

# The Forensic Expertise as a Probative Procedure Used in the Criminal Proceedings in Romania

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**ABSTRACT:** The article presents and analyzes aspects related to the disposition and performance of the forensic expertises in accordance with the criminal procedural legislation in Romania. The article presents and analyzes aspects of forensic tactics related to the disposition and performance of the forensic expertise in accordance with the criminal procedural legislation in Romania.

**KEYWORDS:** forensic expertise, forensic tactics, Romanian criminal procedure code, criminal proceedings

## Introduction

The forensic expertise is part of the broader category of forensic expertise which is a valuable evidentiary procedure, through which, based on research based on scientific data and methods, “the expert brings to the attention of the judiciary scientifically reasoned conclusions about specialized knowledge is required” (Mihuleac 1971, 20).

The forensic expertise has been defined in the literature as “the result of scientific research, of factual circumstances, performed at the request of judicial bodies, by one or more specialists, whose scientific training and experience specific to each specialty allows them to report detail the facts in that field and process them in order to make them accessible to the judiciary activity” (Stancu 2011, 83).

Carrying out the forensic expertise is in principle optional, the judicial bodies approving it only if it is pertinent, conclusive and useful to the criminal case, it being disposed, according to the provisions of the Article 172 (1) of the Romanian Criminal Procedure Code, when for the ascertainment, clarification or evaluation of certain facts or circumstances that are important for finding out the truth in question, the opinion of an expert is also necessary.

The expertise is ordered under the conditions of Article 100 of the Romanian Criminal Procedure Code regarding the administration of evidence, upon request or *ex officio*, by the criminal investigation body, by reasoned ordinance, and during the trial it is ordered by the court, by reasoned decision (Article 172 para. 2 of the Romanian Criminal Procedure Code).

The request for the forensic expertise must be made in writing, indicating the facts and circumstances subject to evaluation and the objectives to be clarified by the expert. The forensic expertise can be performed by official experts from laboratories or specialized institutions, or by independent experts authorized from the country or from abroad, in accordance with the law (Article 172 para. 4 of the Romanian Criminal Procedure Code).

The ordonnance of the criminal investigation body or the order of the court ordering the forensic expertise must indicate the facts or circumstances that the expert must ascertain, clarify and evaluate, the objectives to which he must respond, the term in which the expertise must be performed, as well as the institution or the designated experts (Moise and Stancu 2020, 310).

In strictly specialized fields, if for the understanding of the evidence certain specific knowledge or other such knowledge is necessary, the court or the criminal investigation body may request the opinion of some specialists who function within the judicial bodies or outside them. The provisions relating to the hearing of the witness shall apply accordingly.

We point out that authorized experts may be involved in carrying out the forensic expertise, appointed at the request of the parties or the main procedural subjects. The expert is appointed by the ordonnance of the criminal investigation body or by the court order. The criminal investigation body or the court appoints by the ordonnance, respectively by the court

order, usually only one expert, except for the situations in which, due to the complexity of the forensic expertise, specialized knowledge from distinct disciplines is required, situation in which it appoints two or more experts.

When the forensic expertise is to be performed by a specialized institute or laboratory, the appointment of one or more experts is made by this institution, according to the law.

The expert, the institute or the specialized laboratory, at the request of the expert, may request, when it deems necessary, the participation of specialists from other institutions or their opinion, and the names of experts appointed by the institute or specialized laboratory shall be communicated to the judicial body that ordered the forensic expertise.

According to the provisions of the Article 175 (1) of the Romanian Criminal Procedure Code, the expert has the right to refuse to carry out the expertise for the same reasons for which the witness may refuse to testify. Also, the expert has the right to get acquainted with the material of the file necessary for the performance of the expertise and may request clarifications from the judicial body that ordered the performance of the expertise regarding certain facts or circumstances of the case to be assessed.

At the same time, the forensic expert may request clarifications from the parties and the main procedural subjects, with the consent and under the conditions established by the judicial bodies. The expert is entitled to a fee for the activity submitted for the performance of the expertise, for the expenses that he should bear or has incurred for the performance of the expertise (Article 175 para. 5 of the Romanian Criminal Procedure Code).

The amount of the fee is determined by the judicial bodies depending on the nature and complexity of the case and the expenses incurred or to be borne by the expert. If the forensic expertise is performed by the institute or the specialized laboratory, the cost of the expertise is established under the conditions provided by the special law. We emphasize the fact that the forensic expert can also benefit from protection measures, under the conditions provided by the Article 125 of the Romanian Criminal Procedure Code, which refers to the protection of threatened witnesses.

The expert has the obligation to appear before the criminal investigation bodies or the court whenever he is summoned and to draw up his expert report in compliance with the deadline established in the ordonnance of the criminal investigation body or at the court order. The deadline in the ordonnance or court order may be extended, at the request of the expert, for good reasons, without the total extension granted being more than 6 months (Article 175 para. 7 of the Romanian Criminal Procedure Code).

The delay or unjustified refusal to carry out the forensic expertise entails the application of a judicial fine, as well as the civil liability of the expert or of the institution designated to carry it out for the damages produced.

The expert may be replaced if he refuses or, unjustifiably, does not complete the expert report by the deadline. The replacement is ordered by ordinance by the criminal investigation body or by conclusion by the court, after summoning the expert and communicated to the association or professional body to which he belongs. The expert is also replaced when his statement of abstention or request for recusal is admitted or if he is objectively unable to perform or complete the forensic expertise.

The criminal investigation body or the court, when ordering the performance of an expertise, fixes a term to which the parties, the main procedural subjects, as well as the expert are summoned, if he has been appointed (Article 177 para. 1 of the Romanian Criminal Procedure Code).

At the set deadline, the prosecutor, the parties, the main procedural subjects and the expert shall be informed of the object of the forensic expertise and the questions to which the expert must answer and shall be informed that they have the right to comment on these questions and may ask modifying or supplementing them. Also, as the case may be, the objects to be analyzed are indicated to the forensic expert (Article 177 para. 2 of the Romanian Criminal Procedure Code).

The expert is informed that he has the obligation to analyze the object of the expertise, to indicate exactly any observation or finding and to express an impartial opinion on the assessed facts or circumstances, in accordance with the rules of professional expertise and science (Moise and Stancu 2020, 311).

The parties and the main procedural subjects are informed that they have the right to request the appointment of a forensic expert recommended by each of them, who will participate in the performance of the forensic expertise. After examining the objections and requests made by the parties, the main procedural subjects and the forensic expert, the criminal investigation body or the court shall inform the expert of the term in which the forensic expertise is to be performed, at the same time notifying him if the parties or the main procedural subjects are to participate (Article 177 para. 4 and para. 5 of the Romanian Criminal Procedure Code).

After performing the forensic expertise, the findings, clarifications, evaluations and opinion of the forensic expert are recorded in a report, which has the value of a means of proof in the criminal proceedings. When there are several experts, a single forensic expertise report is drawn up, and the separate opinions are motivated in the same forensic report. The forensic expertise report is submitted to the judicial body that ordered the forensic expertise.

### **Forensic tactics rules applied in the disposition and performance of the forensic expertises in the criminal proceedings**

The most important tactical rules applied in the disposition of the forensic expertises are the following (Moise and Stancu 2020, 312-313): the opportunity of the forensic expertise; the correct establishment of the object of the forensic expertise; the clear wording of the questions addressed to the expert; ensuring the quality of the materials sent for forensic expertise.

The forensic expertise goes through three main stages or moments, consisting in knowing the object and materials of the forensic expertise, in the separate examination of each category of materials and in comparing the characteristic elements, in order to identify (Ionescu and Sandu 1990, 41-42).

Knowing the object and materials of the forensic expertise is the first stage in which the specialist proceeds to study the disposition of the work, as well as the research materials, in order to establish the concordance between the indications and data contained in the ordonnance or the court order and the objects received (Moise and Stancu 2020, 314).

The separate examination considers both the traces or objects in dispute and the comparison models, the expert being interested in capturing sufficient characteristics on the basis of which to establish the identity or non-identity of the person or object included in the research scope.

The comparative examination aims at comparing the characteristics, reflected or contained after the high scene from the crime scene, with the characteristics of the comparison models created experimentally with the objects included in the research scope (Buzatu 2013, 125). We specify that the procedures used in the comparative examination are confrontation, juxtaposition and overlap.

According to the provisions of Article 178 (4) of the Romanian Criminal Procedure Code, the forensic expertise report shall include the following parts: the introductory part, which shows the judicial body that ordered the forensic expertise, the date when it was ordered, the name and surname of the expert, the objectives to be met by the expert, the date on which it was performed, the material on which the expertise was performed, proof of knowledge of the parties, if they participated in it and gave explanations during the expertise, the date of preparation of the forensic expertise report; the exposition part describing the expertise operations, methods, programs and equipment used; the part of the conclusions, which responds to the objectives set by the judicial bodies, as well as any other clarifications and findings resulting from the performance of the forensic expertise, in connection with the objectives of the forensic expertise.

Depending on the results of the examination process, the conclusions may be certain, presumptive or impossible to solve the problem (Ciopraga and Iacobuță 1997, 358). During the criminal investigation phase or the trial phase, the expert may be heard by the criminal investigation body or the court, at the request of the prosecutor, the parties the main procedural subjects or ex officio, if the judicial body considers that the hearing is necessary to clarify the expert's findings or conclusions. The hearing of the expert is carried out according to the provisions regarding the hearing of witnesses, provided by the Romanian Criminal Procedure Code.

When the criminal investigation body or the court finds, upon request or ex officio, that the expertise is not complete, and this deficiency cannot be filled by hearing the forensic expert, it will be ordered to carry out a supplement of expertise by the same forensic expert. When it is not possible to appoint the same expert, the judicial bodies will order the performance of another forensic expertise by another forensic expert.

According to the provisions of Article 181 (1) of the Romanian Criminal Procedure Code, the criminal investigation body or the court orders a new forensic expertise when the conclusions of the forensic expertise report are unclear or contradictory or there are contradictions between the content and the conclusions of the forensic expertise report, and these deficiencies cannot be removed by hearing the expert.

### **Aspects regarding the development of the forensic expertises**

According to the provisions of the Romanian Criminal Procedure Code, the forensic expertise is performed by forensic laboratories or any other specialized institute. The forensic expert or specialist must not forget that, no matter how competent he is through the multitude of his specialized knowledge, his act remains limited, and the verification of the expertise by the judge is not a test of distrust, but an additional proof of objectivity.

Currently, the National Institute of Forensic Expertise is subordinated to the Ministry of Justice of Romania, and the inter-county laboratories of forensic expertise are subordinated to this institute. The National Institute of Forensics within the General Inspectorate of the Romanian Police, as well as the forensic laboratories from the territorial units of the Police, operate in the system of the Ministry of Internal Affairs of Romania.

During the forensic expertise, the expert must comply with several general and special rules of ethics. Thus, the forensic expert having to (Stancu 2011, 85): to carry out the entire forensic expertise based on a thematic plan, representing a minimum point; to examine all materials submitted to the forensic expertise, to use all modern means of scientific research, to explain in detail its findings and to give clear and concise answers to all questions; to keep secret the works and their findings that he makes, this secret being absolutely *erga omnes* for any kind of work and for anyone, except the judicial body that ordered the forensic expertise; not make any changes to the objects or traces in dispute, as they are likely to alter their probative value; to study either directly or with the aid of the devices, the general and individual characteristics of the trace or of the object in dispute.

Moreover, in order to establish the authenticity or to identify the original person or object, the forensic expert must (Stancu 2011, 85-86): learn how to trace or carry the object in its visual field and how to look at; to acquire the ability to observe and examine the evidence, with total objectivity and increased attention, without being influenced by prejudgments or distracted by non-essential elements; to make the examination carefully; to know the atmospheric conditions in which the trace was created, the time elapsed since the creation of the trace; not to answer to legal problems, but only to scientific ones; not to assume the duties of a criminal investigation or prosecution body and to reject any delegation to that effect; in cases where the forensics experts do not have the competence to carry out the tasks received or if they do not have access to the necessary devices or equipment, they will decline their tasks, to a competent forensic laboratory.

During the forensic examinations, some errors may occur that may be due to the following: the lack of thorough knowledge of the forensic expert in the forensics field and the methods of expertise he uses; the application of the technique not as a means of scientific research, but as a goal, without being permanently subject to the critical spirit of the creative thinking of the forensic expert; the participation of the forensic expert in some acts of criminal investigation that may influence him in formulating the conclusions; overcoming professional competence or trying to solve legal issues through the forensic expertise.

The most common errors that can appear in the forensic expertise are the following (Stancu, 2011, 86-89): errors caused by improper picking and packaging of traces or criminal instruments; errors produced by not examining the evidence under the same conditions, it is known that many forensic expertises use a number of technical means from a wide range ranging from electron microscopes (transmission, scanning) nuclear reactors, particle accelerators, computer, lasers, and other instruments of measurement, comparison and control, these technical means having a high degree of improvement, so that both the evidence in dispute (traces of the crime) and the comparison models are examined (Buquet 2011, 132-133); errors produced by not examining the original - non-compliance with one of the deontological norms, according to which the forensic expert is obliged to perform the examination only after the original of the trace or evidence in dispute; errors produced by comparing the trace with the trace creator object; errors caused by not using all means and methods of forensic expertise; errors produced in the process of finding and interpreting the identifying characteristics; errors caused by improper assessment of insignificant details; measurement or calculation errors, in many of the forensic examinations it is necessary to make measurements and calculations in order to make the most accurate findings in order to compare the evidence in dispute and those created experimentally to form a fair conclusion; the logic errors, such as incorrect appreciation of deductions, the material errors, such as misrepresentation of facts and the verbal or written errors, which refers to the misuse of the terms; errors produced by subjective assessments; errors produced by not performing experiments errors produced by the examination of a document or a voice in foreign languages, the forensic expert being difficult to perform a work to identify the voice and speech in a language, other than the one spoken by him; errors caused by not performing experiments, which is likely to make it impossible for the expert to draw an exact conclusion and can sometimes lead to the installation of a horror; in the latter case, the error may occur when the expert performs the required experiment, but does not follow the principle that the same causes produce the same effects under the same conditions (Palmiotto 1994, 175).

## **Conclusions**

The forensic expertise brings a very important contribution to achieving the purpose of the criminal process, finding out the truth and prosecuting the offender.

The forensic expertises have the object set by the judicial bodies and constitute activities of research and scientific interpretation of traces and material means of evidence, which involve the use of common methods, procedures, technical means and working techniques, in order to identify persons and objects in certain relationships with the crime.

The forensic expertise can be ordered both after the beginning of the procedural phase of the criminal prosecution, after the initiation of the criminal action and in the trial phase of the criminal process. We emphasize that the object of the forensic expertise is ample, consisting in a detailed investigation of the specialized problem submitted to the solution, the forensic expert expressing a point of view in the respective issue.

The interpretation and capitalization of the conclusions of the forensic expertise report marks the moment of appreciation and weighing of the evidences highlighted through scientific examinations.

Among the conclusions of the forensic expertise reports, the most valuable are the conclusions of a certainty whose interpretation does not raise particular problems, being frequent the cases in which the forensic expertise is the only way to bring to light the evidence necessary to establish the existence or non-existence of a crime and the identification of its author.

Probability conclusions have a lower weight in the overall results of the forensic expertise. Opinions have been expressed on these conclusions for and against their usefulness or admissibility, both in the speciality literature and in practice, some experts even avoiding formulating them.

We are of the opinion that the conclusions of the impossibility of solving the problem, contrary to appearances, require the same attention in interpretation, especially if they will be taken into account in all the existing evidence in question.

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