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LICENSING AND CERTIFICATION ACTIVITIES OF NON-STATE FORENSIC INSTITUTIONS: THEORY, LEGISLATION, LAW ENFORCEMENT PRACTICE (CRIMINAL PROCEDURAL ASPECT)

This article comprehensively and adequately considered some theoretical and practical aspects concerning the types of expert activities, the implementation of which non-state forensic-expert institution should have an appropriate license issued by them in the manner prescribed by law. Reflected the current system of voluntary certification for the test subject non-state forensic activities. The analysis of judicial practice on sample questions provided law enforcement mistakes of actors eligible to appoint a forensic examination in the criminal case, invited some of the trends of the current legislation.

As shown in the examples, despite explicit legal requirements on licensing of certain types of expertise-there are still violations of non-state forensic agencies. Regarding the certification of the institutions, we note that the absence in the law on forensic examination requirements for mandatory certification activities of non-state forensic institutions allow these organizations to make a decision about the need of certification of their activities. This approach of the legislator to the activities of non-state forensic institutions in light of the discussion in this section is not correct, in view of what we have proposed recommendations to improve normative-legal regulation in the field of forensics.

Key words: licensing, certification, non-state forensic institution, forensic, litigation, and enforcement errors, improving legislation.

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In accordance with the provisions of Art. 12 of the Federal Law of 04.05.2011 Nr. 99-FZ "On Licensing of Certain Types of Activities" (hereinafter - the Federal Law "On licensing certain types of activities") forensic expert activities does not apply to the list of activities for which a license is required. It follows that non-state forensic institutions now can perform forensic examinations in criminal cases without a license.

At the same time, we should pay attention to the provisions of para. 46 part. 1 Art. 12 of the Law, according to which medical activity should be licensed. Regulations on licensing of medical activities is approved by the RF Government Decree of 16.04.2012 number 291. The provisions of medical activities constitute the works (services) on the list according to the application, including in medical expertise.

In accordance with the Annex to the Regulation on licensing of medical activities, approved by the RF Government Decree of 16.04.2012 number 291 the list of works (services) that make up the medical activities include a forensic medical examination of different species, as well as the forensic psychiatric examination.

Thus, it follows from the foregoing rules, if the non-state forensic expert institution intends to engage in the production of forensic examinations, the receipt of an appropriate license for said institutions is a must. This draws attention of the Academy of General Prosecutor's Office of the Russian Federation in the relevant guidance on implementation of prosecutors supervisory powers over the implementation of legislation on expert activity [1, p. 54].

Questions of necessity to obtain the appropriate license to carry out activities in the field of forensic examinations were attached by wide publicity of cases in the Supreme Court of the Russian Federation.

For example, in one case the applicant with a medical degree and significant experience in the field of activity of Forensic Medicine, pointed out that the disputed points of the Nomenclature of works and services provide appropriate health care services include the licensing of forensic activity that is contrary to Art. 195 Code of Criminal Procedure and Art. 41 of the Federal Law "On State forensic activities in the Russian Federation." In the absence of the applicant's license during the forensic examination appointed by resolution of the investigator, the prosecutor ordered to bring him to administrative liability under Part. 2 tbsp. 14.1 of the Code of Administrative Offences (entrepreneurial activities without a special permit (license) if such permission (license) is required (optional).

Considering the case, the Supreme Court of Russia noted that the list of activities for the implementation of which a license is required, is given in Art. 17 of the Federal Law "On licensing certain types of activities" (the Act repealed 02.11.2011). There are no forensic expert activities in this list. Consequently, according to the court, carrying out forensic examinations, as part of the forensic activity, it is not subject to licensing. In view of the above, the Russian Supreme Court satisfied the applicant's claim.

However, the Cassation Board of the Supreme Court has reversed the judgment, having confirmed the fact of necessity of receipt of the compulsory license for the production of forensic examinations.

The Cassation Board said that, indeed, forensic expert activities in accordance with the Federal Law "On licensing certain types of activities" are not subject to licensing. However, carrying out forensic examinations as "an integral part of forensic activities" is also one of the activities for the medical examination. The same activities (conducting medical examinations) in accordance with the Regulation on licensing of medical activities is one of the types of medical activities subject to licensing. Consequently, activities for the forensic examination are impossible without obtaining a license for medical activities.

It is interesting that, despite the above decision of the Cassation Chamber of the Supreme Court of the Russian Federation (on the recognition of forensics activities subject to licensing), the forensic expert activity is still provided by organizations without proper license. They mention the decision of the Supreme Court of the Russian Federation dated 23 June 2004 as support (which has long been abolished) [2, p. 47] .

E.V. Elagina notes that "the reference to it in the absence of justification for the need to obtain a license for carrying out forensic examinations is a kind of speculation" [2, p. 47]. In fairness it should be noted that the above-mentioned decision and the determination of the Supreme Court found an active discussion in the literature [3, p. 18-23]. Let us note that after the issuance of the relevant license non-state forensic institution should to be monitored (also by the prosecutor's

office), so that it is fully complied with all licensing requirements established by the Regulation on licensing of medical activities.

The prosecutor's Office of the Kursk region audited the non-state expert organization "M". The Ltd. carried out forensic examination of physical evidence and studies of biological objects (genetic, forensic and biological). During the period 2012 - 2014 Ltd. "M" carried out more than 370 examinations. However, Ltd. "M" has not represented registration certificates of medical equipment, which constitutes a violation of sub-clause. "B" n. 4 of the Regulation on licensing of medical activities [4, p. 55]. It is obvious that forensic medical examinations of this Ltd. entail reasonable doubt on the reliability of the results of such researches.

In accordance with the RF Government Decree of 16.04.2012 number 291 forensic psychiatric examination is in the list of works (services) constituting the medical activity (and thus requiring a license). Despite the fact that the forensic psychiatric examination is included in the concept of "medical activity" and requires an appropriate license, non-state forensic institutions are not allowed to produce this variety of forensics. Licenses for production of forensic evidence of these institutions should not be issued.

Thus, by virtue of Art. 62 of the Federal Law "On the basics of public health protection in the Russian Federation" forensic psychiatric examination is carried out in accordance with the legislation of the Russian Federation on the state forensic activities. In accordance with Part. 5 Art. 11 of the Federal Law "On State forensic activities in the Russian Federation," the organization and production of forensic medical organizations or divisions are not within the jurisdiction of the federal executive authority in the health sector, carried out on the basis of normative legal acts of the relevant federal executive bodies, taken together with the federal executive authority in the health sector. In these organizations, and divisions can not be organized and carried out forensic psychiatric examination. Thus, a forensic psychiatric examination can be carried out only in medical institutions and their subdivisions, which are in the area of responsibility of the federal executive authorities in the health sector. It is logical that non-state forensic institutions do not possess the status of such bodies. But despite the express legal prohibition, in practice there are cases of appointment of the preliminary investigation bodies of forensic psychiatric examinations non-state forensic expert institutions, including commercial organizations [5-9], it is extremely inadmissible.

In one of the definitions of Appeal of the Moscow City Court it is noted that the investigator in the decision on the appointment of outpatient psychiatric examination, having admitted the existence of doubt as to mental competence of the accused N., had appointed examination by the non-state organization. According to the forensic psychiatric expert in relation to the accused N., examination was carried out in the company with limited liability. By the verdict of the court of the first instance N. has been recognized to be able to realize the actual character and social danger of his actions and control them, found guilty of the crimes imputed to him.

The higher court pointed out that the presence of outpatient forensic psychiatric examination conducted Ltd. in the materials of the criminal case against N. is contrary to the requirements of Art. 11 of the Federal Law "On State forensic activities in the Russian Federation." In view of the above, the judgment of the trial court was abolished, and the criminal case was sent to the prosecutor for the removal of obstacles of the judicial consideration.

The analysis of judicial practice in criminal cases has shown that the facts of misinterpretation of the law of non-production of forensic psychiatric examinations in non-forensic establishments also happen in prosecutor's practice. Thus, the decision of the district court was returned to the prosecutor to eliminate obstacles of consideration by the court. The appeal of the State prosecutor

asked the court to cancel criminal proceedings against P. and to send it to court for consideration on the merits in a different format. In support of the submission, the public prosecutor pointed out that the above argument of the court of first instance for a forensic psychiatric examination of non-state expert institution is not the basis for the return of the criminal case to the prosecutor, as Art. 195 of the Code of Criminal Procedure states that the forensic examination is carried out by state forensic experts or other experts, from among persons having special knowledge. It seems the public prosecutor's position is inconsistent with the earlier analyzed legislation norms, since then, of course, the appellate court found that the appellate representation is not to be satisfied.

Para. 18 part 1 Art. 12 of the Federal Law "On licensing certain types of activities" provides such a type of activity subject to licensing as traffic in narcotic drugs, psychotropic substances and their precursors, as well as the cultivation of narcotic plants.

The RF Government Decree of 22.12.2011 number 1085 provides a list of works and services that make up the work on trafficking in narcotic drugs, psychotropic substances and their precursors, the cultivation of narcotic plants. Paras 12, 24, 40, 56, 64 provide such activities requiring a license, such as the use of narcotic drugs and psychotropic substances included in the list of I, II, III of the List and their precursors included in list I of the Schedule, as well as the cultivation of narcotic plants included in the list of plants containing narcotic drugs or psychotropic substances or their precursors in the expert activities.

The current activities of non-state forensic institutions of the Russian Federation is not fully ruled, and, in fact, is not controlled (eg, there are no statutory mechanisms of control of the premises (the expert laboratories), which produces the appropriate legal expertise, as well as an expert equipment and other material resources used in the production of expert studies). There are no mechanisms to verify the teaching materials, the effectiveness of methods and tools for forensic examination carried out in private forensic institutions. The legislation does not set requirements to the number of forensic experts with special knowledge in science, technology, arts or crafts that need to operate in an expert institution on a permanent (temporary) basis, to an institution in which these experts carry out their activities, could have namely the status of non-state forensic organizations. The legislation should clearly establish the requirements to be met by non-state forensic expert institution by introducing a legal institution to obtain a license entities (nonprofit organizations) for the implementation of the non-state forensic activities.

Obtain the appropriate license for the implementation of the expert activity itself should not exempt non-state forensic institutions from obtaining other licenses authorizing the production of certain types of licensed forensic examinations (such as forensic examinations). Note that an attempt to introduce some requirements (but not licensed) to the non-state forensic expert institutions has been made in the draft law "On forensic activities in the Russian Federation" (adopted on first reading in November 2013). Thus, in para. 2 part 2 Art. 13 it was established that non-state forensic organizations must have at least one employee, whose qualification should be confirmed by a certificate of competence, and for whom this is the main place of work. In addition, the draft law "On forensic activities in the Russian Federation" provided the need for non-state forensic agency to have a license. The idea of introducing licenses for legal entities (non-profit organizations), non-state forensic activities should be supported. Mandatory certification of activities of non-state forensic institutions, should be also provided [11, p. 15].

It is interesting that at the present time the certification of expert activities of non-state forensic institutions is carried out on a voluntary basis [12-21]. One of these bodies of the voluntary certification of activities of non-state forensic institutions in the Russian Federation is a non-profit partnership "Union of persons carrying out activities in the field of forensics and forensic expert

studies" Chamber of forensic experts named after Yu. Korukhov" ("forensic experts Chamber "(NP" Sudeks ") (hereinafter - NP" Chamber of forensic experts ").

In accordance with the rules of functioning of system of voluntary certification of competence of non-governmental forensic laboratories approved on April 5, 2010 the confirmation of the competence of forensic laboratories in the system of voluntary certification of competence of non-governmental forensic laboratories is conducted in compliance with the criteria of competence, their requirements (legal norms) to the production of forensic examinations, established by legislation of the Russian Federation. The non-state forensic laboratory should have a staff of at least three certified experts with special knowledge in science, technology, arts or crafts, as well as the need to conduct forensic examinations on the stated forensic specialties premises, certified test equipment and resources.

We note that the lack of legislation on the judicial examination of the requirements for mandatory certification of non-state forensic institutions now allows these organizations to decide on the need for certification of their activities. This approach of the legislator to the activities of non-state forensic institutions in the light of the above seems to be wrong, so the legal regulation needs to be improved.

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