

# **CORRELATION OF THE LEGISLATIVE SITUATION REGARDING THE FORENSIC EXPERTISE CARRIED OUT BY THE EXPERT RECOMMENDED BY THE PARTIES**

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## **Abstract**

*A new institution, that of the forensic expert recommended by the parties, has been regulated in the field of forensic medicine. Corroborating the new regulation with the existing ones in the field, it is found that the guarantee of procedural rights, conferred by the right of the party to recommend a forensic expert, is not fully effective, on the considerations analyzed extensively in the present study.*

**Keywords:** *forensic medicine; forensic doctor; forensic expert; expert report; expert opinion*

**JEL Classification:** [I18]

## **1. Introduction**

The importance of forensic expertise as evidence administered in order to solve increasingly complex cases is undeniable. Consequently, together with the expert appointed by the court, an expert recommended by the parties may participate in the performance of the expertise. The powers of this expert and his rights are particularly restrictive compared to those of the expert appointed by the court. As such, the regulation needs to be reformed, and this article is the starting point in formulating a proposal for *lege ferenda* in the field.

## **2. Regulation of the activity of forensic medicine at national level**

The regulations in the field of forensic medicine in Romania are, in sintesis, the following:

(i) Government Ordinance no. 1 of January 20, 2000 on the organization of the activity and functioning of forensic institutions<sup>2</sup> 1 approved by law 459/2011.

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(ii) Order of the Ministry of Justice no. 1.134 of May 25, 2000 and of the Ministry of Health no. 255 of April 4, 2000 for the approval of the Procedural Norms on carrying out expertises, findings and other forensic works<sup>3</sup>;

(iii) Government Decision no. 774 of 7 September 2000, approving the Regulation of 7 September 2000 on the application of the provisions of Government Ordinance no. 1/2000 on the organization of the activity and functioning of forensic institutions<sup>4</sup>;

(iv) Order of the Ministry of Health no. 938 of September 7, 2005 for the approval of the criteria for attesting the quality of forensic expert, as well as for establishing the conditions for suspending or withdrawing the quality of forensic expert<sup>5</sup>;

(v) Order no. 1.196 of October 16, 2013 for the approval of the nominal composition of the Superior Forensic Commission, of the Commission for the approval and control of forensic acts within the National Institute of Forensic Medicine “Mina Minovici” Bucharest, of the nominal compositions of the commissions for the approval and control of forensic acts within the institutes of forensic medicine in the university medical centers of Cluj-Napoca, Iasi, Timisoara, Târgu Mureş and Craiova, as well as the functioning of these commissions<sup>6</sup>;

(vi) Decision no. 14 of 23.06.2017 of the Superior Council of Forensic Medicine approving the Methodological Norms on the activity of the forensic doctor as an expert appointed by the judicial bodies at the request of the parties<sup>7</sup>;

(vii) The Code of Ethics and Deontology of the Forensic Doctor adopted by the Society of Forensic Medicine of Romania, Superior Council of Forensic Medicine, Bucharest, 2016.<sup>8</sup>

The forensic institution is carried out at the level of the following institutions:

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<sup>2</sup> Posted in Official Monitor of the Romania, Part I, no. 418 out of 27 July 2001, hereinafter referred to as Law 459/2011 and amended by Government Emergency Ordinance No. 115/2004 on the salary and other rights of the contract staff in the public health units in the health sector, Published in Official Monitor of the Romania, Part I, no. 1,138 out of 2 December 2004, hereinafter referred to as Law No. 125/2005, Published in Official Monitor of the Romania, Part I, no. 416 out of 17 May 2005.

<sup>3</sup> Posted in Official Monitor No. 459 out of 19 September 2000.

<sup>4</sup> Posted in Official Monitor No. 459 out of 19 September 2000.

<sup>5</sup> Posted in Official Monitor No. 844 out of 19 September 2005.

<sup>6</sup> Posted in Official Monitor No. 654 out of 24 October 2013.

<sup>7</sup> Accessible at <https://www.legmed.ro/?pdf=normemet.medicexpertrecomandatultima,versiune2016>, accessed on 21.01.2022.

<sup>8</sup> Accessible at <https://inml-mm.ro/>, accessed on 21.01.2022.

- The National Institute of Forensic Medicine “Mina Minovici” and the Institutes of Forensic Medicine from the university centers: Cluj-Napoca, Târgu-Mureș, Iași, Craiova, Timișoara, having legal personality, within which there is a<sup>9, 10</sup> Commission for the approval and control of forensic acts.

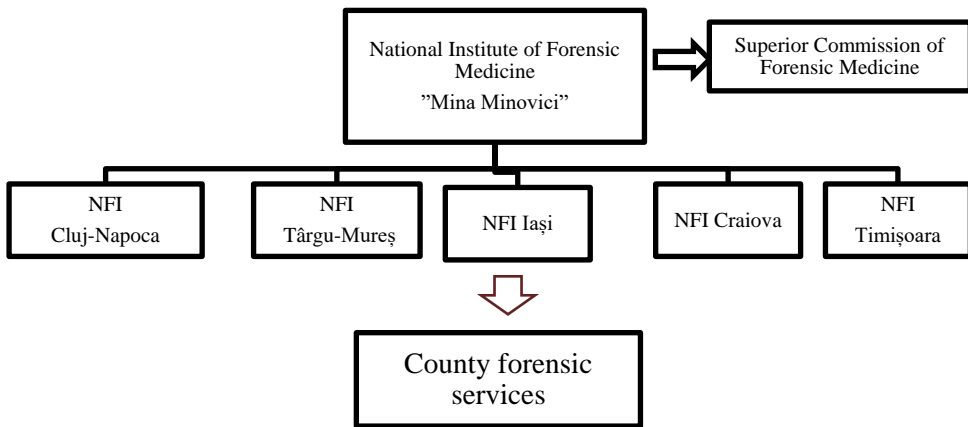


Fig. 1 Forensic activity– levels of development

The commission for approval and control carries out its activity as follows: for the report of a new forensic expertise - *ex officio*; for the other forensic works - following the request of the criminal investigation bodies and of the courts of law; following the verification, evaluation and analysis from a scientific point of view of the content and conclusions of the forensic work, they are approved, and if they are not endorsed due to contradictory conclusions in its content or when they deviate from the scientific information, the commission shall issue clarifications or additions or recommendations for the total or partial restoration of the work or the performance of a new expertise.

We mention that, at the level of the NFIM, the Superior Forensic Commission also carries out its activity, at the request of the criminal investigation bodies and by the courts, following the verification, evaluation and analysis from a scientific point of view of the content and conclusions of the forensic work, opinions are issued. If the forensic works are not approved due to the contradictory conclusions of the different forensic acts made available or when they deviate from the scientific information, the Superior Forensic Commission issues clarifications or additions or recommendations

<sup>9</sup> Hereinafter referred to as NFIM.

<sup>10</sup> Hereinafter referred to as NFI.

for the total or partial restoration of the work, formulating proposals in this regard or its own conclusions;

In conclusion, the competences of the Commission for the approval and control of the forensic acts within NFIM Bucharest, NFI Cluj, NFI Târgu-Mureș, NFI Iași, NFI Craiova, NFI Timișoara are the following: because the conclusions of the forensic expertise are contradictory, the commission formulates certain clarifications or additions; because the conclusions of the forensic expertise cannot be endorsed, the commission recommends their partial or total restoration or the performance of a new expertise.

The competence of the Superior Commission of Forensic Medicine within the NFIM “Mina Minovici”, the supreme scientific authority in the field of forensic medicine: verifies, evaluates, analyzes and approves from a scientific point of view, at the request of the judicial bodies, the content and conclusions of various medical acts; where the conclusions between the first and subsequent expert opinions are contradictory, the committee may deliver opinions, in whole or in part, on the conclusions of one of them, and may make particulars or additions. If the conclusions cannot be endorsed, the committee recommends: the total or partial redoing of the work by making proposals to this effect OR its own conclusions.

### **3. *Sedes materiae* regarding the regulation of the activity of the recommended expert**

The notion of recommended expert is relatively new in the Romanian forensic activity and has as main sources in chronological order: Law 459/2001 regarding the financing of the activity and the functioning the initiation of forensic institute; The new Criminal Procedure Code in force from 01.02.2014.<sup>11</sup>; Methodological norms regarding the activity of the forensic doctor as an expert appointed by the judicial bodies at the request of the parties included in the Decision no. 14 of 23.06.2017 of the Superior Council of Forensic Medicine.<sup>12</sup>

The norms have by way of formulation and by contain the claim of completeness, the framework of approaching the problem and represent an internal regulation of the forensic activity of the recommended expert, being elaborated by the Superior Council of Forensic Medicine.

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<sup>11</sup> Accessible at <https://legeaz.net/noul-cod-procedura-penala-ncpp/art-173>, accessed on 21.01.2022.

<sup>12</sup> Accessible at <http://www.legmed.ro/?doc=1458135975&>, accessed on 21.01.2022, hereinafter referred to as Rules.

#### **4. Analysis of the regulations regarding the activity of the recommended expert**

In the following, we will analyze the provisions contained in the three normative acts indicated ut supra in order to achieve a more rigorous synthesis of them.

(i) Law 459/2001 on the approval of the activity and functioning of forensic institutions, provides in the Implementing Regulation; in Chapter IV, regarding the competence of forensic doctors, the following forensic agents are:

- the competence of forensic experts “Art. 32. - (1) Forensic findings are performed by forensic doctors, and the expertise is performed by forensic doctors who have the quality of official expert appointed by the management of forensic institutes and medical services county law. (2) Experts appointed by the judicial bodies, at the request of the parties, from among those registered on the list of institutes of forensic medicine, may participate in carrying out the legal expertise carried out by the official experts, at the request of the parties, with the opinion of the Superior Council of Forensic Medicine.”

- the activity carried out by the forensic experts “Art. 33. (1) Experts appointed by the judicial bodies at the request of the parties may attend the proceedings and the examination of the persons, may request further investigations, and in the case of the expertise on the courts may he worked individually, in a national area with official experts. (2) The objections and the contribution of the experts appointed by the judicial bodies at the request of their parties shall be recorded in the forensic report. (3) Where experts appointed by the judicial bodies at the request of the parties shall assist the official experts, their presence shall be recorded in the introductory part of the forensic report. (4) The experts appointed by the court at the request of the parties shall have access only to the medical and forensic data in the criminal investigation file, respectively of the court. Access to the data from the archives of the forensic institutions may be made only with the written consent of the head of the forensic institution.”

- legal requirements to hold the quality of forensic expert and the criteria for attestation “Art. 34. (1) The person who fulfills the following conditions may be a forensic expert: a) he is a Romanian citizen and knows the Romanian language; b) has the capacity of full exercise; c) is a licensee of a medical university education institution, under the conditions of the law; d) has graduated from university courses of specialization in forensic medicine; e) he/she is currently practicing this specialty; f) has not suffered a final conviction for an offence committed in the exercise of the profession; g) is certified as a forensic expert by the Superior Council of Forensic Medicine. (2) The criteria for attesting in the capacity of forensic expert, as well as the

conditions for suspending or withdrawing the quality of forensic expert shall be worked out by the Superior Council of Forensic Medicine and approved by order of the Minister of Health. (3) The quality of forensic expert shall be evaluated annually by the Superior Council of Forensic Medicine, which may suspend or withdraw this quality, as the case may be. (4) Failure to any of the conditions provided in par. (1) by the person who has the quality of expert forensic causes the withdrawal of this quality. Initiation of criminal proceedings against forensic expert for a crime committed in circumstances related to the exercise the profession entails suspension.”

- limitations on forensic acts drawn up “Art. 35. (1) The coroner who issued a forensic certificate may no longer participate in the drafting of an expert report or in the performance of a new forensic expertise in the same case. (2) If the coroner is asked, for justified reasons, to perform the requested work, he shall communicate this in writing, stating the reasons, showing the reasons, immediately to the competent forensic institution, in view the appointment of another specialist. (3) Resident doctors in the specialty of forensic medicine may not sign forensic documents.”. “Article 36. - He may not be appointed by the judicial bodies at the request of the parties to participate in carrying out the expertise: a) the expert who has been officially appointed to carry out the expertise in question; b) the expert who was a witness in the same case; c) the expert who declared that he was abstaining, being in a case of incompatibility, or who has been objected to.”

- the conditions for consulting medical documents “Art. 38. (1) If the coroner considers it necessary to consult the medical documents, respectively forensic documents, on file or other documents necessary for carrying out the forensic work, he may request the competent judicial bodies to do so. (2) If in order to carry out the requested expertise it is necessary to examine the person or to carry out specialized medical investigations, the coroner may request the judicial bodies to order these examinations to be carried out.”

- the obligation to keep the professional and professional secrecy „Art. 39. (1) The coroner is obliged to keep professional and professional secrecy regarding the forensic work performed. He may use the documentary material on forensic works, in order to write communications and scientific papers, only after the final settlement of the case, under the conditions of the law. 2. The joint communication of the results of the expertise and/or forensic work to interested persons, institutions or organizations shall be made during the criminal proceedings only with the approval of the judicial body which requested that it be carried out. (3) The institutions of forensic medicine have the obligation to make available to the competent bodies of the Romanian

College of Physicians the forensic acts necessary for the purpose of judging the disputes and deontological misconduct”

(ii) The new Code of Criminal Procedure specifies in para. (5) of Article 172 as follows:

Art. 175, para. (5) “The expertise may be attended by independent authorized experts, appointed at the request of the parties or the main procedural subjects. (4) The parties and the main procedural subjects shall have the right to request that an expert recommended by them participate in the performance of the expertise. If the expertise is ordered by the court, the public prosecutor may request that an expert recommended by him participate in the performance of the expertise.”

(iii) The methodological norms regarding the activity of the forensic doctor as an expert appointed by the judicial bodies at the request of the parties adopted by the Superior Council of Forensic Medicine by decision no. 14 of 23.06.2017

The expert's opinion shall be governed by Article 15, Chapter IV, namely:

(1) The recommended forensic expert may express his point of view on the forensic aspects of a judicial case, in writing, by drawing up a document entitled expert opinion and/orally before the judicial body. (2) The recommended forensic expert shall not participate in the preparation of the official document of the forensic institution. (3) The document drawn up by the recommended forensic expert, called “expert opinion”, cannot be titled or cannot contain in the name other elements by which to be confused with another official act drawn up by the forensic institution such as: certificate, report, opinion, expertise, finding, etc. (4) The expert opinion drawn up by the recommended forensic expert shall not constitute an official document of the forensic institution. (5) The expert opinion may be drawn up by the recommended forensic expert only in the procedural framework in which he was appointed by the judicial body at the request of the party. (6) The recommended forensic expert shall be prohibited from drawing up written documents in extrajudicial advice. (7) The expert opinion drawn up by the recommended forensic expert may attract legal liability, according to the law.”

In relation to the somewhat incoherent legal provisions, indicated ut supra we ask ourselves what categories of documents has the right to issue the recommended expert? We observe, in accordance with art. 15, para. (1) that the recommended forensic expert may express his or her point of view on the forensic aspect of a case in writing and that the document thus drawn up is called an “expert opinion”. It is defined thus the type of document that the recommended expert will formulate, not expertise or expert report, but “expert opinion”.

Doctrine highlights, with priority, among the documents emanating from the coroner: (Apan, Fodor, 2020, p. 145)

„(i) a forensic report shall be drawn up at the request of the criminal investigation body, in situations where there is a risk that the lack of celerity will lead to the loss of the evidence on which this act would be based.

(ii) the forensic expertise report is a complex act, carried out, either by a single coroner or in committee, which may include several forensic doctors, but also specialists from different medical fields, depending on the specificity of the case. Applicants may be the police, the public prosecutor's office, the courts.”

Moreover, the before mentioned doctrine notes that, “The forensic expertise report represents the keystone of the forensic activity. Forensic expertise report means the act drawn up by an expert at the request of the criminal investigation body or the court and which includes the data on the expertise carried out. The expert shall answer questions put by the investigating body or by the court and, if he considers it necessary, may ask the patient to consult specialists in the clinical fields (medical and surgical) or may convene a committee of experts in the field of the patient's pathology.”

According to the provisions of para. (2) of Article 15 of the Norms, the recommended forensic expert does not participate in the preparation of the official document of the forensic institution, so his competences are limited only to the renewal of this expert opinion.

According to the provisions of the New Criminal Procedure Code, respectively art. 173, para. (4), the parties and the main procedural subjects are given the right to request that an expert recommended by them participate in the expertise, so that the recommended expert participates in carrying out the expertise, but not in drawing up the official document, trained as a result of carrying out the expertise, i.e. the expert report.

According to para. (3) and (4), of Article 15 of the Norms, the document drawn up by the recommended forensic expert, called “expert opinion”, cannot be titled or cannot contain in the name other elements by which to be confused with another official act drawn up by the forensic institution such as: certificate, report, opinion, expertise, finding, etc., so the name of the document emanating from the recommended expert is express and limited set.

The expert opinion drawn up by the recommended forensic expert is not an official document of the forensic institution, but an act of the expert as a professional in the forensic field. So, clearly the expert opinion is an act completely independent of those drawn up by the official forensic expert, employee of the forensic institution, and it also follows from this that the recommended expert is an independent expert.

Moreover, an analysis of the provisions stipulated in Law 459/2011 and in its Implementing Regulation in art. 42, of the in. (2) and (3); shows that a ration and contribution to the experts appointed by the judicial bodies at the request of the parties is recorded in the forensic report. Also, if the experts appointed by the judicial bodies at the request of their parties, i.e. the recommended experts, assist the official experts, their presence shall be recorded in the introduction part of the forensic report.

Therefore, the official expert records the presence of the recommended expert in the forensic contribution, as well as his opinion, respectively his objections and contributions to the expert report in the conditions in which, In Article 19 of the Norms, it is provided that: the recommended forensic expert shall not participate in the preparation of the forensic report made by the official expert and shall not sign the forensic report drawn up by the official expert. Moreover, it is forbidden for the recommended forensic expert to record on the forensic report his opinion on the conclusions made by the official expert, so it is obvious that he will record his opinion in a separate act. In the context of the above-mentioned provisions, we wonder that the objections and the contribution of the recommended expert will be recorded, given that the expert opinion “is drawn up separately and independent” of the forensic report in which the same rules show that they must be recorded? At any time, what was recorded by the official expert, can be endorsed by the expert party, given the fact that he did not record in the report.

Therefore, a second aspect to be mentioned is that, according to art. 16 of Norm the expert opinion is drawn up separately and independently of the forensic report prepared by the official expert coroner or by the forensic commission, and the name of “official expert” is also used., so, *per a contrario*, the recommended expert is the “unofficial” expert.

In these circumstances, of uncertainty regarding the status of the recommended forensic expert, we note in addition to those indicated above, that the expert opinion of the recommended forensic expert cannot be submitted to the opinion of the Commission for the control and approval of the medico-legal acts and that it can be submitted to the opinion of the Superior Commission of Forensic Medicine, but only together with the report of the new forensic expert opinion drawn up in the case in question.

The rights of the recommended experts established by the Superior Council of Forensic Medicine in order to be able to carry out its mission are also uncertain and specified in article 17 of the Norms. That is, in order to be able to argue his expert opinion, the recommended forensic expert can:

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

to the recommended forensic expert and to the interested party the date and time when the examination will take place within the forensic institution. Or, we note that, it is right, from a forensic point of view, the simultaneous examination by the two experts of the corpse/person in life, not separately, given the dynamics of the change the appearance of the lesions in both cases.

(b) study the documents or means of proof of the case made available to the forensic institution by the judicial bodies, in the presence or with the consent of the official expert. Taking into account the fact that, usually, the parties have access to the case file, respectively they have the right to obtain even copies of it, the article seems rather useless.

(c) have access to the data from the archive of the forensic institution, only with the written consent of the head of the respective forensic institution; Regarding this aspect, access to the documents from the archive of the forensic institutions is granted even to the own employees of the institution only with the approval of the head of the institution, so the provision is redundant.

(d) ask the official expert, justifiably, to carry out certain clinical investigations and/or paraclinical, the procurement of medical documents or additional investigation data, steps considered necessary and useful in order to prove the forensic factual truth.

As regards the provisions of Article 17, of para. (4) of the Rules; the data recorded by the official expert in the content of the forensic report, as well as the conclusions formulated, are not made available to the recommended forensic expert, in order to know them, which would contribute to the equidistance of the probation procedure. Also, as I indicated above, paragraph (1), (2) and (3) of article 19, they provide that the recommended forensic expert does not participate in the preparation forensic report made by the official expert and does not sign the forensic report prepared by the official expert, or even prohibits the forensic expert recommended to record in the forensic report his opinion on the conclusions formulated by the official expert.

Taking into account the fact that according to the above indicated, the work of the official expert is unknown to the recommended expert, this aspect raises difficulties in practice, and in his own name, the recommended expert may not request documents from the health institution unless the parties who recommended him. But, the Criminal Procedure Code, in art. 175, provides that: “(2) The expert has the right to take cognizance of the material of the file necessary for carrying out the expertise. (3) The expert may request clarifications from the judicial body that ordered the expertise to be carried out on certain facts or circumstances of the case to be evaluated. (4) The expert may request clarifications from the parties and the main procedural subjects, with the consent and under the conditions established by the judicial bodies.”

Are the recommended experts exempted from these rules, as they are applicable only to official experts? In the silence of the law, we appreciate that these rights are also aimed at the recommended experts.

Also, according to the provisions of the Code of Criminal Procedure, the procedure for the implementation of the expertise is established, respectively in art. 177, para. (1): “The criminal investigation body or the court, when ordering an expertise, sets a deadline to which the parties, the main procedural subjects, as well as the expert, if he has been appointed, are summoned. “Although, the parties are aware that they have the right to request the appointment of a recommended expert to participate in the performance of the expertise, it is not clear whether the recommended expert is also called upon at this deadline.

Express and surprising limits to the activity of the recommended forensic expert also appear in Article 22 of the Norms: “(2) In the expert opinion, the recommended forensic expert may not make assessments: a) on the mental competence or discernment of a person even if he participated in the examination of that person carried out by the psychiatric forensic commission; (Micluția, 2021) b) if the person concerned can serve the sentence to which he or she was sentenced or if he/she can participate in the conduct of the criminal proceedings, from a medical point of view.” Therefore, by the prohibitions they establish, the Norms bring a restriction of the generic right arising from the provisions of art. 173, para. (4), Criminal Procedure Code: “The parties and the main procedural subjects have the right to request that an expert recommended by them participate in the expertise.”

At the same time, we note that the obligations of the recommended forensic expert, according to the Norms are superposable, those of the official expert who emerge of art. 48, of the Regulation for the application of Law 459/2001. (Năsui G. A., 2016, p. 47) Regarding the responsibility related to the expert opinion, according to the provisions of art. 15, paragraph, (7) of the Norms, this is similar to that of the official expert 13, aspect expressly provided: “The expert opinion prepared by the recommended forensic expert may attract legal liability, according to the law. “(Beliș V., 2018)

The formal criticisms by this study, regarding the forensic expert recommended by the parties are not singular in the field of forensic expertise. A criticism of the system of regulating the forensic expertise can also be found in the judgments of the European Court of Human Rights, (Moise A., 2017) namely:

(i) Case Eugenia Lazăr v. Romania, Application no. 32146/05, Judgment of 16 February 2010.<sup>13</sup>

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<sup>13</sup> Accessible at <https://hudoc.echr.coe.int/eng?i=001-123214>, accessed on 21.01.2022.

(ii) The case of Ioniță c. Romania, Application no. 81270/12, Judgment of 10 January 2017, for the aspect regarding the conditions under which a new<sup>14</sup> forensic expertise can be carried out.

In the case of Eugenia Lazar, the Court considered, in particular, that the existence in national law of provisions authorizing forensic institutes to ignore the requests of the judicial authorities is not compatible with the primary obligation of the State to ensure the right to life by establishing a legal and administrative framework to determine the cause of death of a person under the responsibility of medical professionals. In the Ioniță case, the Court, like the national investigating authorities, found significant discrepancies between the various forensic medical reports drawn up during the criminal investigation; they considered that a new forensic report would have been necessary to determine the cause of death. However, their requests to the NFIM “Mina Minovici” for a new forensic report were rejected because, the applicable law did not allow a new report to be drawn up, on the grounds that NFI had already expressed its opinion on the case. (Turcu I., 2010, p. 51)

### Conclusions

1. The activity of the recommended expert is regulated by three legal norms: the Criminal Procedure Code, Law 459/2001 and the Decision no. 14 of 23.06.2017 of the Superior Council of Forensic Medicine that approves the Methodological Norms.

2. The first two provide a general framework for carrying out the work, and the last one regulates in extenso the work of the expert recommended by the party.

3. The impartiality of the expert medico-legal party is ensured in a theoretical way by the Deontological Code of the forensic doctor.

4. There are also unjustified limitations to the work of the recommended experience, such as the prohibition on pronouncing in certain types of cases/cases, psychiatric expertise, expertise on the interruption/postponement of the custodial sentence. In the desire to obtain an equidistance of the probation procedure, the activity of the recommended expert has as a hindrance and the prohibition to be communicated to him the content of the official forensic report as well as the conclusions drawn.

5. Taking into account the criteria that we have brought to the regulation to the expert recommended by the parties, we consider that the system created

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<sup>14</sup> Accessible at <https://hudoc.echr.coe.int/eng?i=001-170052> , accessed on 21.01.2022.

does not achieve the proposed purpose. The procedural protection of the parties who appeal to this institution is diluted and almost illusory.\*

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