

Ethical and legal perspectives of forensic psychiatry in expert testimony

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Abstract

Knowing the ethical paradigm that bases the medicine moral code is fundamental to act not only in care but also in the expert testimony process. From a revision of the literature, we propose to evaluate the way the four fundamental ethical principles (beneficence, nonmaleficence, autonomy, and justice) apply before, during, and after the psychiatric expert testimony, be it as expert or as technical assistant. New ethical challenges have been appearing in forensic psychiatry. With the COVID-19 pandemic, technology was adopted to allow the practice of telemedicine, but debates still occur if that would suffice for an adequate psychiatric expert testimony evaluation. Considering the complexity of the area, each situation must be analyzed in an individualized and all-encompassing way and seeking help to debate the ethical and legal perspectives of psychiatric expert testimonies is recommended when necessary.

Keywords: Forensic psychiatry. Forensic medicine. Expert testimony. Ethics. Ethical theory. Morals.

Resumo

Perspectivas éticas e legais em perícias de psiquiatria forense

Conhecer o paradigma ético que fundamenta o código moral da medicina é fundamental para atuar não só na assistência, mas também em processo pericial. A partir de revisão da literatura, propõe-se avaliar a maneira como os quatro princípios éticos fundamentais (beneficência, não maleficência, autonomia e justiça) se aplicam antes, durante e após a perícia psiquiátrica, como perito ou como assistente técnico. Novos desafios éticos vêm surgindo na psiquiatria forense. Com a pandemia de covid-19, a tecnologia foi adotada para permitir a prática da telemedicina, mas ainda se debate se seria suficiente para promover avaliação pericial psiquiátrica adequada. Considerando a complexidade da área, cada situação deve ser analisada de forma individual e abrangente, sendo recomendável buscar auxílio para debater as perspectivas éticas e legais das perícias psiquiátricas quando necessário.

Palavras-chave: Psiquiatria legal. Medicina legal. Prova pericial. Ética. Teoria ética. Princípios morais.

Resumen

Perspectivas éticas y legales en la pericia de la psiquiatria forense

Conocer el paradigma ético que subyace en el código moral de la medicina es fundamental para actuar no solo en la asistencia, sino también en el proceso pericial. A partir de una revisión bibliográfica, se propone evaluar cómo se aplican los cuatro principios éticos fundamentales (beneficencia, no maleficencia, autonomía y justicia) antes, durante y después de la perícia psiquiátrica, ya sea como perito o como asistente técnico. Están surgiendo nuevos desafíos éticos en la psiquiatria forense. Con la pandemia del Covid-19, se utilizó la tecnología para permitir la práctica de la telemedicina, pero aún está en debate si esto es suficiente para promover una adecuada evaluación psiquiátrica forense. Considerando la complejidad del área, se debe analizar cada situación de manera individual e integral y, cuando sea necesario, buscar ayuda para debatir las perspectivas éticas y legales de la perícia psiquiátrica.

Palabras clave: Psiquiatria forense. Medicina legal. Testimonio de experto. Ética. Teoría ética. Principios morales.

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Principlism underlies the moral values that guide every medical act, including expert testimony. The psychiatric report, the result of this type of assessment, is legally recognized as a way of establishing the truth that exists in a given occurrence from the viewpoint of an expert¹. As such a document serves as technical evidence in legal or administrative proceedings and is intended to assist the requesting authority in its decision regarding the distribution of justice, it is essential that the evaluating psychiatrist possess specific technical capacity, know the legislation in force and be legally qualified to exercise the role of expert.

When translated into Latin, the Greek term *ethos* (“character trait”) became *mos* (“custom”). Historically intertwined, the concepts of ethics and morality have often been considered interchangeable. However, nowadays morality is considered a set of standards in force in a given group within a specific space and time, and ethics is viewed as reflection that seeks to clarify and support such a set. In other words, morality guides what one should do and ethics explains the reasons why one should do it¹.

Ethical reflections on the moral code can be based on different paradigms. In utilitarianism, for example, an action is considered morally adequate if it leads to the happiness of the greatest number of people, that is, the means do not matter so as much as the end. In contrast, the paradigm of intentionalism suggests the opposite: action is right when it is intended to be positive, even if its outcome turns out to be negative; in this case, intention is valued over results. Therefore, it is important to clarify which ethical paradigm is being used when evaluating a moral code¹.

Resolution 2057/2013 of the Brazilian Federal Council of Medicine (CFM)² consolidates several psychiatry resolutions. In the section on psychiatric expert testimony, it mentions ethics based on virtues such as impartiality, respect for humans, truthfulness, objectivity and professional qualification. However, traditionally, the philosophical reflection of medical ethics is based on the four principles of Beauchamp and Childress³: beneficence, non-maleficence, autonomy and justice. Ideally, the four principles should be aligned in the different situations of clinical practice and expert testimony. However, conflicts may occur between them and, given that

such precepts are not previously hierarchized⁴, each specific case must be individually analyzed to determine which one should prevail⁵.

In 2018, CFM published the most recent Code of Medical Ethics (CEM)⁶. This document contains 117 articles covering deontological standards, seven of which are specific to the expert testimony process—articles 92 to 98, in chapter 11, entitled “Medical auditing and expert testimony.”

Given that the purpose of health assessment differs from that of expert testimony assessment⁷, it is important that psychiatrists involved in this kind in activity in Brazil constantly seek to improve their knowledge and build capacity in the area of forensic psychiatry. To this end they must know, besides the current legislation, the fundamental ethical perspectives related to the expert testimony process, which in this article were categorized in three different moments: before, during and after the expert assessment.

Therefore, this study proposes to undertake an updated review of the subject based on data from the main bibliographic works written in Portuguese and English, in addition to sources obtained by searching for the descriptors “forensic psychiatry,” “expert testimony” and “ethics” in the databases of PubMed and SciELO, considering the period from January 1999 through December 2020.

Before the expert testimony assessment

Ethics for psychiatry expert witnesses

In a legal process that involves expert testimony in forensic psychiatry, the assessment is done by an official expert—a psychiatrist who holds a public position in which he/she gives expert testimony. In the absence of such an expert, the competent authority appoints a psychiatrist to this position, who is called “appointed expert” or “ad-hoc expert”¹. In view of the citizen’s duty to serve justice, when appointed as an expert, the psychiatrist must accept the task, unless he/she is prevented from doing so by any ethical or legal conflict⁷. The former is based on the four ethical principles that guide medical activity: beneficence, non-maleficence, autonomy and justice. The latter determines, through legislation, the reasons

for being excused from assuming the position of expert, namely: lack of technical knowledge, impediments, suspicions and legitimate reasons. Of these, impediments and suspicions concerning the expert can be alleged by any of the parties, objecting to the appointment. The ethical and legal perspectives are independent, and although they are not necessarily congruent, it is possible to compare ethical principles and current legislation, as exemplified below.

Non-maleficence

Technical knowledge

Psychiatry is a broad medical specialty consisting of different areas of expertise—child and adolescent psychiatry, psychogeriatrics, forensic psychiatry and psychotherapy, for example. Given that psychiatric assessment is mainly based on subjective and objective anamnesis and thus less dependent on complementary exams than other specialties, it is essential that the expert assessment be done by forensic psychiatrists with technical knowledge of current legislation.

Due to the specificity of the area and the differences between the roles of expert witness and treating physician, it is prudent to consider that a clinical psychiatrist will not necessarily be fully capable of giving expert testimony. Therefore, in light of the principle of non-maleficence and in order to avoid malpractice, when a psychiatrist is not technically qualified to provide the requested expert testimony, he/she may, under civil law, declare him/herself unfit for *lack of technical or scientific knowledge*⁸, and may be replaced as provided in Item I of Article 424 of the Code of Civil Procedure (CPC).

However, despite being ethically coherent, this might not be accepted by the judge as a reason for the psychiatrist to excuse him/herself from the role of expert, due to the provisions of Article 145, Paragraph 3 of CPC: *in places where there are no qualified professionals who fulfill the requirements of the previous paragraphs, the appointment of experts will be at the discretion of the judge*⁹. Therefore, despite declaring not having the best technical conditions for the function, the psychiatrist may still be appointed to exercise it¹⁰.

Justice

In order to guarantee impartiality and reinforce the ethical principle of justice, the concepts of impediment and suspicion are provided in the legislation.

Impediments are objective and easily identifiable situations that show that the expert's impartiality may be impaired. In the Code of Criminal Procedure (CPP), Item II of Article 279 provides that *anyone who has deposed in the proceedings or previously expressed an opinion on the object of the expert testimony cannot give expert testimony*¹⁰.

In CPC⁸, in turn, there are analogs. The reasons for disqualifying judges, outlined in Article 134 and cited below, are extended to experts according to Item III of Article 138, providing that a psychiatrist cannot act as an expert in proceedings: *I – of which he/she is a party; II – in which he/she has intervened as agent of a party, officiated as an expert, worked as a body of the Public Prosecutor's Office or deposed as a witness; III – that he/she knows from the original jurisdiction, having there passed sentence or decision; IV – in which his/her spouse or any relation, by blood or similar, in direct line, or in collateral line up to the second degree, is acting as lawyer for a party; V – when he/she is the spouse, relative, consanguineous or similar, of any of the parties, in direct line, or in collateral line up to the third degree; VI – when he/she is a managing or administrative body of a legal entity that is a party to the proceedings*⁸.

The cases for disqualifying the judge, extended to the expert, were expanded by Law 13.105/2015, current CPC, whose Article 144 provides that *the judge is disqualified (...) VI – when he/she is heir presumptive, donee or employer of either party; VII – in which one of the parties is an educational institution with which he/she has an relationship of employment or resulting from a service provision agreement; VIII – in which one of the parties is a client of the law firm of his/her spouse, partner or relative, consanguineous or similar, in direct or collateral line, up to and including the third degree, even if sponsored by a lawyer from another firm; IX – when taking legal action against the party or its lawyer*¹¹.

In CEM, in turn, the principle of justice, based on impartiality, is reinforced by Article 93 when it regulates that the expert cannot have *relationships capable of influencing his/her work*⁶, and when it prohibits, in Article 96, physicians from *receiving financial remuneration or recompense in amounts linked (...) to the success of the case*⁶.

Suspicious, in turn, are characterized in the criminal sphere by Article 254 of CPP, which rules that the judge is under suspicion: *I – if he/she is a close friend or capital enemy of any [of the parties]; II – if he/she, his/her spouse, predecessor or descendant, is a defendant in proceedings for an analogous fact, of whose criminal nature there is controversy; III – if he/she, his/her spouse or relative, by blood or similar, up to and including the third degree, is a claimant or defendant in a lawsuit that has to be judged by either party; IV – if he/she has advised any of the parties; V – if he/she is a creditor or debtor, guardian or custodian, of either party; VI – if he/she is a partner, shareholder or senior manager of a company with interests in the proceedings*¹⁰. Such suspicions are extended to experts, according to Article 280 of CPP¹⁰.

In the civil sphere, Article 135 of the CPC provides suspicion of the judge's partiality by criteria similar to CPP:

I – intimate friend or capital enemy of either party;

II – any of the parties is a creditor or debtor of the judge, of his/her spouse or of their relatives, in direct line or collateral line up to the third degree;

III – heir presumptive, donee or employer of any of the parties;

IV – receives gifts before or after the proceedings begin; advises any of the parties about the object of the case, or provides means to meet the expenses of the litigation;

*V – is interested in the judgment of the case in favor of one of the parties*⁸

If the psychiatrist appointed as an expert considers him/herself in suspicion of partiality for reasons not expressed in the cited articles—such as acquaintance—he/she may claim suspicion for “intimate reasons,” as set forth in the sole paragraph of article 135 of CPC⁸. It is worth mentioning that such suspicions do not apply

to the role of technical assistant, which the professional is free to exercise, given that it is, by definition, a position partial to the hiring party.

Autonomy

Legitimate reason

As provided in Article 146 of CPC⁸, the physician may also excuse him/herself from giving expert testimony for a legitimate reason, including insufficient expert witness fees, as set forth in the sole paragraph of Article 98 of CEM⁶. However, the judge or competent authority may legally declare the alleged reason unfounded, and, as provided in Article 277 of CPP, *the expert appointed by the authority will be obliged to accept the appointment, under penalty of a fine (...), except for a reasonable excuse*¹⁰. This attitude is considered to violate the ethical principle of professional autonomy, despite being legally regulated¹.

During the expert witness assessment

Ethics for the psychiatry expert witness

The expert witness assessment is especially sensitive from an ethical perspective. In the popular imagination, medicine is akin to a mission and physicians are always expected to provide care and preserve confidentiality in everything they do. However, the physician's commitment, when in the position of expert, is to the authority that appointed him/her and to society, which exempts such professionals from, for example, commitment to one of the main characteristics of treating physicians: confidentiality. Therefore, it is essential that the expert make clear to the examinee: 1) the reason for the assessment, explaining that it is an expert-examinee rather than a physician-patient relationship; and 2) the non-confidentiality of the process, explaining that after the assessment he/she will prepare a report to be forwarded to the requesting authority¹².

Regarding the use of electronic means to obtain images during the assessment, CFM Consultation Process 11/2018, CFM Opinion 39/2019, thus provides: *there is nothing in the ethical standard that impedes the expert physician from*

photographing, recording and/or filming the medical expert assessment, informing the parties that the entire record will be included in the expert witness report¹³. However, such records do not have an ethical provision to inhibit aggression or serve as evidence in any legal defense¹⁴.

During the assessment, it is important that the expert be impartial and avoid judgments, acting with absolute neutrality, without exceeding the limits of his/her duties^{6,15}. In order to provide a reliable technical opinion, the forensic psychiatrist must not be seduced by the role of lawyer or judge¹⁶.

However, it is worth mentioning that since countertransference occurs unconsciously, it is recommended that the expert be also aware of his/her own feelings in relation to the examinee, his/her background, the presiding judge and the lawyers of the parties so as not to lose objectivity when assessing and producing the opinion. Barros and collaborators¹⁶ show in their study that forensic psychiatry and psychology experts tend to feel more distant and remain more motionless when assessing sexual abusers and some experts tend to suppress their feelings and focus only on the technical aspect.

From the perspective of non-maleficence, it is important to show respect for the dignity of the examinee¹⁷⁻¹⁹, taking care not to worsen his/her physical or emotional health condition. For example, in the absence of imminent risk of aggression, escape or suicide, there is no reason to keep the examinee restrained or handcuffed during the assessment. It is essential to make it clear that loss of liberty (detention of the individual) does not mean loss of intrinsic human rights²⁰. In its Article 95, CEM prohibits carrying out *corpus delicti forensic exams on humans inside buildings or premises of police stations, military units, detention centers and prisons*⁶. CEM⁶ also prohibits the physician, whether expert or technical assistant, from interfering in the professional actions of another physician.

Steps of ethical expert witness assessment

The psychiatric expert assessment involves specific ethical cares at different times, explained and summarized in Chart 1.

Chart 1. Seven steps of ethical expert witness assessment

The expert witness should
1) Explain who he/she is ^{7,21}
2) Record the identification data of the examinee from an official document ¹
3) Explain the reason for the assessment ⁷
4) Inform about non-confidentiality ^{1,7}
5) Explain that the examinee is not obliged to undergo the expert witness assessment ⁷
6) Obtain informed consent ¹
7) Conclude the assessment only when there is enough data ²¹

In the first contact with the examinee, the physician must introduce him/herself and explain who he/she is^{5,21}. Then, he/she must record the identification data of the examinee from an official document¹, since it is the expert's responsibility to ensure that he/she is assessing the person indicated by the authority, and he/she may be penalized for conducting an expert examination on the wrong person. He/she must then explain the reason for the expert assessment¹ and warn the examinee about the non-confidentiality of that assessment, given the need to forward the opinion to the requesting authority^{1,5}.

Respecting the autonomy of the examinee and the legal principle of non-self-incrimination, the expert must inform the examinee that he/she is not obliged to undergo the expert assessment and may choose to end the assessment at any time. In case of refusal, in the light of the principle of non-maleficence, it should be evaluated whether the examinee is able to understand the possible consequences of not accepting the assessment²². If he/she shows capacity for understanding, self-determination and choice to refuse the assessment, his/her wish must be respected and the authority requesting the expert testimony must be informed²¹.

The expert must obtain the examinee's informed consent. If the latter has an intellectual disability or his/her understanding is impaired for any reason, the physician must obtain the informed consent of a responsible person. In the case of a minor being assessed, it is prudent to obtain the agreement of the examinee and the consent of his/her legal guardian.

The expert is prohibited from intervening in the professional actions of another physician or from making any comment in the presence of the examinee, reserving all observations for the report. It is also forbidden to modify instituted propaedeutic or therapeutic procedures, except, in the latter case, in situations of urgency, emergency or imminent danger of death of the patient, communicating the fact in writing to the treating physician⁶. Whenever necessary to better understand the case, the expert may request the judge for access to medical records, summon other reliable sources for an interview and authorize additional exams and tests required to fully assess the examinee's condition^{1,11}.

After the expert witness assessment

Ethics for the psychiatry expert witness

The preparation of the psychiatric report requires as much technical and ethical rigor as the other stages of the expert witness assessment. CEM⁶ recommends that the physician sign only expert reports whose examination has been done in person. In writing the report, the expert must focus on the objective of the assessment⁶, that is, in an expert testimony of criminal liability there is no reason to comment on the civil capacity and possible need for the interdiction of the examinee. It is also essential to prepare a report that is intelligible to laypersons. The reports may constitute means of evidence in the process and attention must be paid to compliance with the established deadlines. Delaying the submission of the expert report is impolite and liable to financial punishment⁸.

Ethical particularities of the technical assistant

A technical assistant is a professional hired by one of the parties with the aim of monitoring and inspecting the expert testimony process at different times. In psychiatry in particular, where signs and symptoms are often immaterial, commitment to ethics is even more important.

There are a few fundamental differences between an expert and a technical assistant. While the expert's commitment is to the authority that appointed him/her, that of the technical assistant is to the party that hired him/her, and therefore he/she is not impartial or legally subject to impediment or suspicion²³. However, it is worth mentioning that both follow the same ethical principles, especially with regard to the virtue of truthfulness². It is not the technical assistant's role to try to support untruths based on tortuous medical arguments, as stated in the CFM publication *Perícia médica: their sole obligation is to speak the truth to those who hire them, even if it is not pleasing to their ears*²⁴.

Despite not being legally prohibited, CEM⁶ does not consider it morally appropriate for the technical assistant to be the same professional in charge of the clinical or psychotherapeutic care of the patient being assessed. The professional may be trained in both functions but must choose to exercise only one of them with the same individual.

Ethics in the digital world: remote expert assessment and ethical conflicts

The need for social distancing in the fight against the COVID-19 pandemic led to the enactment of Law 13,989/2020²⁵, which authorizes the use of telemedicine, and Resolution 317/2020²⁶ of the National Council of Justice, which allowed the execution of remote expert assessment, both valid as long as the pandemic persisted.

However, the Brazilian Association of Psychiatry (ABP)²⁷ understands that telemedicine does not extend to psychiatry expert witness, given that CEM itself, in its Article 92, prohibits physicians from signing expert, audit or legal medicine reports if the examination was not carried out in person⁶. Thus, according to Valença and collaborators²⁸, from the ABP's perspective it is recommended to reschedule expert witness assessments until face-to-face examination is possible. Also according to this conception, in the understanding of the Brazilian Medical Association, Brazilian Association of Legal and Forensic Medicine, National Association of Occupational Medicine and CFM,

ethical violation occurs when expert witness assessments are conducted remotely²⁹. This is further supported by CFM Consultation Process 7/2020, CFM Opinion 3/2020³⁰, on remote or virtual expert witness assessment, which concludes that forensic medical experts who use technological resources without performing a face-to-face assessment of the examinee violate CEM and other regulations issued by CFM.

Final considerations

The moral principles that guide medical care are also applicable to the practice of expert witnesses and technical assistants, but with due adaptations to the professional's role. Knowing the ethical paradigm on which they are grounded is key to reflecting on what is considered right or not. Applied to forensic psychiatry, the principle of justice is characterized by professionalism; that of beneficence, by objectivity and impartiality; that of non-maleficence, by the psychiatrist's renunciation of acts that may harm

the dignity of humans; and that of autonomy, by informed consent, despite the non-guarantee of confidentiality³¹.

To be suitable for practice, a code of medical and forensic ethics must be *sensitive to the need to reconcile its fundamentals with dignified professional practice, in favor of patients and the community*³². However, it should not be expected that such a document, based on an inflexible framework, will be sufficient to account for all ethical assessments. Although medical morality is strongly based on the four ethical principles of Beauchamp and Childress³, there is no quick and easy recipe to assess the different situations that professionals may encounter before, during or after the expert medical assessment³³. Each of them must be analyzed broadly, based on more than a single argument. In more complex situations, it is recommended to seek assistance or supervision from other professionals in the forensic area or from ethics councils to discuss the ethical and legal perspectives of psychiatric expert testimony.

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Caio Gibaile Soares Silva, Lisieux Elaine de Borba Telles and Alcina Juliana Barros conceived the article, selected and analyzed the bibliography and discussed the findings, producing the initial manuscript, which was reviewed and modified by all. All authors approved the final version for publication.

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