# ASPECTS ABOUT NON-COMPLIANCE OVER THE PROCEDURAL RULES REGARDING THE MAKING OF MEDICO-LEGAL EXPERTISE

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**Abstract**
*The medico-legal expertise is evidence in the trial. Failure to comply with the provisions of art. 10 of the "Procedural Norms regarding the performance of expertise, findings and other medico-legal works can lead to the distruction of evidence. Deficiencies were found in the medico-legal approach, regarding the performance of medico-legal expertise and given the increased number of lawyers, it can be assumed that there will be reports of inadvertences in the drafting of medical-legal expertise and consequences.*

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## 1. Introduction

With the topic of medical malpractice returning to the news, it was natural to ask ourselves the following question: "Does malpractice exist in Legal Medicine in Romania?".

We can answer that we did not identify systemic faults, but not infrequently deficiencies were found in the medico-legal approach, regarding the performance of medico-legal expertise. Next, we proposed a series of topics that we consider relevant, to be debated in the given context.

## 2. Discussions

Failure to comply with the provisions of art. 10 para (1) of the "Procedural Norms regarding the performance of expertise, findings and other forensic works" (Ministry of Justice & Ministry of Health, 2000).

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This article states the following in point 1: "When drawing up medico-legal documents, the coroner or the designated commission has the following obligations: a) to take into account the certificates, medical reports and clinical observation sheets issued by health units of the Ministry of Health or accredited by it ; b) to check if the documents mentioned in letter a) presents the following security elements: registration number, stamp of the health unit, signature and initials of the doctor, who must mention the specialty and the code of the doctor, and in the case of photocopies, the mention "in accordance with the original", certified by the responsible doctor." We have found that documents without security elements or with only medical initials, without the doctor's signature or the lack of the mention "in accordance with the original" on the xerox copies were taken into account, in order to draw up a medico-legal Expertise.

In the same article, point 2 states that "The coroner cannot take into account medical information contained in other types of medical records than those provided for in para. (1), such as referral tickets, prescriptions, prescription consultations, medical leaves, discharge letters."

Regarding this point, there are expertises, some even carried out by Medico-Legal Institutes, which took into account other types of documents, including medical prescriptions, witness statements or other medical documents.

The question naturally arises as to what to do if the court or investigative and criminal investigation body expressly requests that documents that do not correspond to Article 10 be taken into account. It is customary for forensic medical experts to comply with the court's orders, but the court's orders cannot be contrary laws.

The question arises: what happens in a higher court if the experts (official or independent) who will carry out the new expertise or approval, will discover that the nominated expertise did not comply with the medico-legal legislation. We are of the opinion that this matter should be referred to the court.

As a comment in drawing up the conclusions of a medico-legal expertise, it is understood that all documents included in the chapter "Expository part", respectively "description of the facts" are taken into account.

Does the fact that the medico-legal expert based his expertise on the documents imposed by the court exempt him from criminal liability in the event that one of the prosecutors/lawyers of the opposing party claims this?

From our experience, we could cite at least 3 cases in recent years in which the prosecutor/lawyer decided to refer such cases to the prosecutor's office. Let's not forget that a criminal complaint filed by the prosecutor can lead to the initiation of criminal prosecution and the defendant's status attracts, according to the medico-legal legislation, the suspension of the quality of medico-legal expert.

A final mention on this point would be the idea that the decisions of the courts are not always what we expect, and we mean here from the point of view of their logic. Courts can consider any expertise, decide the guilt of experts, and act according to the spirit of the law, not the letter of the law. The conclusion is the lack of a unified practice of the courts.

Mistakes in respecting the ranking of expertises, respectively the shortening/shunting of stages, for example by the approval by the approval and control committee of the first expertise.

We can give an example of a regional forensic medicine unit territorially assigned to an institute, but the court considered delegating a totally different Institute, in a completely different area of the country.

Difficulties in conducting expert examinations by attacking them by lawyers who invoke d.1. non-compliance with teaching degrees, d.2. omitting them, or by d.3. misuse of teaching degrees from other disciplines, not forensic medicine.

This subsection can be exemplified by: primary medical examiner, who is a lecturer in a discipline other than forensic medicine, who signs a First Medico-Legal Expertise Report with the initials " Assoc. Prof. Dr....", which blocks the performance of a new expertise in that territory, with the exception of a full professor.

If a New Expertise is requested, the previously reflected elements may lead to the request of the lawyer to analyse and debate in court the situation created, without insisting on the fact that the lawyer of the opposing party can claim falsity in the statements.

This situation exists in medico-legal institutes with medical universities that have surrounding counties that also have medical faculties. Thus, there are expertises signed by smaller regional legal medicine services with faculties of medicine that will be signed by the head of works, lecturers and professors that will require an appropriate attitude within the institutes of forensic medicine.

As another idea, the lawyers believe that a specialist doctor, primary care physician, university assistant is hardly qualified to change the conclusions of a university with a higher degree in the discipline of forensic medicine, without motivating it in an analysis of the facts / discussion of the facts.

All these elements proposed for debate and presented above, can be used by lawyers, asking the courts to cancel the expertise, on the merits. It is also possible to present the case of a lawyer who requested the annulment of the New Expertise cancelled at the national institute of legal medicine, upon the

recommendation of the Higher Medico-Legal Commission[1], invoking abusive non-compliance with art. 27 of the implementing regulation.

Art. 27 states "1. If the HMLC finds the existence of contradictory conclusions between the first expertise and the subsequent one or of other medico-legal documents, it can fully or partially approve the conclusions of one of them, being able to formulate certain clarifications or additions. 2. If the conclusions of the medico-legal acts cannot be approved, the HMLC recommends the total or partial restoration of the works, formulating proposals in this regard or its own conclusions. 3. In the event that there are deficiencies in the drafting or deviations regarding the methodology of drawing up some medico-legal documents, the CSML can order their partial or total restoration."

Another aspect worth remembering is shown in the following example: in the conditions where there is an Expertise that has type A conclusions and a New Expertise that has type B conclusions, and the first expertise has legal effects on the perpetrator, or the new expertise has effects of this type, a court decision that will tranche in sense A or B can be exploited by the lawyers of the parties.

In this sense, clients through lawyers, after the communication of the court decision, can file a criminal complaint for intellectual forgery and/or favouring the offender against the experts of the other party, and if this request is taken over by an interested criminal prosecution body, it could lead to the opening of a criminal case against the medical examiners who signed one of the expert reports. Another issue of major importance would be a possible referral made by the plaintiffs through the lawyers of the parties to the Medical College against some medical examiners. The obvious errors made in the expertise led a county college to sanction the forensic doctors after analysing the file and the expert report of a personality from Romanian legal medicine.

We must also mention a few tangential aspects from Decision no. 14 of 23.06.2017 of the Superior Council of Forensic Medicine regarding the methodological norms regarding the activity of the forensic doctor as an expert appointed by the judicial bodies at the request of the parties as follows:

"Chapter IV Activity of the recommended expert" Art. 17- (1) In order to be able to argue his expert opinion, the recommended medico-legal expert can:

a) participate in the examination of the person or the corpse, only in the presence of the official expert, in which case the judicial body will communicate

[1] HMLC.

to the recommended medico-legal expert and the interested party the date and time when the examination will take place within the medico-legal institution;

b) study the documents or evidence of the case made available to the medico-legal institution by the judicial bodies, in the presence or with the consent of the official expert;

c) have access to the data from the archive of the medico-legal institution, only with the written consent of the head of the respective medico-legal institution;

d) request the official expert, in a justified manner, to carry out certain clinical and/or paraclinical investigations, procure medical documents or additional investigation data, the opinion of doctors of various medical specialties recognized as scientific personalities, etc. steps considered necessary and useful in order to demonstrate the medico-legal factual truth; e) formulate questions or observations to the official expert;

e) request various documents, in his own name, without using the letterhead of the official medico-legal institution which, if they are not found in the case file, has the obligation to make them available to the judicial body".

Thus, sometimes point "a" is not respected by the territorial medico-legal institutions so that the participation of the recommended expert is prevented by presenting unachievable deadlines or by omitting to notify the judicial bodies / the recommended expert regarding the date and time of the expertise. The express announcement of the recommended expert considering that all his contact data are made available to the official expert in the order for the medico-legal expertise. This aspect is not legislated, but we believe that informing the recommended expert in a personal manner would show real collegial respect.

Point "b", often misinterpreted, can create the impression that the recommended medico-legal expert could be prevented from studying the case file. The recommended medico-legal expert has the right to study the case file in the presence of the official expert, and if he is not available, the recommended expert must obtain the agreement of the official expert. Also, if the recommended medico-legal expert comes into possession of relevant medical documents in the file, he is obliged to bring them to the knowledge of the official expert either on the date of the examination or before it. The medico-legal expertise based on documents is not specifically legislated, so we can make assumptions if the participation of the recommended expert is mandatory when studying the medical

and medico-legal documents in the file or the medico-legal institution can make these documents available to the recommended expert scanned in electronic format of course if the latter requests this. In conclusion, we would like to draw attention to the expertise taken by the recommended experts, who may raise ethical issues by participating in antagonistic positions in the cases. (the parallel with law offices where several lawyers work and some of them may be employed by the opposing parties in the same case would be questionable.)

**Conclusions**

1. The medico-legal expertise is evidence in the trial (art. 97 CPP).

2. According to art. 103 CPP: Assessment of evidence: a. The evidence does not have a value established in advance by law and is subject to the free judgment of the judicial bodies following the evaluation of all the evidence administered in the case. b. This raises the question: which of the expertise will be taken into account by the courts? Answer: the court may decide to consider the most plausible expedient.

3. Given the increase in the number of lawyers, it can be assumed that there will be reports of inadvertences in the drafting of medical-legal expertise and consequences.

4. In their defence, being put against the wall, the official experts will invoke the approval of their expertise by the approval and control commissions, which may attract the liability of their members, and possibly the blocking of local activity.

5. Strict compliance with the legislation is essential in continuing to carry out the expert activity in good conditions.

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