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# Expert Proof of Psychic Incapacity in Marriage Cases Under Canon Law

REV. JOHN G. PROCTOR, JR.\*

The term *peritus* is canonically defined as "one whose knowledge and experience make him an authoritative specialist in some art or science."<sup>1</sup> In the Code of Canon Law (Code), then, the word *peritus* refers to a variety of official, quasi-judicial figures. But the term is used equivocally. In the Code, for example, the term can also refer to administrative figures. Canon 1520 stipulates that the ordinary of each diocese, insofar as he is able, is to appoint a *Consilium* which will assist him in the proper administration of ecclesiastical goods. This *Consilium* consists of two or three "*periti*" in civil law.

In the fourth book of the Code, the word *peritus* can refer to various kinds of experts. For example, a handwriting expert is clearly a *peritus*. In like manner, so is the medical doctor, who performs the physical examination in cases of nonconsummation. The *peritus* is also the psychiatric figure who advises the judge about the presence or absence of *amentia* or *dementia* in formal trials. Finally, a *peritus* is the expertly trained figure who instructs the judge concerning psychic incapacity in marriage cases.

The use of *periti* to define psychic incapacity in marriage cases is a meaning probably not envisioned by the Code. The Rota has articulated its persistent concern that the internal freedom necessary for marital consent not be obviated by psychological determinism.<sup>2</sup> Therefore, it is probable that when the Code refers to a *peritus* in cases of *amentia* or *dementia*, the reference is only to cases of total or partial insanity.

The development of the psychic incapacity *caput* in marriage cases has initiated a potentially new involvement for the canonical *peritus*. For purposes of this Article, then, the focus of the discussion will be limited to the use of *periti* in formal marriage cases where the possible grounds for annulment deal with the notion of psychic incapacity.

The sources of law for our discussion are:

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<sup>1</sup> W. DOHENY, CANONICAL PROCEDURES IN MATRIMONIAL CASES 258 (1938).

<sup>2</sup> Cf. *Coram Fiore*, S.R.R. DEC. No. 53, at 232-40 (1961). Fiore states that trained experts can be of help, but they repeatedly yield to false arguments and think that merely ethical requirements are juridically necessary. They confuse value judgments with legal necessity. They try to equate what is only desirable in marriage with what is essential to marriage. Thus, "sua ipsorum probitate decipiuntur." This attitude of Fiore reflects a rather consistent Rotal theme: a mistrust of experts because of their determinism.

- 1) The Code of Canon Law (Canons 1792-1805 and Canons 1976-1982);
- 2) The Instruction *Provida Mater*, Numbers 139-154;
- 3) The American Procedural Norms, Norm #17; and
- 4) The proposed code, *De Processibus*, Canons 222-233.

Canon 1792 describes the job of a *peritus*. He is to establish some fact or, diagnose or analyze the true nature of a thing. Canon 1793 establishes that it is the judge's duty to select or identify the experts. However, in suits concerning the public good, as all marriage cases are, the promoter of justice or the defender of the bond must also be heard. It is left to the sound discretion of the judge to select one, or many, experts according to the nature of the case and the degree of difficulty of the matter, unless the law itself specifies the number.

Canon 1794 merely affirms that the expert is to validate the truth. Canon 1795 stipulates that an expert's competency is established by the authoritative statement of a competent magistrate. Those who are rejected under canon 1757 as witnesses are also excluded under canon 1795 as experts. Thus, persons under the age of puberty and weak-minded persons are unfit. The excommunicated, perjurers, and persons who have been branded with infamy by a declaratory or condemnatory sentence are suspect; people of violent character and the public, bitter enemies of the party are also suspect. Those incapable of acting as experts are the parties in the case or those who take the place of the parties; the judge and his assistants; the attorney and others who assist or have assisted the parties in the case; priests, in reference to all things of which they gather knowledge from Sacramental confession, even though they have been freed from the seal of confession by will of the penitent; and finally, husbands in the case of their wives and vice versa.<sup>3</sup>

Canon 1796 states that the experts can be challenged for the same reasons as witnesses. Canon 1797 stipulates that experts are to accept the requisite office by swearing an oath. Parties to the case may be present when the expert takes the oath, and they also may be present at the execution of the expert's commission, unless the nature of the matter indicates to the contrary. Canon 1798 stipulates that the experts are to fulfill their commissions expeditiously. Canon 1799 requires the judge to outline the tasks to be undertaken by the expert. In his own discretion, the judge will define each and every item about which the expert is to testify. The judge also specifies the time period for the completion of the expert's commission.

Canon 1800 deals with handwriting experts. Canon 1801 stipulates that experts may give their opinion before the judge either in writing or orally. If the testimony is to be given orally, however, it must be transcribed immediately by a notary. In the case of written testimony, the judge may further subpoena the expert for whatever clarifications seem necessary. According to canon 1801, experts must clearly indicate the

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<sup>3</sup> Cf. Canon 1974. Blood relatives are allowed to testify in marriage cases. However, *Provida Mater* excludes blood relatives from acting as experts in article 142.

methodology they used in fulfilling their commission and the chief reasons on which they based their opinion. If there is more than one expert in the case, canon 1802 stipulates that each expert must deliver a separate opinion. If there are diverse opinions, these must be separately noted. In the case of diverse opinions, canon 1803 provides for the appointment of *peritiores* and *peritissimi*.

Canon 1804 is really the essential canon of this section. It stipulates that the judge must carefully consider not only the conclusions of the experts, even if all the experts are in agreement, but he must also weigh the circumstances that surround each case. When the judge presents his reasons for a decision, he ought to express cogently why he accepted or rejected the conclusions of the experts. Canon 1805, which is probably considered the key canon by experts, allows for equitable expenses and stipends to be paid to the experts.

From this brief overview, therefore, it can be seen clearly that the Code emphasizes judicial discretion as the controlling factor in the work of the *peritus*. The judge appoints the expert; the judge specifies the expert's tasks; the judge accepts or rejects (he is free to do either) the opinions of the experts. Although the expert enjoys a quasi-judicial, instructive role in the case, he is not a judge. The legal dictum says it all: the judge is the "*Peritus Peritorum*."

Canons 1976 through 1982 deal with the so-called corporal inspection of the parties in cases of impotence and nonconsummation. For our purposes, the only significant canon in this section is 1982. Here is the sole reference in the Code to a defect of consent in marriage cases, *ob amentiam*. The canon requires experts to do two things. They are to examine the allegedly sick person, and they are to examine the acts of the case to affirm or deny the suspicion of insanity. They must make this examination according to the canons of their profession.

Those who have examined the allegedly sick person prior to any litigation are also to be heard. They are witnesses, however, not experts. Canon 1982 is one of the clearer expositions of the difference between the role of an expert and the role of a witness. A *witness* is one who saw the allegedly sick person in his own environment before any suspicion that there might be litigation. He, therefore, testifies to the *fact* of his knowledge of the mental defect. The expert, on the other hand, does not testify to the fact of mental defect. Rather, he analyzes the facts of the case, weighs the pros and the cons, and instructs the judge on a diagnosis. The witness testifies to fact; the expert diagnoses.

Article 139 of *Provida Mater* states that the opinion of experts is required in cases of impotency and insanity. It seems to be the common jurisprudential understanding that expert testimony is required in these cases only for liceity and not for validity.<sup>4</sup> This jurisprudence is based on

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<sup>4</sup> Cf. W. DOHENY, *supra* note 1, at 259.

the fact that the appointment of an expert is basically a function of judicial discretion. Furthermore, the judge must reach moral certitude about the matter to be defined "*ex actis et probatis*."<sup>5</sup> He evaluates the facts and proofs "*ex sua conscientia*."<sup>6</sup> Thus, the opinion of experts is one of the varied means the judge can employ to arrive at moral certitude. It is interesting to note that although *Provida Mater's* language requiring the use of experts in *amentia* cases is stronger than the language of the Code, neither requires the use of experts absolutely.

Article 141 of *Provida* simply notes that the expert is appointed either upon the instance of the parties or *ex officio*. As Doheny states: "It is of particular interest to note here that only the presiding judge may appoint the experts, even in cases where the auditor decides experts are to be employed."<sup>7</sup> However, once the Tribunal decides that the matter under consideration requires experts, experts then must be appointed.

There are significant differences between article 141 of *Provida Mater* and canon 1793. Canon 1793, section 1, authorizes the judge to appoint experts; article 141 limits this power strictly to the presiding judge. Furthermore, canon 1793, section 2, demands consultation with the promoter of justice or the defender of the bond. *Provida Mater* no longer requires this consultation with the promoter.

Article 142 of *Provida Mater* discusses the qualities demanded in the *peritus*. The unfit, the suspect, and the incapable, who are debarred from testifying in virtue of canon 1757, likewise may not fulfill the functions of experts. *Provida* adds another clause: "Those likewise are to be excluded from the office of expert who have any necessary bond whatsoever of professional practice, friendship, or intimacy with either consort."<sup>8</sup> *Provida's* requirements for an expert are far more exacting than those stipulated in canon 1795. *Provida Mater* demands special and marked proficiency, in addition to probity of life and a true religious character, on the part of the expert.

Article 143 of *Provida Mater* prohibits those persons who have examined one of the parties privately—extra-judicial experts—from acting as court-appointed experts—judicial experts. In the case of insanity, however, such extra-judicial experts must be introduced as *witnesses*. Caution is to be exercised here. The persons who have examined one of the parties privately may not testify before they are released from the obligation of the bond of professional secrecy. Furthermore, they must decide prudently that they can testify. If they decide that they cannot, in conscience, prudently reveal what they have learned professionally, the court cannot force them to testify.<sup>9</sup> It is obvious that an insane party cannot release a person

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<sup>5</sup> Cf. Canon 1869, § 2.

<sup>6</sup> Cf. *id.* § 3.

<sup>7</sup> W. DOHENY, *supra* note 1, at 260.

<sup>8</sup> *Id.* at 262.

<sup>9</sup> Cf. *Provida Mater* art. 121 § 2.

from the obligation of the bond of professional secrecy. In such a case this permission is to be secured from the guardian.

Articles 144 and 145 of *Provida Mater* deal with the issue of substitution and recusal. It is sufficient to say that the parties in a marriage case have the right to object to the appointed experts. In every case, however, the disposition of such an objection is the function of judicial discretion.

Article 146 of *Provida Mater* deals with the oaths of office and secrecy administered to the expert.

Article 147 of *Provida Mater* deals with the prerequisite for an expert examination. The judge should determine in his decree each and every point with which the study of the expert is to be concerned. This task-specificity appears to be an important value in the whole process of expert examination. Thus, all the acts of the case that are necessary or expedient to enable the expert to perform his duty correctly should be sent to him. Also, the litigants have the right to submit questions. The Judge, however, has the right to reject these questions. Doheny makes a special point of emphasizing the specificity and exactitude of the expert's examination. He notes: "Ordinarily, the examinations are not satisfactorily detailed or thorough. Frequently the reports of the experts are not sufficiently comprehensive and precise."<sup>10</sup>

Article 148 of *Provida Mater* deals with the methodology of the experts' examinations and opinions. Basically, the various experts should conduct their examinations individually and submit individual reports. Any kind of collusion is strictly forbidden. In the report, signed in his own hand, each expert should clearly indicate the methodology he used in conducting the examination. He should also indicate the cogent arguments his report is based upon.

The presiding judge may decide that the examination should be conducted by a group of experts together. In such a case, divergent opinions, if there are any, should be noted. Doheny notes that in cases of insanity, the only evidence very often available will be written evidence, since it is not practical to examine people who are committed to asylums.

Article 151 of *Provida Mater* deals with expert examinations in cases of insanity. In insanity cases, one or two experts are to be appointed. Article 151 cautions that such experts, although they do not have to be Catholic, must nevertheless profess sound Catholic doctrine. Article 151 also stipulates that one expert may be sufficient at times for the examination in cases of insanity. Thus, there is a small modification of canon 1982.

Article 152 of *Provida Mater* deals with the oral testimony of experts, after they have submitted their written evaluations. Doheny seems to require a particularly rigorous oral questioning of the experts, subsequent to their written statements. In light of present tribunal practice, such rigor is probably highly questionable.<sup>11</sup>

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<sup>10</sup> W. DOHENY, *supra* note 1, at 267.

<sup>11</sup> Cf. Lefebvre, *De peritorum iudiciumque habitudine in causis matrimonialibus ex capite*

Article 153 deals with the situation where the experts do not agree with each other. In this case, a *peritior* is appointed. Such a *peritior* is another expert, eminently better qualified. Such a designation appears to be a function of particular judicial discretion. It appears that the authority of either the presiding judge or the tribunal is sufficient to decide upon the qualifications of such a *peritior*. Such a *peritior*, by the way, is supposed to make his own complete and thorough examination. Although canon 1803 does not seem to require this, *Provida Mater* does.

Finally, article 154 indicates that the judge is never bound to accept the opinions of the experts. It is the judge who must arrive at moral certitude, "*ex actis et probatis.*"<sup>12</sup> Since the testimony of experts is only one source of proof, the judge must make a cumulative decision and thus may reject the opinions of the experts if such opinions do not take into account all the circumstances of the case. It is most important to note, however, that the judge must indicate the reasons why he has accepted or rejected the conclusions of the experts.

Norm 17 of the American Procedural Norms (APN) deals with the issue of experts in psychic incapacity cases. Norm 17 reads:

In cases involving physical or psychic impotence and lack of consensual capacity, the judge, after consultation with the advocate and the defender, shall designate one or more experts to study the acts of the case and submit a written report thereon. When advisable, this expert will examine the party or parties to the case and will include in his report the results of his examination. The oral testimony of the expert is to be taken only if his report requires clarification or implementation. Following consultation with the advocate and the defender, the judge may appoint additional experts.<sup>13</sup>

Several aspects of this norm differ from universal law. The advocate is now party to a consultation about the appointment of experts. Oral testimony from the expert is only necessary at the discretion of the judge. Thus, article 152 of *Provida Mater* is modified. Finally, before *peritiores* or *peritissimi* are appointed, the judge is to consult not only with the

*amentiae*, 65 PERIODICA 107. Lefebvre says:

Qua in re quaedam notanda est difficultas. Etenim instructio *Provida Mater* insistit in responsione orali quidem facienda a perito in examine subeundo seu in peritiae confirmatione. Et contra doctores in psychiatria versati extollentes materiae frequentem substitutem nonnullarum causarum malunt scripto consignare proprias observationes etiam extra peritiam, ne periculum sit erroris in re adeo sollerti.

Ad hanc apparentem saltem oppositionem solvendam forte responderi possit psychiatarum mentem hac in re servandam esse, cum lex ipsa nonnumquam ferat regulas indicativas, quarum tenor exinde haud semper servandus sit ad unguem; aliunde lex ipsa agnoscit, quando agitur de calculis seu de rationibus, usum adnotationum, ex quo facile per analogiam idem potest admitti in aliis materiis implicatis et minutis, eo vel magis quod agatur de peritis, qui saepius vocantur et ipsi 'testes technici.'

*Id.* at 118.

<sup>12</sup> Cf. Canon 1896 § 2.

<sup>13</sup> N.C.C.B. PROCEDURAL NORMS FOR THE PROCESSING OF FORMAL MARRIAGE CASES 21 (1970).

defender but also with the advocate. It might also be noted at this point that norm 17 is an excellent example of the generally strengthened role of the advocate in the APN. As in *Provida Mater*, the promotor of justice is absent from this process.

It might be noted at this point also that the American Procedural Norm Update<sup>14</sup> (as envisioned by an ad hoc committee formed in March, 1978, to review the nearly 8 years of experience under the APN) envisions a change in norm 17. In the updated draft, norm 17 would simplify its language by obtaining expert opinion in cases involving "impotence or mental illness."<sup>15</sup> This simpler phrasing comes directly from the language of the proposed Code. The present norm 17 specifically requires the expert to study the facts of the case; this would seem to restrict unduly the use of experts to a particular stage of the case. The updated norm 17 deletes this phrase, as well as the specific mention of seeing the party or parties, for these possibilities are contained in the revised wording. Finally, whether the expert's opinion is to be written or oral, especially in cases where the expert has participated in the examination of the principals and witnesses, should be left to the discretion of the court. Thus, the new norm would read as follows:

In cases involving impotence or mental illness, the judge, after consultation with the advocate and the defender, is to make use of the services of one or more experts. Having studied the data, the expert shall offer his opinion to the court. The judge may require additional clarification; following consultation with the advocate and the defender, the judge may appoint additional experts.<sup>16</sup>

The proposed *schema* on procedural law also offers some insight about how the Pontifical Commission for the Revision of the Code of Canon Law views the issue of experts. Canons 222-233 of the *schema* treat experts. The following items are of note: canon 222, which restates the Code's 1792, relates directly to the new canon 345 in terms of the testimony of experts as a source of proof.<sup>17</sup> Canon 223 would simplify the language of the present canon 1793. The present canon 1794 is dropped in the proposed *schema*. In canon 224, which reflects the Code's 1795, the notion of the authority of a magistrate is dropped. Canon 227 drops the present canon 1800. It might also be noted that proposed canon 227, section 2, contains a new section of law. The facts and other documents of the case must be sent to the *peritus*. Proposed canon 229 drops the first paragraph of the present canon 1801. Thus, the possible conflict between requiring written or oral testimony from the expert now appears to be left totally to the discre-

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<sup>14</sup> An unpublished paper entitled simply, *A.P.N. Update*, by a committee of C.L.S.A.

<sup>15</sup> *Id.* at 6.

<sup>16</sup> *Id.*

<sup>17</sup> PONTIFICIA COMMISSIO CODICI IURIS CANONICI RECOGNOSCENDO, SCHEMA CANONUM DE MODO PROCEDENDI PRO TUTELA IURIUM SEU DE PROCESSUS 50 (1976).

tion of the judge.<sup>18</sup> The rest of the section remains substantially the same.

At this point, let us summarize. The expert is not a witness. He offers deductions or appraisals and does not just report facts. The expert is thus an intermediary probative figure. He is more significant than the witness but certainly less significant than the judge. The office of expert is a specifically canonical institute. The expert instructs the judge, that is, he compensates for a lack of knowledge on the part of the judge. There is a distinction between an extra-judicial expert, who must act as a witness, and a judicial expert, who performs his proper function at the order of the court. A court-appointed expert, that is, a judicial expert, has a favorable presumptive value. An extra-judicial expert, that is, a witness, does not necessarily have this extra presumptive value.

There are two articles on this subject that merit special attention. In *The Role of Psychiatric and Psychological Experts in Nullity Cases*,<sup>19</sup> Father Heber McMahon argues that the findings of experts, no matter how clearly they indicate incapacity, do not *ipso facto* change the legal standing of marriage. The parties are still regarded by the Church as married with legal consequences. Father McMahon then asserts an important point: "In fact, I would go further and say that it really does not bring a Tribunal very much further towards understanding the capacity of a party in a case to have had an expert give a clinical 'tag' to him. . . . [W]hat is absolutely vital is that a Tribunal know how the individual was *affected* by the condition *whatever* it is called."<sup>20</sup> Thus, the input of the expert informs the court not about a particular medical condition, but about *how* that medical condition interacted with personal capacity to give consent in a particular marriage.

Father McMahon states that it is particularly helpful, in our law, that the judge appoint the expert. We are thus spared the spectacle of competing experts arguing about the credibility of their conclusions.

Father McMahon clarifies what the expert is to be asked by the tribunal. McMahon does not feel the expert should be asked whether a particular marriage is valid or invalid. What the expert should be asked, instead, is this question: would this person's condition have had any adverse effect on his ability to appreciate a life-long relationship with a man or woman? Or perhaps, would his condition have had any effect on this person's ability to be a parent? The proper professional opinion, then, does not predetermine the judge's legal decision.

Father McMahon raises the issue of whether the *peritus* is a *testis qualificatus*. Canon 1791 gives full probative force to a *testis qualificatus*. However, (and the opinion is mine), the *peritus* is not a *testis qualificatus*. A simple comparison between canons 1791 and 1804 makes this abun-

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<sup>18</sup> Cf. note 11 *supra*.

<sup>19</sup> McMahon, *The Role of Psychiatric and Psychological Experts in Nullity Cases*, in 9 *STUDIA CANONICA* 63. (1975).

<sup>20</sup> *Id.* at 66.

dantly clear. There are two distinct institutes here. Qualified witnesses are those "who have been appointed to an office that they might observe or do, and then testify to acts observed or done in fulfillment of their office."<sup>21</sup> The usual list of examples includes such people as ordinaries, pastors, notaries, court messengers, etc., in respect to the acts they are specifically authorized to perform according to the office they enjoy. Within the technical meaning of the word, then, experts are not *testes qualificati*.

What about the probative value of the extra-judicial *peritus*, that is, the technical witness who has examined a patient for possible mental illness prior to any marital litigation? Canon 1789 stipulates how the judge is to evaluate the testimony of the witnesses who have testified. Canon 1789, section 1, states that the judge is to take into consideration the *condition of the person*. This can easily be interpreted to mean that there is a presumptively higher value to the testimony of a witness who testifies to a fact that he knows, not simply by sight or sound, but because of his expert qualifications to analyze it. Thus, the extra-judicial expert does have a greater presumptive value in the law than simply the untrained, unskilled person who testifies to mere facts or dates or other data.

Another article which merits attention appeared in the *Jurist*.<sup>22</sup> Father Martin Lavin reaches the following conclusion: "[I]t is the scientific methodology correctly employed by a medically-initialled person who has tribunal experience and canonical appreciation for the work of the tribunal. To reject such opinion or conclusions from such an expert would require serious motives on the part of the judge."<sup>23</sup> I am not sure what Father Lavin is attempting to say. If he is saying that the judge is bound to offer a serious explanation for the acceptance or rejection of an expert's opinion, he is stating the law well. However, if he is indicating that there is any kind of moral onus on the judge to accept the statement of the expert (*qua expert*), this does not seem to reflect the understanding of the various sources of law we have examined.

In conclusion, I would offer some practical observations about the use of experts. It is important to remember the canons of professional ethics by which experts are bound. Thus, the issue of confidentiality becomes very important. For those of us who operate in the tribunal context, we must remember that we cannot expect the experts to do what is unethical. Therefore, "release of information" forms and a clear explanation to any party that an expert is going to offer some kind of evaluation to the tribunal become very necessary in our dealings with experts.

An expert can do one of four things: 1) he can read the acts and proofs, analyze them, and submit a written report; 2) as part of his official examination of the case, he can offer tests and psychiatric examinations and

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<sup>21</sup> F. WANENMACHER, *CANONICAL EVIDENCE IN MARRIAGE CASES* 113 (1935).

<sup>22</sup> Lavin, *Canonical Equity Applied to Moral Certainty and to the Worth of Expert Testimony*, *THE JURIST* 316. (1975).

<sup>23</sup> *Id.* at 320.

interviews to one or more of the parties; 3) he can interview one or more of the parties to ascertain whether or not they are ready for future marriage in the Catholic Church; and 4) the expert may serve as a kind of marriage counselor to administer the psychiatric rehabilitation ordered by a court before any future marriage in the Catholic Church. It is crucial to our job as tribunal workers that we make it clear to both the parties and the experts what it is we are expecting of a particular expert in a particular situation. There is always the problem of the reluctant client. Such reluctance simply will not evaporate. However, such reluctance can be minimized if we are careful in explaining to the parties and to the experts what we are expecting.

Cases of psychic incapacity form the primary grounds for nullity cases presently undertaken by the tribunals of the United States. Therefore, the work of experts becomes crucial to our development and use of jurisprudence. If we are truly to offer a ministry of justice and reconciliation to those whose status in the Church needs clarification, then we have a valuable tool in the work of our experts. Together we must fulfill the ministry which is primary to all legal work within the Church: the ministry of reconciliation.