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## **Testimonies Deposition Of The Victim And Witness In The Criminal Procedure Of The Republic Of Kazakhstan**

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**Abstract.** *On the basis of the analysis of the criminal procedure novel of the Kazakhstan legislation there are considered features and problematic issues of interrogation by the investigating magistrate of the victim and witness (testimonies deposition). Deposition by the investigating magistrate of testimonies of the victim and witness in pre-judicial proceedings provides acceleration and simplification of all criminal legal proceedings.*

**Keywords:** criminal procedure, evidence process, victim and witness testimony, deposition, investigating magistrate, reception of right.

### **Introduction**

Before the adoption of the new edition of Criminal Procedure Code RK of 2014, a number of the victims and witnesses, including key, weren't done court appearance for variety of valid reasons, they avoided to appear in court without a valid reasons. It was involved an adjournment of judicial proceedings, tightening of terms of consideration and adjudication and, respectively, redundancy of criminal procedure coercion for providing their court appearance and, eventually, it wasn't facilitated the timely solution of problems of criminal procedure.

Solution of the problem was become possible at a combination of the reasonable balance of public and private interests, provided in particular, with testimonies deposition.

In this regard Art. 217 of the Criminal Procedure Code PK<sup>1</sup>, changes the approaches to the theory and practice of collection of evidence in criminal procedure. The Code provides a new to Kazakhstan an institute of testimonies deposition — features of interrogation by the investigating magistrate of the victim and the witness.

In structure of the criminal procedure law the testimonies deposition of the victim and witness is regulated by chapter 26 of the Criminal Procedure Code RK "Interrogation and Confrontation". On the face of it, it is quite logical to consider deposition of such testimonies as a kind of interrogation of the victim and witness.

But deposition significantly differs from other varieties of interrogation of the victim and witness: primary, additional and re-examination, with use of scientific and technological means (STM), interrogation of the minor.

The last ones on the key parameters are almost identical to standard interrogation in a stage of pre-judicial investigation. They are made and procedurally made out by the examining magistrate, the investigator. Defender, representatives, experts can participate at their conducting. Interrogation goes by

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<sup>1</sup> The Criminal Procedure Code of the Republic of Kazakhstan of July 4, 2014 No. 231-V with amendments of November 7, 2014 No. 248-V [An electronic resource]. — Access mode: <http://adilet.zan.kz/rus/docs/K140000231>, accessed 12. 06. 2017.

the general rules of pre-judicial investigation (Art. 210 of the Criminal Procedure Code RK), which don't coincide with conducting of interrogation on judicial examination. The testimonies, which are previously received in a stage of pre-judicial investigation owing to spontaneity of investigation of evidences, are estimated by court, as a rule, in total with results of interrogations in judicial examination of the same participants of process.

Despite such common features as the search, informative, certifying direction,<sup>2</sup> testimonies deposition of the victim and witness differs from classical investigative interrogation in the following signs:

- do not coincide with the traditional interrogation of the initiators of this investigative action (the person, conducting the pre-judicial investigation, having the right to initiate before the prosecutor, and the prosecutor, the suspect or his defense attorney has the right to petition before the investigating magistrate for interrogation of the victim and witness);

- the executor of deposition – the investigating magistrate;

- the testimonies of the victim and the witness, deposited by the investigating magistrate as the "preserved" proving evidence are checked and estimated directly at consideration of criminal case by court;

- in a stage of pre-judicial investigation there is excluded the subsequent interrogation of such depositors by the examining magistrate, investigator;

- interrogation by the investigating magistrate of the depositor is conducted by the general rules of judicial examination of the main judicial proceedings;

- deposition is provided with guarantees of reliability and admissibility of the received testimonies, and it is carried out in the conditions of publicity, participation of the parties, their equality and competitiveness, with involvement of defenders, representatives, the prosecutor;

- the deposited testimonies are registered by the court clerk in the form of the protocol of court session;

- the participants of process who were presented at testimonies deposition have the right to receive the copy of the protocol of court session in which the testimonies deposited by the investigating magistrate are recorded, and they can bring the remarks about it.

Possibly, on the basis of similar intrinsic differentiation earlier the legislator marked out as an independent investigative action - confrontation.

## **Discussion**

Thus, here it seems that the stated arguments are sufficient for a conclusion about the difficult legal nature of the deposited testimonies of the victim and witness which are differed considerably in a procedural form from traditional interrogation of the examining magistrate, the investigator. It gives the grounds to raise a question about independent nature of *interrogation of depositors - the victim and the witness and its separation in an independent variety of investigative actions along with interrogation and a confrontation.*

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<sup>2</sup> V. V. Kalnitsky, *Investigative actions*, Omsk, 2003, p. 4.

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Art. 217 of the Criminal Procedure Code RK is contained the closed list of circumstances - legislative bases of the prosecutor statement, the suspect or his defense attorney of the petition before the investigating magistrate for testimonies deposition of the victim and witness. Let's notice that the domestic circle of such bases is more systematized, than for example, Ukrainian, which besides is open (Art. 225 of the Criminal Procedure Code Ukraine).

The provided bases of deposition of testimonies of the victim and the witness can be classified by the standard criterion in the theory of criminal procedure as justification of the basis on two groups:

- 1) actual bases;
- 2) juridical (legal) bases.

According to the fair statement of the Professor S.A. Shafer, factual basis of proceedings of these or those investigative actions are the data, indicating a possibility of extraction required evidentiary information from sources provided by law.<sup>3</sup>

The actual bases of deposition in the formulation of part one of Art. 217 of the Criminal Procedure Code RK: “if there is reason to believe” represent a set of both sufficient evidences, and other data, substantiating before the investigating magistrate a conclusion of the initiator of this investigative action about need of its proceedings.

These evidences form testimonies of other participants of process on interrogations, confrontations, during the checking and specification of testimonies on the place, results of other public and unpublished investigative actions, the conclusions and testimonies of the expert, the specialist, documents and materials, other sources of evidences.

A.S. Shafer notes that the juridical (legal) bases of conducting investigative action are existence of the general competences of the investigator to proceedings of investigation.<sup>4</sup> It is necessary to specify such approach in the conditions of the reformed criminal procedure law of Kazakhstan, in the context of the considered investigative action - interrogation by the investigating magistrate of the victim, the witness (testimonies deposition).

It is preferable to refer to the legal ground of proceedings of investigative action, regulated by the Criminal Procedure Code of the formal legal requirements:

- existence of criminal proceedings;
- the investigator authorities, examining magistrate, other authorized subjects (prosecutor, investigating magistrate, chief of body of inquiry) and participants of criminal procedure (parties);
- preconditions legality of procedural decisions (for example, overcoming immunity and privileges of persons, witness immunity, etc.);
- the formalized circumstances generalized by the law;
- if it is necessary - coordination or sanction of the authorized official;

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<sup>3</sup> S. A. Sheyfer, *Investigative actions. System and procedural form*, Moscow, Norma, 2001, p. 60.

<sup>4</sup> *Ibidem*.

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- pronouncement of the relevant resolution or statement of the petition.

As the generalized and formalized legislative bases of interrogation by the investigating magistrate of the victim, the witness (testimonies deposition) there are served the norms, enshrined in part one of Art. 217 of the Criminal Procedure Code RK. They reflect the most typical investigative situations when their later interrogation during pre-judicial investigation or court session can be impossible owing to the objective reasons.

Based on the various and successfully approved foreign experience, the legislator of Kazakhstan enumerated a number of the objective circumstances, interfering an appearance of the victim, witness in court:

- 1) permanent residence outside the Republic of Kazakhstan;
- 2) travel abroad;
- 3) serious condition of health;
- 4) application of security measures;
- 5) elimination of the subsequent psychoinjuring impact on minor witnesses and the victims.

Absence of the victims and witnesses in the main judicial proceedings doesn't violate its general condition - direct examination by the court of circumstances of a criminal offense and confrontation of trial. It is compensated by the deposited "secondary" personal source of the evidence, which is previously modeling a situation if the process of evidence would have happened in court with their participation.

The foreign legislative experience, connected with somewhat different aspect, deserves attention. Particularly, the rule 15 (c) (3), Federal rules of criminal legal proceedings of the USA, is regulated deposition of testimonies of the witness, who is out of the territory of the USA, which is conducted without defendant. Such deposition can be conducted if according to the circumstances of concrete case the court finds out the following:

- a) for the purpose of implementation of criminal prosecution on cases of serious crimes, the testimonies of the witness can be considered as the important evidence for establishment of the actual facts of the case;

- b) there is a high probability of the fact that it will appear impossible to provide participation of the witness in judicial proceedings;

- c) presence of the witness during the deposition, which is conducted in the USA, is impossible;

- d) the defendant won't be able to be involved in interrogation of the witness, who is in other country; because the country, where witness is, won't allow to the defendant to be present at deposition;

- e) defendant, by force of reasonable means, can be present at process of deposition of testimonies of the witness, who is in other country.

Applications of security measures have to have the actual justification, and don't take into account an imaginary fears and assumptions of the victim and witness. Criminal prosecution authorities, the investigating magistrate must base their decision on testimonies deposition on reality of threat, impossibility to

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prevent it other measures (for example, election or change of a measure of restraint, other procedural enforcement measures – restraining order, etc.).

Undoubtedly that the third part of Art. 97 and Art. 217 of the Criminal Procedure Code RK contain rather effective procedural guarantees of reliability of the deposited anonymous testimonies. On the assumption of features Kazakhstan national investigative and judicial practice, there is pertinent their strengthening at application of security measures to anonymous depositors - prosecution witness. Certainly, they are really afraid of punishment and counteractions from the suspect, the defendant, the defendant, their environment in many cases.

At the same time we dare to assume that in this area criminal prosecution authorities will be allowed abuses under the pretext of such basis of deposition most of all. Anonymous deposition will begin to be applied on criminal cases, as a rule, about sale of drugs after involvement as the main prosecution witnesses, dependent on law enforcement agencies and drug-addicted persons.<sup>5</sup> Similar negative practice is widespread in member-countries of Europe Council. It is clearly demonstrated by rather typical situation with anonymous witnesses in the case "Doorson v. the Netherlands" (the resolution of March 26, 1996).<sup>6</sup>

The deposition bases for an exception of the psychoinjuring impact on the minor victims and witnesses, unfortunately, aren't detailed yet. As it seems to us, in this context the main idea, first of all, must be about testimonies of the juvenile victims on criminal cases in the sphere of sexual integrity.

In addition experience of Estonia can be useful to the Kazakhstan legislator. According to Art. 691, 70 (2) of the Criminal Procedure Code of this state the following special conditions of deposition of testimonies of the minor victims and witnesses are provided:

- 1) the witness hasn't reached ten-year age, and repeated interrogation can exert an adverse effect on mentality of the minor;
- 2) the witness under fourteen years of age, and interrogation is connected with family violence or with the inadequate sexual treatment;
- 3) the witness has speech or sensory impairments, a mental shortcoming or has a mental disorder (with the expressed disease of nervous system).

At the same time foreign law-enforcement practice allows investigative and miscarriages of justice, when prosecution is based not on the deposited testimonies of the juvenile victim, and on "secondary" testimonies of witnesses from his words. It is a characteristic example the case "P.S. v. Germany" (the resolution of December 20, 2001).<sup>7</sup>

Expansion of the Kazakhstan bases of deposition of testimonies of the victim and witness is urgent. In this regard there is reasonable a reception of norm of Art. 691 of the Criminal Procedure Code Estonia, establishing:

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<sup>5</sup> Baltabayev K.Zh., etc. Consideration of criminal cases by the courts, connected with illicit manufacturing, processing, acquisition, storage, transportation, transfer or sale of drugs or psychotropic substances. – Astana, 2011. – Page 200-201.

<sup>6</sup> T.G. Morshchakova (ed.), *Fair trial standards (international and national practitioners)*, Moscow, Norma, 2012, p. 407-409.

<sup>7</sup> *Ibidem*, p. 401-402.

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- a restrictive substantive legal basis of the deposition – is a deliberate crime, for which as punishment there is provided an imprisonment for the term of not less than three;

- besides the objective reasons of impossibility of interrogation during pre-judicial investigation or court session the second criminal procedure basis of deposition – is fear that the person can be forced to perjury.

Along with the stated and contained in Art. 217 of Criminal Procedure Code RK, the general basis of deposition - is impossibility of later interrogation of the victim and witness during pre-judicial investigation or court session, in our opinion, it is advisable to add it with a case of difficulty of interrogation.

The foregoing is enabled to us to construct a revised edition of the first part of Art. 217 of the Criminal Procedure Code RK:

"1. The prosecutor, the suspect or his lawyer, participating in case as the defender, have the right to petition for interrogation by the investigating magistrate of the person who is the victim, the witness in case *pre-judicial investigation is conducted concerning the deliberate crime suspected of commission for which the law has prescribed punishment in the form of imprisonment for the term of over two years, and* there are had the reasons to believe that their later interrogation during pre-judicial investigation or court session can turn out impossible *or difficult* owing to the objective reasons (permanent residence outside the Republic of Kazakhstan, travel abroad, serious condition of health, application of security measures), and also *in view of fear that the victim and the witness can be forced to perjury, and for not conducting* the subsequent interrogations of minor witnesses and victims for an exception of the psychoinjuring impact on them".

The order of deposition by the investigating magistrate of testimonies of the victim and witness, established in Kazakhstan, *guarantees their reliability and admissibility*, their objective assessment by court of the first instance by consideration of criminal case in absence of depositors.

It is no accident, that interrogation of the depositor at the investigating magistrate and recording of his testimonies are made with observance of the rules of the main judicial proceedings, provided by articles:

- 347 of the Criminal Procedure Codes RK - recording by the court clerk of process of deposition of testimonies of the victim and witness by the general rules, provided for recording of the main judicial proceedings.

The protocol of court session, fixing the deposited testimonies of the interrogated person by the investigating magistrate is signed by the investigating magistrate and the court clerk. The participants of process who were present at testimonies deposition have the right to receive the copy of the protocol of court session, to bring for it the remarks within five days after its signing. Remarks for the protocol are considered by the investigating magistrate in day of receipt with pronouncement of the resolution on their acceptance or a deviation. After that the protocol of court session, the remarks (if they were brought) and the judge's ruling on their consideration are directed to the prosecutor for attaching to the criminal case file.

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- 369 and 370 of the Criminal Procedure Codes RK – the deposited interrogation of the victim and witness are kept publicly, in the conditions of competitiveness and equality of participants, at a possibility of interrogation of the depositor by the investigating magistrate and the parties: the prosecutor, the victim, the civil claimant, the civil defendant, their representatives, the suspect, his defense attorney, and also with application of scientific and technical means of fixing of testimonies of the depositor.<sup>8</sup>

- 371 of the Criminal Procedure Codes RK - interrogation of the minor depositor (the victim and the witness) in the presence of their lawful representatives and the teacher.

In addition, the norms of the Criminal Procedure Code about an order of conducting judicial examination directly indicate a possibility of use by court of the testimonies of the victim and witness, deposited by the investigating magistrate with stages of pre-judicial investigation:

- the fourth part Art. 366 of the Criminal Procedure Code RK - the citation and interrogation in court of the witness and victim aren't conducted in cases if their testimonies are deposited by the investigating magistrate in the order, provided by Art. 217 of the Criminal Procedure Code RK.

- the fifth part Art. 371 of the Criminal Procedure Code RK - a citation in court session and interrogation of the minor victims and witnesses aren't conducted if their testimonies during pre-judicial proceedings are deposited by the investigating magistrate.

- point 3) of the first part Art. 372 of the Criminal Procedure Code RK - announcement in the main judicial proceedings of the testimonies of the victim and witness, given by them at pre-judicial proceeding, and also video recordings and filmings of their interrogation is allowed at their deposition by the investigating magistrate.

Being guided by the rule of free assessment of evidences, the law and conscience (Art. 25, Art. 125 of the Criminal Procedure Code RK), the judge, considering in the main judicial proceedings criminal case in essence, at his permission has the right to recognize motivated on the internal belief, based on set of the evidences considered in judicial examination reliable or doubtful, admissible or inadmissible the evidence, obtained by the investigating magistrate in the form of the deposited testimonies of the victim and witness. In this case there is worked the general rule – no evidences have in advance established force.

If it is necessary the judge (court) of the first instance, considering criminal case in essence, is competent to interrogate depositors in judicial examination repeatedly - the witness and the victim, having subpoenaed them or remotely in the location online with application of scientific and technical means. Need of elimination of the reasons of essential contradictions, completions of considerable gaps in earlier given deposited testimonies, and also doubts in reliability and admissibility of the deposited testimonies can be the bases of repeated interrogation. In such situation the judge (court) can also use the right for

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<sup>8</sup> The Criminal Procedure Code of the Republic of Kazakhstan of July 4, 2014.

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announcement (re-proceedings) in court of the deposited testimonies for their comparison to those which are received in the main judicial proceedings.

*Limits of testimonies deposition.* According to the Criminal Procedure Code RK the procedural form of interrogation in the form of its deposition by the investigating magistrate is possible only in stages of pre-judicial proceedings: beginnings of pre-judicial investigation, pre-judicial investigation and referral of the defendant to court by the prosecutor.

## **Conclusion**

Testimonies deposition is allowed by the legislator applicable only to two types of sources of evidences – to testimonies of the victim and testimonies of the witness. Due to various forms of fixing of testimonies there is lawful a question: whether are testimonies a subject of this action, which were reported by specified persons on interrogation; or can be there testimonies during other adjacent investigative actions, directed to fixing of testimonies of the victim and witness?

We believe that the legislator mentioned no incidentally, as far as in edition of the name of Art. 217 of the Criminal Procedure Code RK there are the semantic row “features of interrogation by the investigating magistrate of the victim, the witness” and “testimonies deposition”.

Such approach dictates need of broad interpretation of the term “testimonies deposition”. In our opinion, except interrogation of the victim and the witness, the investigating magistrate has the right to deposit also their testimonies on confrontations, during the checking and specification of their testimonies on the place and line-up. As an integrated subject of extensive deposition by the investigating magistrate there are served the testimonies of the victim and the witness, reported by them during proceedings of the called investigative actions.

Unlike criminal legal proceedings of the USA, the Kazakhstan criminal procedure doesn't limit the number of depositors for the parties of prosecution and defence. In the long term we believe reasonable to limit the number of the deposited testimonies on criminal cases, for example, no more than 5 persons for each of the parties of criminal procedure. It will allow not to turn the main judicial proceedings into the absentia process, not to push the parties to concealment of weak evidentiary base, to evasion of doubtful reputation of witnesses, often prosecution, from confrontation in court of the first instance.

Interrogation by the investigating magistrate of the victim and witness is conducted in the presence of the prosecutor, the suspect (at his presence), his defense attorney, and in cases of need and other participants of process. In our opinion, to other participants of process can be included other victims, representatives, and also experts, specialists.

Unfortunately, the Criminal Procedure Code RK isn't regulated a question about alternative place of interrogation of the seriously ill patient of the witness, the victim who can't be according to subpoena. For example, in a number of the



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countries (Art. 225 of the Criminal Procedure Code of Ukraine,<sup>9</sup> the project of the Criminal Procedure Code of Armenia, etc.) interrogation of the depositor by the investigating magistrate can be conducted during assizes court session in the place of treatment or stay of this person.

Thus, deposition by the investigating magistrate of testimonies of the victim and witness in pre-judicial proceedings provides acceleration and simplification of all criminal legal proceedings.

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<sup>9</sup>A. P. Getman (ed.), *Commented Criminal Procedure Code of Ukraine of April 13, 2012 No. 4651-VI*, Kharkov: Yaroslav Mudryi National Law University [An electronic resource]. - Access mode: <http://pravo-ukraine.org.ua/resyrsi/kz/ugolovno-protsessualnyj-kodeks/5395-statya-225-dopros-svidetelya-postradavshego-vo-vremya-dosudebnogo-rassledovaniya-v-sudebnom-zasedanii>, accessed 12. 06. 2017.

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