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УГОЛОВНЫЙ ПРОЦЕСС И КРИМИНАЛИСТИКА

CRIMINAL PROCEDURE AND CRIMINALISTICS

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The purposes and tasks of defense in criminal case

On the basis of general laws of activity, the goals and tasks of the lawyer are formulated in the criminal process. Participants in the criminal process, in accordance with their sense of justice, interpret the legislative objectives in relation to a specific legal situation. The initial scientific data on these problems, the criminal procedure code are analyzed. Attention is focused on the importance of protection goals, on the delineation of goals and objectives. The objectives of defense determine the structure of protective activity, reflect its objective legal and factual capabilities. Some classification of goals and tasks are given, its content is disclosed. The hierarchical decomposition method is used in the analysis of goals and tasks. By the time of the onset, the goals are immediate and final and form its strategy. By degree of generality, the objectives of protection are classified into perspective, final, intermediate and immediate. The long-term and ultimate goals of protection are dialectical unity.

Keywords: the tasks of the criminal process, the goals in the defense against charges, the classification of defense's goals, the goals- tasks of the defender, the «tree of goals» in defense, the theory of systems.

A special, substantive study of advocacy is a new scientific direction [1]. Protection in criminal cases is a certain system of actions or activities. Activities should be appropriate, where the purpose is the ideal model of future results. The purpose, achieving it is one of the main criteria of efficiency of activity [2; 16]. The purpose of protection directs it, gives it a meaningful and deliberation. It provides the basis for a kind of programming activities. Sophisticated protection activities can not be planned, carried out, if it does not have a specific purpose. It not casually mentioned in the literature, that the planning of the investigation and trial by nature invariably embodies the realization of common objectives of criminal justice in relation to the characteristics of each individual criminal case [3; 36]. The first thing that takes the subject, starts operations - the definition of objectives, without which the activity itself loses its meaning and purpose. It's not always possible to objectify or externally to determine the motive, but the purpose is concentrating a motive in the form of the desired result. In other words, the purpose (or objective) determines the result in the broadest sense, is the first concept in the decision-making processes. Criminal procedure activity is subject to the general laws as a whole, taking into account additional laws of enforcement process. Members by virtue of their procedural status are forced to define the purposes and objectives of activities for themselves; sometimes these purposes have already been defined in the law, and participants need only to choose the means to achieve them, without regard for the simulation of the desired result, a general model which has already been built by the legislator. The participants of the criminal proceedings in accordance with their sense of justice clarify the purpose of the law and interpret in relation to a specific situation, in accordance with this they choose the means of achieving objectives, evaluate the results, take interim and final decision on the case [4; 219].

In our opinion, with respect to the specificity of the activities of the lawyer-defender we should elaborate on the procedural aspect of the purposes and objectives of protection, to focus on the relationship of pur-

poses and objectives of protection with the objectives of the criminal process. Another approach would correctly interpret the purposes and objectives of protection to the detriment of achieving the truth in a criminal case. In the criminal procedure and forensic science purposes issues were the subject of the research. These issues were considered in terms of the effectiveness of criminal procedural law [3], Criminal Procedural Law [5; 249-259] criminal procedure [5; 259-269] in relation to the objectives [6], in relation to the activities of participants of the process [7; 117, 8; 73-77, 9, 10; 66, 67]. So, L.Ya. Drapkin emphasizes situational relations between purposes and means, the specificity of educational objectives of the investigator, setting purposes in both simple and complex investigative situations, the multiplicity of purposes, organic connection with the formation of new purposes. E.G. Martynchik introduces operational definition of the objectives of activities of lawyers in criminal proceedings as a whole and its individual stages, displays quantitative performance indicators of activity of lawyers [11]. At first glance, the definition of the purposes and objectives of defense is not difficult, as they are enshrined in law. But we have in mind the purposes and objectives not only enshrined in law, as well as established during protection of the accused, depending on conditions. Protection activities, with its purposes, is itself a means of achieving the purposes enshrined in the law, as well as application of the rules of criminal procedure will be available in a way of the implementation of these purposes say P. Elkind [3; 20-24]. At the same time, the unity of the perspective purposes creates a single focus of criminal procedure and forensic means. Purposes in the area of criminal procedure have a hierarchical and diversified structure, headed by the target of general nature. In criminal proceedings, it is believed that the general purpose consists of several components [4; 226, 227, 3; 20]. It was opined that the law enforcement knowledge is a function of time and purposes [11; 9]. The meaning of purposes of protection is in the following. The purpose motivates defense lawyer, as the subject of activity, to action at the time of its decision on imposing the defense of the accused. Protection purposes serve as a guide, regulate and safeguard activities of important factors. They relate to the means and ways of protection used constantly by lawyer. Protection purposes significantly affect the structure of the protective activity, making stability and commitment. Purposes and objectives of protection reflect the objective legal and factual abilities of protection, allow to take them into account. The purpose setting includes planning and forecasting results of the elements that is beneficial to the organization of protective activity. The clarity in the definition of purposes and objectives allows to determine the legality or illegality of the purposes and the means of its implementation accordingly [12; 55]

Since we emphasize the need to distinguish between the purposes and objectives of protection, we consider it necessary to consider this issue. The question was raised on the delimitation of the objectives and objectives in criminal proceedings. So, prof. I.V. Tyrichev does not use the term «the purpose of criminal proceedings» and is talking only about the objectives [13; 5-8], prof. K.F. Gutsenko equates both concepts [14; 14, 15], prof. A.S. Koblikov distinguishes between general social objectives and specific, but does not mention the problem of the first type of purposes [15; 8, 9]. Other authors (B.Kh. Toleubekova, V.T. Tomin and others.) distinguish between the concept of «objective» and «objectives». V.T. Tomin says the purpose of criminal proceedings «exposes the person (s) who committed the crime, and the definition of measures (their) guilt and responsibility» [16; 56] that, in our opinion, is rather the objective of the criminal process, than purpose, because the purpose is over the system, organizing it. B.Kh. Toleubekova rightly distinguishes between the purposes and objectives of the criminal procedural law [17; 54]. At the same purpose of criminal procedure activity she considers as part of the objectives of criminal procedural law [17; 52]. Methodologically justified indication of the multidimensionality of purposes [17; 57]. E.V. Mizulina considers pointless a dispute about the delimitation of the concepts of «purpose» and «objective» [6; 140]. Not entirely agree with this statement, but surely it correctly points at two sides of the definition of the purpose of criminal proceedings: protection from the prosecution of an innocent and just punishment of perpetrator [6; 148].

As we believe, the distinction between the concepts of «purpose» and «objective» in the field of criminal proceedings has a fundamental importance for the theme of our research, as it is required to make a distinction between the objectives and objectives of protection. Firstly, it is necessary to distinguish between purposes of criminal procedure and criminal procedure law. The purposes of criminal procedural law have a general, abstract nature, reflecting its essence, nature, and purpose in society. We believe that the components of the right branch target (it is obvious that criminal procedural law - this branch of law) is expressed in the internal and external functions (regulatory and enforcement including) of the right [18; 124-126]. The purpose of the criminal procedure law is the optimal settlement of public relations in the sphere of criminal proceedings. In this - the purpose of the criminal procedural law, it is - the result of set of rules of law. Criminal procedure includes regulated by law criminal procedure activity and legal relationships (arising in this

case), aimed at implementing the purposes and objectives set out in the Criminal Procedure Act. As you can see, the purpose of criminal proceedings is primarily the purpose of criminal procedure activity, formulated by the criminal procedural law. Therefore we can say that the overall purpose of criminal procedural law is beyond the scope of criminal proceedings, it is part of a set of components of system of law purposes. Purposes of the criminal proceedings are enshrined in the Criminal Procedure Act in art. 8 of Code of Criminal Procedure. It is puzzling only fact: why the legislator refers them to objectives? This article traditionally consists of two parts. Part 1 of Article 8 of the of Code of Criminal Procedure refers to the problems, and part 2 of the same article formulates none other than the purposes of criminal proceedings. Unfortunately, the legislator did not include a recognized position in the theory of objective truth as the purposes of criminal proceedings, which is achievement of national criminal procedure school. The purpose is the subject of activity, that is necessary to exercise, and the problem - it is something that requires execution permission. Obviously, such provisions as providing protection against unreasonable accusations and conviction, illegal restrictions of the rights and freedoms of man and citizen, in the case of fraudulent charges or conviction of an innocent person - immediate and complete its rehabilitation, as well as to contribute to the strengthening of law and order, crime prevention, formation respect for the law (art. 8), are nothing more than the purposes of criminal procedure activity. The purpose is an anticipation in the mind (in our case, as enshrined in the regulatory model - R.Zh.) result, which is achieved by the actions [19; 534]. Since the achievement of the objectives enshrined in Part. 2 of Art. 8 of Code of Criminal Procedure is not a momentary act, but a process deployed in time, to rationalize criminal procedure activity in Part 1 of Art. 8 of Code of Criminal Procedure there are provided criminal procedure objectives. The ratio of purposes and objectives everywhere, not just in the criminal process, is very dialectical. The fact that there is a purpose in relation to the components of the system, subordinate, is a challenge with respect to the components of the system, subordinating it. In other words, the purpose - the purpose and essence of the problem at the same time depending on the conditions and the level of system activity. The aim is specified in a objective, that is, «the problem - this is the purpose under certain conditions» [20; 107]. The objective becomes a means in relation to the target. Purposes and objectives do not only form a hierarchy, but are in dialectical unity and move one to another. The purpose determines objectives which require the latest formulation of other objectives at the same time turning into a purpose, and so up to the objective of particular unit of activity. A unit or component of the defensive activity is an action. The activity can be described as a system of successive actions [20; 105, 21; 256]. With regard to the criminal procedure activity its unit is the procedural action to the defensive activity - procedural action (participation in it) and non-procedural action. The objective in conditions of particular action becomes its purpose. As the action here can be a part of procedural and non-procedural action. For example, during the interrogation, each question asked by the lawyer, pursues a specific purpose (or objective), subordinated to the common purpose of participation in the interrogation, interrogation conditions are changing - changing objectives of certain issues, but a common purpose of interrogation is invariable, subordinated to the purposes of the protection in a particular criminal case.. The purpose with each such «step» transforms, being every time a specific objective [22; 209]. It should be noted that our attempt to differentiate goals and objectives in the criminal process, presented earlier [23; 106-110], was questioned by scientists. Reason: the inability to evaluate the criminal process by psychological categories [24; 130]. We believe that the methodology of system analysis is used.

In criminal proceedings there are different approaches to the necessity and the bases of differentiation of objectives and purposes. For example, V.M. Tsarev believes that if the activity is investigated only in the intentional aspect, i.e., when the result of interested activity is important and its content is indifferent, the above concept is no need to distinguish. And if there is a need to trace the path of achieving a particular result, the purposes and objectives should be distinguished [25; 89]. It seems the author in some extent is not entirely fair. Purpose and means to achieve it are related categories, the concept of activity is unthinkable outside practical, content part of activity. We can not explore any of one of the components (purpose-result) in isolation (motive, planning activity, methods and tools). The final result always leads to the analysis of other elements, especially the means and methods of activity. Objectives, as mentioned above, are a kind of a means or way to achieve the purpose. As in setting purposes as a result of analysis of the conditions its specification occurs in objectives, and in the final results of the analysis, when we investigate the effectiveness of activity, the entire path of the process of making and implementing decisions is analyzed: the definition of the target to achieve a result. Division to purposes for the objectives is the link between abstract purposes and specific conditions of activity of defense attorney. Moreover, the author, referring to the purpose of the activity in general, himself identifies perspective target [25; 94].

P.S. Elkind distinguishes prospective and immediate purposes, both general and specific, she allocates a separate functional, she also divides the purposes into formal and informal [3; 39-58]. Indeed, the general purpose of criminal procedural law for the improved management of relevant social relations is transformed in criminal proceedings in a complex of more specific purposes (objectives), defining the direction of the practical activities of the competent state bodies (officials) at initiation of an investigation, consideration and resolution of cases of crimes [3; 29]. It is interesting the classification of purposes, given by B.Kh. Toleubekova, where in addition to the general purposes, the purposes are distinguished between special and private. Special purposes are inherent to activity of subjects, and private are inherent to a certain stage, the procedural act [17; 56]. But at the same time I would like to note that the allocation of special or functional purposes based on the classification should be based on a common feature, rather than the direction of the competent authorities. Especially because the author distinguishes a common purpose of the criminal proceedings from the essence of the rules governing the basic functions [17; 53], and in the list of subjects which perform one of the basic functions - protection, includes not only the subjects of criminal procedure relations, authorized to carry out criminal legal proceedings [17; 56]. We see that the activity of the subjects of protection must be taken into account in the classification of the criminal justice purposes mentioned above. Such an approach would take into account the variety of activities in the area of criminal procedure and the existing classifications would cover a greater number of objectives and purposes.

V.M. Tsarev believes that «the purpose of the participation of the defender is to assist the protection of rights and legal interests of citizens rather than to ensure» [25; 92]. We agree with the author in relation to such component of the purpose of protecting as the ensuring the rights and interests of persons who are suspected of committing a crime. Firstly, there is the question of the same provision of the rights and interests of the person accused in committing a crime. The legislator in relation to accused speaks only about the denial of charges or its mitigation. Secondly, security or the protection of rights and interests - it is rather a function of authorities conducting the criminal proceedings, the principles of criminal process (eg Article 26 of Criminal Procedure Code - to ensure rights of the accused, a suspect for the defense or Article 15 of the Criminal Procedure Code - protection of the rights and freedoms of citizens in criminal proceedings), but not the purpose of protection. The purpose has to be determined as a result that should be achieved; while in an operational sense it must have a generalized form - a common purpose of protection. Every purpose, before becoming particular, passes the necessary way of defining [26; 59]. To formulate a common purpose of protection is very difficult, because its formulation for each criminal case is original. We see that the defensive activity, which is part of criminal procedure activity, «a deliberate motive performs the role of general purpose, turning in the motive-purpose due to its consciousness» [20; 105]. That is the purpose of the protection can not be precisely defined in the law. Greatly influenced by subjective factors (interest of the defendant). But considering that «the motive and purpose constitute a sort of «vector» activity, defining its direction, as well as the amount of force exerted by the subject when it is executed» [22; 205, 206], we must determine the motive-purpose, which is a system-forming factor for all protection activities.

We have already considered the problem of the relation of interest, motive and purpose. It is noted that the content of interest was organized with the help of purposes, identified this content as achieving a favorable outcome. In this case, if the achievement of a favorable outcome of the case - it is the motive, the interest, the purpose of protection, as the ideal result is a model case of a favorable outcome for the accused. In each criminal case, this model is filled with content that takes into account the conditions of protective activity. Until recently in the literature, clarifying the relevant circumstances and to provide the necessary legal assistance formed the purpose of the protection [7; 72], assisting the protection of rights and legal interests of citizens /203, 92/, establishment of objective truth [28], nomination and verification of justifying or mitigating version aimed at the search and discovery of new sources of evidence, by which they could confirm [27; 22]. In opinion of A.Kh. Davletshin, finding justificatory and mitigating circumstances and causing other (not affecting liability) improving the situation of the accused are the components of protection as an activity [28; 9]. Direction of protection to justification, exemption from criminal liability, liability mitigating and other (not affecting liability) improving position of the accused is the purpose of protection [28; 10].

Thus, the purposes of protection form functional purpose of the criminal proceedings as an activity. They are based on the provisions of Part 2 of Art. 8 of Code of Criminal Procedure - protection from unlawful prosecution and conviction of illegal restrictions of the rights and freedoms of man and citizen. This part of the common purpose relates to any other participant of the process, but especially for professional defender. Further the law specifies an element of the common purpose to purpose of the form, direction of procedural activities. Paragraph 19 of Art. 7 Code of Criminal Procedure formulates the following purposes of

protection - protection of rights and interests of persons who are suspected in committing a crime, denial or mitigation of the charges, as well as the rehabilitation of persons unlawfully subjected to criminal prosecution. We see that these components of protection's purpose may be divided into separate purposes. Formulation of a purpose depends on the particular criminal case.

The purposes of protection can be classified as long-term, close and immediate, general and particular, intermediate and final [19; 539]. The long-term purposes of protection mean favorable outcome of the case, close - it's purposes that are set for a particular criminal case (for example, the purpose - the termination of a criminal case), the immediate purpose - purpose is the participation of the defender in particular stage or procedural action. Long-term purposes may be the same with the general, partial with immediate and immediate and can end at the same time can be private. By the volume purposes of protection can be classified into general and particular. General purposes and objectives are primarily strategic, particular - these are aims and objectives of a separate phase of the activities - mainly tactical objectives in this group. Common purposes include purpose formulated by us above - a favorable outcome of the criminal case for the accused, as well as the purposes of protection contained in Code of Criminal Procedure. By the time the of occurrence of the purpose there are immediate and final purposes. Both purposes make protection strategy. Defender determines the final purpose - the termination of the criminal case. In accordance with it he formulates the next objectives that are implemented before, without which it is impossible to realize the final purpose. For example, the final purpose is the termination of the criminal case (lack of crime). This purpose is achieved by defining a number of immediate objectives: the destruction of evidence of the prosecution system in the presence of bases; collection and presentation of evidence to justify the defendant or reinforcing arguments against prosecution evidence; detection of violations in connection between the subject and evidence of prosecution. Achieving the purpose is the destruction of prosecution evidence in the presence of bases is possible by identifying and addressing the following series of intermediate purposes (objectives): a study of the evidence for each of its relevance, admissibility, reliability; elimination of not relevant to the requirements evidence; revealing the contradictions in the system of the remaining evidence; determination of the sufficiency of the evidence to support a guilty system output on the case; correlation with the results of completed objectives in parallel. According to the degree of community protection purposes are classified as long-term, final, intermediate and immediate. The objectives enshrined in Code of Criminal Procedure are the final, they can be combined by a single concept - a favorable outcome for the accused, the suspect. They are subordinated to perspective protection objectives enshrined in Part 2 of Art. 8 of the Code of Criminal Procedure. As a permanent purpose of activity regardless the outcome – ensuring the rights and interests of the suspect, the accused and the provision of legal assistance. With regard to the activity of the lawyer-defender of these objectives are perspective which always are meant in setting of the final purpose. At the same time, the perspective and the final purposes, by analogy with the purposes and objectives in Part 1 and 2 of Art. 8 also constitute a dialectical unity: providing protection from unreasonable charges is possible under a favorable outcome for the accused, and the latter is permissible in protecting against unlawful charges. We can say that these two kinds of purposes become one: the most favorable outcome for the case to the defendant and contribution to protection of rights and interests. We do not see the possibility of inclusion in the content of the purpose the protection of rights and interests of all participants in the process. It is impossible to put the contribution to the protection of the rights of all participants in the process as purpose of protection, even if against them or that the rights granted to them had been violated. For example, in case of violation of witness immunity, this fact will not be left without attention of the defense counsel only if it affects identification of purposes and solution of problems of protection, for example, to confirm the presence of inadmissibility or relevance of this type of evidence. Criminal Procedure Law formalizes protection purposes which can stand in front of a professional defender, depending on the circumstances of the case. In accordance with the Code of Criminal Procedure there can be distinguished following types of ideal models of protection results:

- Denial of the charges;
- Mitigation of charges;
- Rehabilitation of persons wrongly subjected to criminal prosecution.

The purposes defined in the Code of Criminal Procedure can be called final purposes, which are achieved by defense lawyer as a result of proposed protective activity. These purposes are achieved not at once but by setting new purposes, subordinated to them, by defining objectives, depending on the protection conditions in a particular criminal case. All subpurposes form a hierarchical system, which is constructed in accordance with the method of vertical decomposition [29]. When it is used «the problem is divided into a

number of subproblems and each of them is solved independently from the other. Decomposition and coordination can be carried out in time, or in space» [30; 169]. Some subpurposes can be formulated. For example, the following subpurposes are subordinated to purpose of refutation of charges: proving the absence of elements of a crime or other circumstances excluding involvement in criminal liability. Proving the absence of criminal event subjugates the following subpurposes: proving the actual mistakes of prosecution, proof of legal error of prosecution. The collection of information about actual events which took place, analysis of actual data of prosecution contribute to proving the actual errors of prosecution. Legal errors of prosecution are set by analyzing the substantive law, the analysis of the logical connection between the rule of law and which took place the facts established by the lack of legally relevant facts. Proving the absence of a crime is divided into subpurposes on the elements of crime: the subjective side, objective side of the act, the object and the subject. General scheme of subpurposes, regardless the element: the lack of proof for the factual basis of the application of the rule of law, lack of proof of legal standards for the qualification, proof of incorrect application of the law to the facts. Proving lack of factual basis has its own subpurposes: establishing the circumstances that occurred in fact, a denial of circumstances established by the prosecution. The establishment of circumstances occurring in fact: collecting information from new sources, additional data collection from existing sources, the analysis of information gathered from available sources, comparing the newly obtained and available information among them. Denial of the circumstances established by the investigation is conducted by excluding facts established by the prosecution, the identification of new evidence, contradicting to evidence of prosecution, proving an alibi. Excluding the facts established by the investigation is conducted mainly through the establishment of the invalidity of the evidence proving the fact, to establishing absence of connection between the fact and the evidence. The entire hierarchy of objectives and sub-objectives can be expressed in a single graph- Tree of Purposes. The tree of protection purposes, there are several levels of purposes and sub-purposes. On the ground level there are the objectives enshrined in the law: denial of the charges, mitigation of charges, rehabilitation. The second level includes such purposes as proving the lack of evidence, lack of criminal event, proving circumstances mitigating liability, exclusion charges episodes, exception of circumstances aggravate the liability and others. The third level is proof of actual prosecution errors, lack of proof of a crime, the factual and legal basis. The fourth level: the establishment of the actual prosecution information, an indication of inadmissibility, the unreliability of evidence, etc. Tree of purposes branches as the specification applied to a separate action. Using this graph with expressed therein hierarchical purposes and sub-purposes can clearly organize the defense on the case, resulting in a system of all available means. In view of the implementation of the conditions for this purpose with respect to the specific situation turn into tactical objectives.

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Қылмыстық істер бойынша қорғаудың мақсаттары мен міндеттері

Қызметтің жалпы заңдылықтарының негізінде адвокаттың қылмыстық процестегі мақсаттары мен міндеттері тұжырымдалды. Қылмыстық процеске қатысушылар өздерінің құқықтық саналарына сәйкес заңнамалық мақсаттарды нақты құқықтық жағдайға қарай өздерінше түсініп қолданды. Осы мәселелерге байланысты бастапқы ғылыми деректер, атап айтсақ, қылмыстық-процестік кодекс талданды. Қорғаудың мақсаттарының маңыздылығына, сонымен қатар мақсаттар мен міндеттерді ажыратуға ерекше назар аударылды. Қорғаудың мақсаттары қорғау қызметінің құрылымын анықтайды және де оның объективті құқықтық және нақты мүмкіндігін көрсетеді. Мақсаттардың және міндеттердің кейбір жіктелулері келтірілді, олардың мазмұны ашылды. Мақсаттарды және міндеттерді талдау кезінде иерархиялық декомпозиция әдісі пайдаланды. Уақытына қарай мақсаттар жақын және түпкілікті болып қорғаудың стратегиясын құрайды. Тұтастықтың дәрежесіне қарай қорғаудың мақсаты келешектік, түпкілікті, аралық және тікелей болып сараланды. Келешектік және түпкілікті қорғаудың мақсаттары диалектикалық бірлікті құрайды.

Кілт сөздер: қылмыстық процесс міндеттері, айыптаудан қорғау мақсаттары, қорғау мақсаттарының жіктелуі, адвокаттың мақсаттар-міндеттері, қорғаудың «мақсаттар ағашы», жүйелеу теориясы.

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Цели и задачи защиты по уголовным делам

На основе общих закономерностей деятельности формулируются цели и задачи адвоката в уголовном процессе. Участники уголовного процесса в соответствии со своим правосознанием интерпретируют законодательные цели применительно к конкретной правовой ситуации. Анализируются исходные научные данные по этим проблемам, уголовно-процессуальный кодекс. Акцентируется внимание на значении целей защиты, на разграничении целей и задач. Цели защиты определяют структуру защитительной деятельности, отражают ее объективные правовые и фактические возможности. Приводят-

ся некоторые классификации целей и задач, раскрывается их содержание. Используется метод иерархической декомпозиции при анализе целей и задач. По времени наступления цели защиты классифицируются на ближайшие и конечные, по степени общности — перспективные, конечные, промежуточные и непосредственные. Перспективные и конечные цели защиты составляют диалектическое единство.

Ключевые слова: задачи уголовного процесса, цели защиты от обвинения, классификация целей защиты, цели-задачи адвоката, «дерево целей» защиты, теория систем.

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