

8.4 FORENSIC EXAMINATION AND AUTOPSY

8.4.1 FORENSIC EXAMINATION

Forensic examination plays an important role in cases of human rights protection in the health sector. Without forensic examination, legal mechanisms of protection of human rights in the health sector are often ineffective, while criminal medical cases are generally not viable without establishing the nature and extent of damage to health, which constitutes the responsibility of forensic experts.

General regulation of forensic work is carried out by the Law of Ukraine “On Forensic Examination” of February 25, 1994. The most common types of forensic examination carried out to protect human rights in the health sector are medical forensic examination and psychiatric forensic examination. Psychological forensic examination is used less frequently but plays an important role in establishing the extent of moral damage. According to Article 7 of the Law of Ukraine “On Forensic Examination,” forensic activities that are part of a criminal, medical, or psychiatric forensic examination are carried out exclusively by specialized governmental agencies, while forensic work in general may be carried out by forensic experts who are not employees of these institutions.

Under the provisions of Article 10 of the Law of Ukraine “On Forensic Examination,” individuals who possess the knowledge necessary to reach a conclusion regarding the issues under inquiry may act as forensic experts; however, forensic experts from specialized governmental agencies are also required to have relevant higher education, be qualified as specialists, have relevant professional training, and be qualified as forensic experts with specific specialization. All certified forensic experts are entered into the State Register of Certified Forensic Experts which is maintained, in accordance with Article 9 of the Law of Ukraine “On Forensic Examination,” by the Ministry of Justice of Ukraine.

Remember!

In accordance with paragraph 1.5 of the Instructions on Forensic Examinations approved by the Order of the Ministry of Justice of Ukraine of January 17, 1995 No. 6, professors and lecturers of Departments of Forensic Medicine, health care professionals, and professionals from other agencies can participate in a forensic examination as forensic experts without further approval by the individual that authorized the forensic examination.

According to Article 71 of the Law of Ukraine “Principles of Ukrainian Health Care Legislation”, medical and psychiatric forensic examinations are authorized by an individual who conducts the inquiry, an investigator, a prosecutor, or a court following the procedure set in Articles 143-150 of the Civil Procedure Code of

Ukraine, Articles 75-77 of the Criminal Procedure Code of Ukraine, and Articles 81-85 of the Administrative Procedure Code of Ukraine. The grounds and the procedure for authorizing a forensic examination under the Civil Procedure Code of Ukraine, the Criminal Procedure Code of Ukraine, and the Administrative Procedure Code of Ukraine are practically the same.

Remember!

A procedural document (a resolution or a ruling) that authorizes a forensic examination and is prepared by an authorized individual (or an agency) constitutes grounds for conducting a forensic examination.

Remember!

In criminal cases, initiation of criminal proceedings constitutes a mandatory precondition for authorizing a forensic examination (paragraphs 5 and 6 of the Resolution of the Plenary Assembly of the Supreme Court of Ukraine "On Forensic Examination in Criminal and Civil Cases" of May 30, 1997 No. 8).

Remember!

It is unacceptable to authorize a forensic examination when specialized knowledge is not required to clarify the circumstances in question or to address to a forensic expert legal questions that are the sole competence of the court (in particular, questions regarding an individual's guilt, liability, or ability to stand trial) (paragraph 2 of the Resolution of the Plenary Assembly of the Supreme Court of Ukraine "On Forensic Examination in Criminal and Civil Cases" of May 30, 1997 No. 8).

Article 76 of the Criminal Procedure Code of Ukraine makes provisions for cases that require obligatory authorization of forensic examination: to establish the cause of death, to establish the nature and severity of bodily injuries. According to Article 145 of the Civil Procedure Code of Ukraine, a forensic examination is mandatory when requested by both parties. A forensic examination is also mandatory when requested by at least one side if the case requires establishing the nature and extent of damage to health or mental state of an individual.

Current legislation of Ukraine defines the following types of forensic examination:

1. A commission forensic examination is carried out by at least two experts with the same specialization.
2. A comprehensive forensic examination is carried out by at least two experts with different specializations or sub-specializations.

3. A supplementary forensic examination is authorized when the conclusion of an expert has been found incomplete or unclear and is carried out either by the same expert or by (an)other expert(s).

Remember!

According to Article 75 of the Criminal Procedure Code of Ukraine or Article 150 of the Civil Procedure Code of Ukraine, a supplementary forensic examination is authorized when the findings of the primary forensic examination (that is a forensic examination during which the object is examined for the first time) have been reviewed and it has been established that an ambiguity or incompleteness of the conclusion cannot be removed by questioning the expert. The conclusion is considered incomplete when the expert did not examine all the items or did not give comprehensive answers to the questions asked. The conclusion is considered unclear when it is not precisely stated or is generic, non-specific (paragraph 10 of the Resolution of the Plenary Assembly of the Supreme Court of Ukraine “On Forensic Examination in Criminal and Civil Cases” of May 30, 1997 No. 8).

4. Re-examination is authorized when the conclusion of the expert is recognized as unsubstantiated or that it contradicts other case materials or raises doubts as to its accuracy and is entrusted to be carried out to (an)other expert(s).

Remember!

Participation of several experts is mandatory for conducting forensic examinations in criminal cases against medical practitioners on professional offences (paragraph 2.4 of the Instructions on Conducting Forensic Examinations approved by the Order of the Ministry of Justice of Ukraine of January 17, 1995 No. 6).

A forensic examination results in a written conclusion of the forensic expert or forensic expert commission which is attached to case materials. If necessary, forensic experts who conducted the examination may be required to appear in court to provide explanations of specific issues.

Forensic examinations in most cases are carried out by a network of governmental forensic agencies (part 2 of Article 7 of the Law of Ukraine “On Forensic Examination”). Non-governmental forensic agencies are essentially deprived of the right to conduct independent forensic examinations by Article 7 of the Law of Ukraine “On Forensic Examination.”

The issue of payment for forensic examinations is also of great practical importance.

Remember!

When addressing the issue of payment for forensic examinations one should be aware that, according to Article 15 of the Law of Ukraine “On Forensic Examination” and the Resolution of the Cabinet of Ministers of Ukraine “On Approval of the Instructions on the Procedure for and the Amount of Reimbursement and Compensation to Individuals Invited by Inquiry Agencies, Pretrial Investigation Agencies, Procuracy, Courts or Authorities that Oversee Cases of Administrative Violations, and Payments to Governmental Research Institutions on Forensic Examination for Expert and Specialized Services Provided by Their Employees” of July 1, 1996 No. 710, forensic examinations in criminal cases are conducted by specialized research institutions of the Ministry of Justice of Ukraine and Ministry of Health of Ukraine on the basis of contracts between these institutions and inquiry agencies, pretrial investigation agencies, or courts are paid from the funds allocated for this purpose in the state and local budgets. The final payment is made after a requested forensic examination is completed.

Payment for forensic examinations in civil cases is made by the party that filed the motion. According to Article 79 of the Civil Procedure Code of Ukraine, costs associated with testimonies of witnesses, services of experts and translators and forensic examinations belong to the expenses associated with the proceedings and constitute legal expenses. The party in whose favor the court awards the decision is compensated for the documented legal expenses by the other party on the basis of the decision of the court; that is, the party that filed the motion to authorize a forensic examination in the case, provided that the court decides in its favor, is entitled to a reimbursement for expenses incurred in connection with the examination. If the examination was authorized upon the motion of both sides or on the court’s initiative, the costs are shared equally by both sides. In case the party (parties) refuse(s) to cover the costs of a forensic examination, the court tries the case on the basis of already-available evidence.

Article 13 of the Law of Ukraine “On Forensic Examination” treats studies of the issues of interest to individuals and legal entities performed by forensic experts on the basis of a contract as the right of forensic experts (paragraph 6). Instructions on Appointing and Performing Forensic Examinations and Scientific and Methodological Guidelines on Preparing and Authorizing Forensic Examinations and Studies by Forensic Experts approved by the Order of the Ministry of Justice of Ukraine of November 3, 1998 No. 705/3145 define the procedure for studies performed by forensic experts. Paragraph 1.3 of this Order states that under current legislation one may utilize studies that require specialized knowledge and use methods of criminology and forensic science performed by forensic experts upon the request of the law enforcement agencies (including in order to resolve the issues related to the initiation of administrative or criminal proceedings), officials of the State Tax Administration of Ukraine, State Customs Service of Ukraine, State Executive Service or upon the request of lawyers, the defense, and individuals who defend their own interests and their representatives, notaries, banks, insurance companies, and other legal entities and individuals. The results of the studies

performed by forensic experts are provided in the format of a written conclusion of forensic experts in accordance with the legislation of Ukraine.

Remember!

The studies by forensic experts are performed on the basis of a written statement (letter) of the individual or legal entity that requests the study with an obligatory indication of the aspects of the study, a list of issues to be resolved, as well as the items provided. Studies by forensic experts, their progress and results are presented in the conclusions of the experts that list their specialization.

The conclusion of a study performed by a specialist is similar in structure and content to the conclusion of a study performed by a forensic expert except that: a) an individual who performed the study is listed as a specialist and not an expert; b) the introductory part of the conclusion states who requested the institution or the specialist to perform the study and when the request was made; and c) a statement that acknowledges the liability of the individual who performed the study for knowingly providing false conclusions is omitted.

8.4.2 AUTOPSY

An autopsy is an important type of medical forensic examination. An autopsy protocol often constitutes a medical record that can challenge the accuracy, timeliness, adequacy and completeness of medical assistance provided and can supply grounds for initiating criminal proceedings etc. Thus, according to Article 72 of the Law of Ukraine “Principles of Ukrainian Health Care Legislation,” an autopsy is performed in order to determine the causes and manner of death of the patient.

Remember!

A mandatory autopsy is performed when the death is suspected not to be due to natural causes (it therefore constitutes part of a forensic investigation or examination) and also when the death of an individual occurred at a health care institution.

An autopsy is not required to be performed (part 3 of Article 72 of the Law of Ukraine “Principles of Ukrainian Health Care Legislation”):

1. for the following reasons: a) availability of written statements of close relatives; b) availability of a documented expressed wish of the deceased (according to paragraph 1 of part 1 of Article 6 of the Law of Ukraine “On Burial and Funeral Matters” of July 10, 2003, “all citizens have the right to have one’s body buried and to express one’s will as to the proper handling of the body after death, which for instance may be done in the form of a permission or a prohibition to perform an autopsy.”);

2. under the following conditions: a) absence of suspicion that the death was not due to natural causes; b) religious and other serious reasons.

If the death occurred as a result of external factors (trauma, asphyxia, under the influence of extreme temperatures, electrical current, poisoning, etc.), after an artificial abortion performed outside of a medical institution, death at work, sudden death of children during their first year of life and other individuals who were not under medical supervision, in case of unidentified deceased, as well as when there is a suspicion of death to be not due to natural causes, an autopsy is performed by a forensic expert who issues a medical death certificate (paragraph 2.3 of the Instructions on Filling Out and Issuing Medical Death Certificates (Form N106 /o) of August 8, 2006 No. 545).

The procedure for performing an autopsy is defined by the Ministry of Health of Ukraine in the Order of the Ministry of Health of Ukraine “On Development and Improvement of Autopsy Services in Ukraine” of May 12, 1992 No. 81. According to this legal act, bodies of deceased patients of medical institutions are generally subject to autopsy. The chief of staff of a medical institution or the head of an autopsy bureau has the right to cancel an autopsy only in exceptional cases. An autopsy is cancelled upon written instructions from the chief of staff of a medical institution or the head of an autopsy bureau which appear in a hospital file of a patient indicating the reasons for cancelling the autopsy. Disputes concerning an autopsy are resolved by the chief coroner of a region (a city). An urgent autopsy is allowed to be performed immediately after the doctors of a medical institution establish the fact of death; a planned autopsy is performed upon presenting the hospital file or the outpatient file of a deceased with instructions from the chief of staff of the medical institution or his deputy to perform an autopsy. Medical records of the deceased from various hospitals are delivered to an autopsy bureau (department) together with the corpse of the deceased. Medical hospital files of patients who died in the second half of the previous day must be forwarded to the autopsy bureau or the autopsy department of a hospital no later than by 9 am. Medical hospital files with the autopsy results are forwarded to the medical archive of the hospital within 5-7 days after the autopsy. The files may be retained for a longer period of time only with a special permission from the hospital administration.

An autopsy may not be cancelled when: a) a patient dies within 24 hours of being admitted to a hospital, b) medical forensic investigation is required, c) infectious diseases are involved or suspected, d) there was no definitive diagnosis established when the patient was alive (regardless of the period of stay in a hospital), e) a patient died in a health care facility after diagnostic procedures, a medical intervention, during or after surgery or blood transfusion, when individual intolerance to certain medications was overlooked, etc. The corpse of a deceased who has not been identified is sent for an autopsy by the order of the chief of staff of a medical institution.