ from physical documents and therefore require separate thorough research.

Physical documents in Ukrainian criminal proceedings can also have the status of physical (real) evidence. According to Part 2 of Article 98 of the CPC of Ukraine, documents can be physical evidence if they meet the criteria outlined in Part 1 of Article 98 of the CPC of Ukraine: they have to be material objects that have been used as an instrument of a criminal offence, retain traces of such or contain other information, which may be used as evidence of the fact or circumstance to be established during criminal proceedings, including the items that have been an object of criminally unlawful actions, money, valuables or other things obtained in a criminally unlawful manner or gained by the legal entity as a result of criminal offence [4]. This means that a document is considered physical evidence in cases where evidentiary information is not carried by its internal features (the content of the data encrypted in it), but by external, physical ones – the fact of its existence, the method of production, its role in the mechanism of committing a criminal offense, etc. [5]. At the same time, there may be situations in criminal proceedings where, based on its characteristics, a physical document simultaneously serves as both a written document and physical evidence.

Additionally, we differentiate physical documents as sources of information and documents as procedural sources of evidence. According to Ukrainian criminal procedural legislation, an object can only acquire the status of evidence after authorized persons perform the procedures prescribed by law regarding it (this will be further elaborated on later in the article). Following this logic, before its procedural processing a material object should be considered a source of evidentiary information (a document in its everyday sense). It is only after applying corresponding procedures, when it becomes a procedural source of evidence (a written document or physical

evidence in the legal sense). In the context of defining sources of evidentiary information, it is expedient to divide documents into two groups: those that were created outside the scope of criminal proceedings (primary documents) and those that were created within the scope of criminal proceedings (secondary ones).

In order for a written document to acquire the status of a procedural source of evidence – a primary document, it must be obtained and examined in accordance with the procedures defined by criminal procedural legislation. In this case, the corresponding source of information of such primary document is a material object specifically created for storing or transmitting information, provided that it meets the requirements of Article 99 of the CPC of Ukraine. The mentioned objects become procedural sources of evidence – written documents only after their examination and procedural fixation. Physical documents acquire the status of evidence through a similar process.

Due to the unprovoked aggression by the Russian Federation and the temporary occupation of certain regions of Ukraine, domestic law enforcement agencies also face the problem of determining the procedural status of documents created by the occupying authority. Ukrainian courts may or may not take into account such documents, in particular: the certificates of release from prisons, located in temporary occupied territories; acts confirming the facts of birth or death; documents certifying the state of health, etc. [9]. We believe that this issue requires further scientific research.

Secondary documents (paragraphs 2-4 of Part 2 of Article 99 of the CPC of Ukraine) are formed as a result of conducting the corresponding procedural actions. Such documents include protocols of procedural actions and their attachments, materials of operational and investigative activities and materials obtained as a result of international cooperation in criminal proceedings [4]. For protocols and other procedural documents, their sources are the authorized individuals who conducted the respective actions, as well as the primary evidence collected or examined during the conduct of such measures; for copies of documents, their sources are the originals. Secondary documents acquire the status of procedural sources of evidence by the fact of their creation by authorized persons in accordance with the procedure prescribed by law.

At the same time, we advocate for the transition to electronic formats for all secondary documents in future criminal proceedings. The gradual transition from the paper form of the exchange of procedural documents between the court and court proceedings participants to the electronic form significantly simplifies the access of citizens to justice, saves time and money for the participants, speeds up the consideration of cases, makes it possible to carry out all procedural actions through electronic communication means with appropriate identification and security mechanisms, etc. [10].

It is also worth noting that by its nature, an expert conclusion is a secondary document that certifies the process and results of forensic examination. At the same time, Ukrainian legislation grants expert opinions a specific procedural status and recognizes them as a separate procedural source of evidence.

B. Procedural Means of Collection and Examination of Documents

Documents can only become evidence after they are collected (received) and examined in accordance with the procedures prescribed by criminal procedural legislation.

The procedure for collecting evidence is most broadly regulated by Article 93 of the CPC of Ukraine, where procedural means of obtaining evidentiary information are divided for the prosecution on one hand, and for the defense, the victim, and the representative of a legal entity subject to criminal proceedings, on the other [4].

For the prosecution party (prosecutor, investigator and interrogator), Article 93 of the CPC of Ukraine provides the opportunity to conduct investigative (search) actions, request and obtain documents, information, expert opinions, audit conclusions, as well as perform other procedural actions prescribed by law [4]. Among the procedural actions aimed at identifying and seizing primary documents, we can mention their requisition, obtaining temporary access to documents based on the ruling of the investigating judge, inspection, search, and covert search. Additionally, documents can be obtained from a person who voluntarily provides them to the prosecution during the conduct of other procedural actions, including interrogation or investigative experiment.

As previously mentioned, Article 99 of the CPC of Ukraine links the procedural status of a document to its content. Authorized individuals can comprehend the content of a document (the information it carries) only through its sensory examination. The examination of evidence should be understood as the process of familiarizing the evidentiary subject with a particular source of evidence, obtaining, clarifying, and verifying the content of factual data contained in such a source [11]. Text documents, including electronic ones, can be read; images can be perceived visually; audio and video recordings can be reproduced and perceived by human senses (sight, hearing), and so on. For the prosecution party, the procedural form of examining documents during pre-trial investigation, similar to material evidence, is their inspection (although Article 100 of the CPC of Ukraine does not explicitly require the prosecution to inspect the documents obtained, the practice has indeed followed this path, which we consider to be correct).

The prosecution party is the subject of creating secondary (procedural) documents. By their nature, such documents are derivative evidence formed as a result of the procedural processing of primary sources of evidential information. The general requirements for the content of procedural documents are defined in Articles 104, 105, and 110 of the CPC of Ukraine, while specific requirements are regulated by the norms governing the conduct of individual procedural actions [4].

The prosecution utilizes documents along with other evidence to substantiate its decisions during pre-trial investigations, to formulate legal positions, and to present them to the

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court to support the prosecution's thesis in judicial proceedings. It is worth agreeing with S. O. Kovalchuk that the use of secondary documents during judicial proceedings is limited. For example, interrogation protocols drafted during pre-trial investigations are not subject to examination during court proceedings, (except for the protocols of interrogation conducted with the participation of an investigating judge under Article 225 of the CPC of Ukraine); as a general rule, courts should be presented with originals of written documents, not their copies, etc. [12].

For the defense, the victim, or the representative of a legal entity subject to the proceedings, procedural opportunities for obtaining documents are defined by Part 3 of Article 93 of the CPC of Ukraine: the requisition and obtaining of copies of documents, information, expert opinions, and audit reports. The defense can also apply to the investigating judge with a motion to obtain temporary access to documents held by other individuals [4].

It is quite obvious that the opportunities for the parties to the proceedings to obtain (collect) documents during the pre-trial investigation are not equal [13]. However, as Radina Stoykova points out, the principle of equality of arms, as understood in Article 6 of the European Convention on Human Rights, does not strictly require providing the defense and prosecution with identical opportunities [14], instead, mechanisms should be established to avoid procedural imbalance between the opposing parties [15]. In Ukrainian criminal procedural legislation, such mechanisms are provided by the opportunities for the defense and the victim to request the initiation of investigative (search) and other procedural actions by the prosecution, as well as to appeal to the investigating judge against prosecutions refusal to satisfy such requests. However, the overall effectiveness of the mechanisms mentioned remains doubtful.

After obtaining the documents in a manner prescribed by law, the defense, the victim, or the representative of a legal entity subject to the proceedings should conduct their own sensory examination of the documents. This involves familiarizing themselves with the content of these documents for their subsequent use. The law does not establish specific requirements for how such examination should take place. Obviously, it involves using the sensory organs of the mentioned individuals, primarily sight and hearing (as well as touch for individuals with visual impairments who read Braille text).

Furthermore, during the pre-trial investigation, the defense, the victim, and the representative of a legal entity subject to the proceedings may, examine the documents collected by the prosecution under the procedure established by Article 221 of the CPC of Ukraine. In such cases, the prosecution has the discretion to decide which documents to provide. Upon the conclusion of the pre-trial investigation in accordance with Article 290 of the CPC of Ukraine, the prosecution is also obliged to provide the defense with all documents that the prosecutor intends to use in court. In such cases, the law allows the defense to review the content of the documents, make extracts from them, or create photocopies [4]. Therefore, it is worth noting that the defense, as well as the victim and the representative of a legal entity subject to the proceedings may create certain types of secondary documents during the evidentiary process: those that completely reproduce the content of the original document (copies) and those that partially reproduce the content of the original document (extracts) [16].

In criminal proceedings, the mentioned parties utilize documents to substantiate and prepare their own operational, tactical, and strategic decisions, as well as to provide evidence to the prosecution during the pre-trial investigation. Additionally, the defense may submit documents to the court during the trial to substantiate its own legal positions.

At the court hearing, the examination of documents takes place after their submission by the parties with the mandatory participation of the judge. Examination of physical written documents is carried out in accordance with the procedures outlined in Article 358 of the CPC of Ukraine. Examination of physical evidence documents follows the rules set forth in Article 357 of the CPC of Ukraine [4]. The judge reads out the content of textual documents (including expert opinions), personally examines non-textual physical documents (such as images, diagrams), and material evidence documents. Afterward, the judge allows other participants in the judicial proceedings to familiarize themselves with them.

C. Forensic Means of Examination of Documents

However, relying solely on procedural law may not suffice for the competent examination of a document. Due to certain peculiarities of documents, it may be necessary to apply specific tools of forensic techniques and tactics for the effective processing of their content and physical features. According to the criteria of the subjects, the purpose and means of research, as well as the stage of the criminal proceedings, it is advisable to distinguish preliminary, judicial and expert examination of documents. We believe that all the mentioned types of examination require the appropriate application of forensic tools.

Preliminary examination of documents is carried out through their detailed inspection by the parties to the proceedings during pre-trial investigation. For the prosecution, this type of inspection can be both a separate procedural action and a component of other actions within which the document was acquired (search, crime scene inspection, temporary access to objects and documents, etc.). The defense, victim, or the representative of a legal entity subject to criminal proceedings conduct such a detailed inspection in a non-procedural manner. The purpose of preliminary examination is to learn the document's the semantic content and to discover its physical (external) characteristics.

During the initial stage of preliminary document examination, its content (the information it contains) is studied [17]. As mentioned earlier, this form of processing the document is carried out with the method of organoleptic analysis, that is by perceiving its content using the sensory organs. In cases where the subject of examination does not understand the language of the document, it is advisable to involve a translator for the detailed inspections. Similarly, if the content of the document

is related to specific scientific, technical, or cultural questions, it is recommended to involve a specialist in the relevant field. At this stage, the subject of the examination familiarizes themselves with the information contained in the main content of the document and makes a decision regarding its relevance as written evidence.

Additionally, while examining the document's content, it is possible to detect signs of its falsification (intellectual forgery). According to the forensic techniques theory, this type of forgery involves deliberate inclusion of false information in a document by the person authorized to prepare it [18]. In the case of falsification, a document is created using genuine forms, stamps, and signatures of the appropriate official. However, it contains false information. Signs of falsification of are typically detected through logical deduction, by comparing the information about the content of the document with other evidence.

In the second stage of the preliminary examination of a document, its physical appearance is analyzed [17], including the material, method of production, presence of security features, etc. Understanding the external (physical) characteristics of a document allows to assess its relevance as physical evidence. One of the main objectives of such examination is to identify signs of possible forgery of the document, which, considering the extent, can be classified to fabrication of entire document and to alteration of the document's certain parts [19]. Authorized persons can identify signs of probable forgery through both logical deduction and instrumental analysis. The latter means identifying specific physical characteristics of the document that may indicate forgery.

Documents with doubtful authenticity are commonly referred to as questionable. Although not directly mandated by law, the authenticity of documents is typically determined through expert examination in practice. The identification of signs of possible forgery and falsification during preliminary examination is the basis for further commissioning of the relevant expertise.

In some cases, physical characteristics of documents, whose authenticity is not disputed, are also subject to identification, such as the material of the data medium, the method and time of creation, the authorship of handwritten elements, etc. This information can help clarify other circumstances in the criminal proceedings that are indirectly related to the document being examined.

As M. V. Saltevskyi pointed out, preliminary visual examination of documents is external and incomplete, as some invisible and less visible physical characteristics cannot be detected by human sensory organs [17]. Therefore, a more thorough and effective examination of documents requires utilizing specialized scientific and technical tools. Most commonly, devices for digital and optical magnification, as well as light sources of both visible and invisible spectra, are used for this purpose. Furthermore, rapid advancements of science and technology have allowed the application of tools within the preliminary examination of documents that were previously only accessible to forensic experts. In particular, mobile devices for video spectral analysis of documents can be effectively utilized in field conditions.

As a general rule, professional lawyers representing both the prosecution and defense, receive specialized forensic training within their legal education, which should enable them to independently apply technical forensic tools for preliminary document examination with a certain degree of success. However, in practice, the application of such document examination tools requires more thorough specialized knowledge and skills. We agree with scholars who recommend involving specialists to conduct joint analysis of physical evidence, traces, and documents during pre-trial investigations [20]. Therefore, we recommend conducting a detailed examination of suspicious documents with the involvement of a forensic specialist.

In the final stage of preliminary document examination, it is advisable to formalize the procedural recording of the detailed inspection results. M. V. Saltevskyi noted that the content of the protocol of such procedural action differs somewhat from the contents of classical protocols It is advisable to record the course of the examination, the methods and techniques used, the technical tools employed, and the obtained results of the detailed document inspection [17].

Forensic techniques, methods, and tools can also be useful during the judicial examination of documents. In doing so, the court may rely on its own specialized knowledge, or, as per Article 360 of the CPC of Ukraine, seek oral consultations or written explanations from a forensic specialist [4]. However, it is worth noting that Ukrainian judges often refrain from directly applying specialized knowledge during document examination and instead prefer to review the conclusions of prior forensic examinations.

Expert examination of documents is carried out by initiating the conduct of the relevant forensic expertise and evaluating its conclusion, which contains new significant information about the examined document. Forensic expertise can be appointed both during pre-trial investigation and court proceedings.

The main means of expert examination of documents include a range of forensic expertises: graphological examination, linguistic examination of speech, technical examination of documents, phototechnical and portrait examinations (for photographic images on physical data medium). Additionally, in cases where specialized knowledge is necessary for proper examination of the document's content, written documents may be subject to other types of forensic expertises, such as economic, engineering-technical, psychological, psychiatric, etc.

If during the preliminary examination of the physical features of the document the investigator has doubts about its authenticity, a technical expertise of the documents is typically appointed. The task of such expertise is to determine the document's authenticity, as well as the method and circumstances of manufacturing its individual elements, etc.

To confirm signs of forgery, the expert may uncover the method of manufacturing the document's medium, identify the device used to print the text, and determine whether several

questioned documents were produced by the same person [21]; establish the facts and methods of alterations made to the document and restore its original content; determine which device was used to produce the handwritten text; ascertain whether the damaged parts of the document are components of one entity, etc. To discover signs of falsification, technical examination of individual details of the documents may be conducted.

Another important tool in the expert examination of documents is forensic handwriting expertise. The objects of its examination are handwritten texts and signatures. This expertise can help establish the author of the inscription or signature and the circumstances of the writing [22].

Following the document examination, the expert provides the client with their conclusion, which serves as derivative evidence and contains answers to questions regarding the significant features of the document. The conclusion directly affects the understanding of the document‘s content by the subject of proof. Specifically, if the document was considered to be questioned before the expert examination, after reviewing the expert’s conclusion, its status may shift to "genuine" or "forged". However, the parties to the proceedings and court may encounter difficulties in correctly assessing the expert’s conclusion, as they may lack deep specialized knowledge that could be necessary for this purpose. In particular, research conducted by Dutch scholars has shown that in most cases, it is difficult for authorized individuals in criminal proceedings to accurately assess reports from forensic specialists and conclusions from court-appointed experts [23]. During a court hearing, an expert may be summoned for questioning to clarify any doubts regarding their conclusion, but such a procedure is not available during pre-trial investigation. It’s also worth understanding that, in the context of professional pride, an expert is a biased party and is unlikely to admit their mistakes.

As a result, it is advisable to involve another impartial specialist in the field to help evaluating the expert’s conclusion. Such practice is actively used in the Netherlands, where forensic advisors with a university degree in forensic science are employed at the courts and provide explanation on forensic evidence to judges when asked for. Cited scholars argue that such an initiative should also be implemented into other organizations handling forensic evidence within the criminal justice system [22].

IV. Conclusion

Thus, according to Ukrainian legislation, any document must undergo a lengthy process to acquire evidentiary status and become admissible in criminal proceedings. For a document to qualify as evidence, it must be obtained in a manner permitted by law and examined using the necessary means of forensic techniques and tactics. The procedural status and methods of collecting and examining a document vary based on its components containing information relevant to the criminal proceedings. If the evidential information is contained within the content of the document, it is considered documentary evidence; if such information is conveyed by its external (physical) characteristics, it is considered physical evidence.

Criminal procedural means of collecting documents are defined in Article 93 of the CPC of Ukraine and differ for the parties to the proceedings. The prosecution has the advantage in conducting investigative (search) actions such as inspection, search, covert examination of premises, etc. At the same time, additional guarantees are provided for the defense through the opportunity to initiate procedural actions by the prosecution. Upon acquiring the document, the party to the proceedings conducts an organoleptic examination which involves familiarizing themselves with its content.

A thorough examination of a document requires the application of specific means of forensic technology and tactics. During the preliminary examination of the document, its content and external (material) characteristics are studied, particularly to uncover signs of possible falsification or forgery. In such cases, utilization of special scientific and technical tools such as magnifying devices, expert lighting sources, etc., and involvement of a forensic specialist is advisable. During the judicial examination of documents, the court may either rely on its own forensic knowledge or seek consultation from a specialist. Expert examination of documents involves initiating the conduct of the relevant forensic expertise and evaluating its conclusion, which contains new significant information about the examined document.

Conducting doctrinal research on the use of documents as evidence in Ukrainian criminal proceedings appears to be promising.

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