

ETHICAL ISSUES IN FORENSIC ACTIVITY

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Abstract: Forensic activity must comply with the general medical deontological principles, but also has some particular features, that derive from its specific role - to serve justice. This paper analyses the main coordinates of forensic professional ethics, with special reference to the relation of the forensic pathologist with the patient, with other health professionals, with justice and society. We emphasized the specific elements that individualise forensic deontology, concerning mainly classified information, the dual loyalty of the forensic pathologist - towards the patient and justice, the status of the recommended expert vs. the official expert and also, the particular aspects of forensic autopsy and forensic psychiatric evaluation. Based on this analysis, we found that a deontological code of ethical conduct in forensic activity is needed, serving as a guide for all the professionals that work in this domain.

The purpose of forensic medicine has always been to serve the truth and justice, while its evolutionary tendencies aimed at surpassing the incrimination / discrimination in order to bring forth a rather scientific conveyance of forensic works.(1,2) Through these goals it is intended that the scientific progress be useful for the human being. Ultimately, forensic medicine plays a truly scientific role, as it is impartial, and based on objective and logical elements; it is constantly improving and opened to innovation. The forensic pathologist is guided by procedures and practices generally acknowledged as having a high level of professional ethics; hence the compatibility of the pathologist with this particular activity which has double valence, both medical and legal.(3)

An ethical code specific to forensic activity would represent a guide for all those who work in this field. The objectives of such a code should be:

- Defining the accepted / acceptable actions;
- Promoting high practice standards in the forensic field;
- Providing a guiding point for self-assessment for the members involved in forensic activity;
- Establishing a framework regarding the professional conduct and the implied responsibilities;
- Formulating this code as a promoter of professional identity and as marker of professional maturity.

Confidentiality in forensic practice – the professional privacy and secrecy

According to art.15 of the Medical Ethics Code, all the physicians, including the forensic pathologists must respect the professional privacy (“the professional privacy continues after the termination of treatment or the death of the patient”).(4) Thus, the details that the forensic pathologist may directly or indirectly find about the private life of the patient, of their families or different circumstances related to the disease are in fact subjected to *professional privacy*. The rule in carrying out a forensic investigation is to examine the living person or the body. Only in special situations can the forensic work be done relying on medical documents.

The professional privacy in forensic medicine partially intersects with the medical one; due to the particularities of this specialization, the pathologist must be aware of the fact that under no circumstances is he to prejudice the procedural course of the investigation, and also he is required to provide the authorities with certain information that – under specific law provisions – can and must be used in the legal process. A special situation in this respect is the case in which the pathologist on duty takes knowledge of transgressions of the law that are being pursued *ex officio* and must be reported to the authorities. The Romanian law in force regarding the forensic activity stipulates that “the pathologists have the obligation to inform the qualified authorities about any violation of the law that may constitute offences, because the criminal proceedings shall be initiated *ex officio*” (Art. 11, Law 271/2004).

Another particularity of forensic activity is the obligation of the pathologist to preserve the *professional secrecy* and to ensure the protection of the information, as well as to keep under secrecy the forensic documents, which must be handed to the judicial body that has requested the forensic examination. Breach of professional secrecy can prejudice the investigation, leading either to the exoneration of the offender or to the offender’s denunciation through defamation by accusing without evidence (the law approves the presumption of innocence).

As a consequence, we speak about a dichotomy and double subordination of the pathologist, both to the patient and to justice, truth and general interest, which often is superior to the personal interest of the involved individual. Nevertheless, the principle of confidentiality must be correctly respected by the pathologist as well. With few exceptions of special situations regulated by the law, when medical data can be disclosed, the information regarding the investigated person represents classified data.

The relation with the legal body is related to the ethical coordinates which are usually in the favour of the patient, as the necessity of the professional secrecy is recognized and respected by jurisprudence. The appeal of the legal body to the

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pathologist to break the secrecy can be done only in writing, stating the purpose and the goals of the specific investigations.

Failure to comply with the principle of confidentiality within the above mentioned legal boundaries can lead to the accusation of the pathologist. Depending on the situation, it may come to disciplinary responsibility, infraction of regulation and / or criminal responsibility.

The right to information

According to the European Charter of Patients' Rights, the right to be informed is one of the most important privileges of the patients. Thus, in order to benefit and control these privileges, the patients ought to be aware of them and to be active partners in the health policies. In a classification regarding the degree of information of European patients, Romania occupies the 30th place, despite the fact that the patients' rights are clearly regulated in the Romanian legislation and the state authorities enable the access of the patients to necessary information in order to capitalize these rights.(1,2)

The informed consent ensures that the right of the patient to participate in the process of decision-making is respected. This appeared due to the necessity to protect vulnerable people from being exploited. Thus, the consent must be obtained only after the patients receive the information, comprehend and analyze it, in order to make a decision. The informed consent of the patient is imperative for any medical act and it must be obtained directly from the patient or, in special cases, from the legal representative, by "substitute decision".(5,6) The information shall not to be used when there is a justified reason to believe that this would cause important prejudice, with no possibility of positive effects or if the patient specifically requires confidentiality. Thus, the acknowledged consent represents a right of the patient and an obligation of the physician, and it is essential in the prophylaxis of malpractice.

In forensic activity, the right to information is acknowledged and respected, but some particularities do exist. In the case of the medical report issued at the person's request, the consent is presumed, the patient has the absolute privilege to be informed and has the right to obtain supplementary explanations and guidance, including the possibility of medical re-examination in order to re-assess the health status, the number of days of care necessary for healing and the final result of the healing process.(7) On the other side, there are the forensic investigations which are performed at the specific request of the legal authorities and are compulsory. In these cases, the consent is relative, as the patient has the right to be informed regarding the examination and its purpose, but the results and the conclusions shall be at the disposal of the demanding body of research.

Relations between pathologist-collaborators

Forensics is an interdisciplinary science that uses specific methods to study the content of juridical regulations from a biological and medical point of view, for their better interpretation, application and development. To this purpose, it joins forces with justice, physicians from other specialties, and with qualified personnel in fields other than medical, thus resolving cases that require investigations and medical or biological assessment.

1. Pathologist - collective

Nowadays each medical examiner is part of a larger or smaller team, consisting of other medical examiners, nurses, autopsists and auxiliary personnel, which complete the specific requests of this field.

The medical examiner holds an independent status. The relationship between the forensic examiners must be of fellowship, mutual respect and even though they are autonomous, they should offer inter-assistance. The feeling of

impartiality is obvious from the ethical honesty that characterizes the relation with the patient, as well as from the forensic examiner's restraint to justify opinions that contradict forensic evidence. Forensic ethics forbids the use of independent expertise in contradiction with this profession, condemning all actions that might prejudice the work of a pathologist.

2. Pathologist - patient

The relation pathologist-patient must be not distant and impersonal, but based on honest dialogue. The examiner has the role of active receiver, in his attempt to "establish a human relationship with the patient" (Art. 51, Medical Ethical Code). It is based on trust, especially on the patient's behalf (Portes' principle), in such a way that medical competence - with the development of life sciences - represents the first obligation and the ultimate form of honesty of the medical examiner towards the patient.(4)

The principle of the human being's priority is specifically regulated by the article 2 of the European Convention on Patients' Rights. It stipulates that "interest and welfare of the human being shall prevail over the sole interest of science". The main exception is regulated by article 26, which states that "no restrictions shall be placed on the exercise of the rights and protective provisions contained in this Convention other than such as are prescribed by law and are necessary in a democratic society in the interest of public safety, for the prevention of crime, for the protection of public health or for the protection of the rights and freedoms of others."(6,8)

Consequently, the pathologist relates his work to a patient who has the absolute right to life, health, integrity and human dignity, in the case of forensic examinations on living individuals. In the case of forensic examinations of bodies, there is involved the right to respect and the right to physical integrity. The pathologist has the mission to understand and reveal the truth, not to judge the cause.

3. Pathologist - physician of other specialty

Forensic has now become an important factor of social progress through its contribution to the promotion and realization of the idea of justice and by removing the myth of the perfect crime. To achieve these goals, as well as to establish the correct diagnosis, treatment, recommendations, and recovery prognosis, cooperation between the forensic expert and other specialists is needed, by accessibility to medical registers, observation sheets, results of paraclinical investigations, as well as other medical documents of the case. The pathologist has the right to study the entire medical documentation, while the medical doctor has the obligation to ease the access of the former to the documents, following a written request. The forensic examiner must be aware of his limitations and of the fact that he does not have all the answers. He has to start not only from the results of his own forensic examination, but also from the premise that the data provided by his colleagues are objective, impartial and scientifically accurate. The forensic examiner must encourage efficient collaboration, must respect the professional decisions and autonomy of others, at least until the contrary evidence.

4. Pathologist - society

The highly society involved forensic activity, as an auxiliary of justice, has the role to contribute to the progress of social relationships. Its scientific battle against violence and ignorance represents a settling of scores against non-values, aiming at reasserting the right and the truth. The physician in general and the pathologist in particular have a tremendous responsibility towards society, because their actions have not just a limited effect on a particular patient, but influence the entire society. The moral duty of the forensic examiner to society resides in the ability to recommend certain medical

measures of safety in the case of patients who represent a real social danger, in the disclosure of information which lead to serious crimes (infanticide, drug abuse, illegal possession of weapons) which are investigated ex officio or to reveal the risk of contagious diseases that may trigger epidemics. In situations as such the principle of general welfare must prevail over the individual.

5. Forensic examiner – justice

Forensic activity is essential in the proper conduct of the judicial process, in the discovery of the offenders, in the establishing of the degree of guilt according to motivation and mental health of the author.⁽⁹⁾ All these information are taken over by the judicial authorities in order to set the connection of causality, guilt and the degree of criminal responsibility. Thus, the role of forensic medicine in the judicial act is to probe and scientifically argue any affirmation. All these aims are accomplished without altering confidentiality, within the above mentioned legal boundaries, nor the moral or physical integrity of the patient. The forensic examiner will always resolve potential conflicts in the benefit of the patient.

Official expert / recommended expert

Forensic expertise is independent from any political and social environment; any attempt – social or political – to control the scientific activity represents a manipulative try. In fact, the expertise must ensure the impartiality of the scientific evidence, which can be guided only by the true facts alone. The independence and the autonomy of the forensic activity arise from the neutrality of the expertise, which guarantees the scientific character exceeding its character of auxiliary to justice. The expertise implies several principles: independence (neutrality, impartiality, objectiveness), autonomy (guaranteed by the state, freedom of opinions facilitated by justice), clinical-university integration (permanent connection to other medical specialties).^(1,8,10) The epistemic effort of forensic expertise aims at attesting the conformity between its scientific findings and the actual facts of the case. Thus, certain particularities need to be respected: the permanent contact with the analyzed fact, moral and ethical behaviour in the doctor-patient relationship, absolute regard for the human being, asserting the objective truth through impartiality, by cleansing it from empirical or inconclusive factors, service of truth by understanding and not judging the circumstances.

The expert must be able to avoid the false positive or false negative errors in order to reach to a liable legal truth. According to methodological regulations in force regarding the forensic activity, the parts may solicit to the judicial authorities to designate a recommended expert from their lists (“the quality of recommended expert is granted, evaluated and withdrawn by the Board of forensic medicine”), in order to represent and ensure an objective expertise. The recommended expert has the same rights as the official expert.

The expertise may be completed with supplementary expertise or with a new one; in between the official examinations and those requested by the parts there can be examinations that meet the principle of contradictoriness and these must be revealed to the parts. The so-called “battle of the experts” can be activated, by expressing the scientific and judicial opinions during the confrontation with other evidences. Accessibility to the principle of judicial contradictoriness, as well as to ensure the public’s confidence in the value and limits of forensic expertise is done by the right of the parties to choose a recommended expert; it is essential that the recommended expert be endowed with a well-define moral consciousness, due to the temptations that can arise from the onerous character of the expertise. In a criminal trial, barring the parties to request a recommended expert to attend the expertise performed by an

official expert is actually a serious violation of a constitutional right. On the other hand, triggering a judicial error through an expertise error, entails correcting the prejudice, according to the regulations of the European Convention on human rights and fundamental freedoms and with the intern legislation.

As a conclusion, all the above analyzed aspects lead to the necessity of an ethical code specific to forensic activity which will take into consideration all the particularities of this field, especially that related to justice. An assembly of ethical forensic principals must take into account the fact that the forensic examiner is primarily a doctor, to whom the patient’s interest must come first. One must also take into account that certain forensic activities have a special moral burden, thus requiring outlining of specially adapted ethical principles.

REFERENCES

11. Stan C. Relația dintre bioetică și cultura medico-legală în România. *Revista Română de Bioetică*. 2008;6(1):47-51.
12. Thomas J. Ethical and legal issues in medical practice. *Indian J Urol*. 2009;25(3):335–336.
13. Joseph D, Onek, J. Confidențialitatea în psihiatrie. *Etica psihiatrică*, editia a II-a (BLOCH, S & CHODOFF, P eds), Asociația Psihiatrilor Liberi, Geneva Initiative on Psychiatry, București. 2000; p. 335-366.
14. Codul de deontologie medicală din 4 noiembrie 2016 al Colegiului Medicilor din România, publicat în Monitorul Oficial 981 din 7 decembrie 2016.
15. Lokesh P, Manthan D, Muddukrishna BS, Bhat KM, Bairy KL, Udupa N, Musmade B. Informed consent: Issues and challenges. *J Adv Pharm Technol Res*. 2013;4(3):134-140.
16. Geneva: Council for International Organizations of Medical Sciences (CIOMS) in collaboration with the World Health Organization; 2002. International ethical guidelines for biomedical research. <http://www.nccr.gov.my/index.cfm?menuid=23andparentid=17> Accessed on 18.08.2017.
17. Curca GC. Medicul între datorie și răspunderea disciplinară și juridică: confidențialitatea informației medicale. *Revista Română de Bioetică*. 2004;2(4):83-90.
18. Morar S. Confidentiality in Medico-Legal Practice. *Revista Română de Bioetică*. 2006;4(2):47-54.
19. Ordinul comun al Ministerului Justiției nr. 1134/C/25.05.2000 și al Ministerului Sănătății nr. 255/4.04.2000 pentru aprobarea Normelor procedurale privind efectuarea expertizelor, a constatărilor și a altor lucrări medico-legale.
20. Levy B. The need for informatics to support forensic pathology and death investigation. *J Pathol Inform*. 2015;6:32.