



Legal compliance with penalties imposed by medical specialty societies

A conformidade jurídica das penalidades impostas por sociedades médicas de especialidades

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■ ABSTRACT

Introduction: The study developed hereafter proposes to analyze the penalties imposed by Societies of Medical Specialties, entities organized in the form of civil associations, specially if they constitute legal usurpation of the competence of Professional Councils. The nature of these punishments and their effects and scope will be investigated, in order to verify whether there is effective damage to the professional practice of medicine by physicians. **Methods:** For this analysis, the applicable rules within the Brazilian legal system were raised, their systematization and apparent conflicts, in order to locate the associative punishments and their compliance with the current legal order. **Results/Conclusion:** It was verified from the study that there is no obstacle to the application of this type of sanctions, once the legal and constitutional guarantees of ample defense, contradictory and due process are respected.

Keywords: Punishment; Medicine; Liability, legal; Social control, formal. Specialty boards; Societies, medical; Surgery, plastic.

■ RESUMO

Introdução: O estudo doravante desenvolvido propõe analisar as penalidades impostas por Sociedades de Especialidades Médicas, entidades organizadas sob a forma de associações civis, sobretudo se configuram usurpação legal de competência dos Conselhos Profissionais. Será investigada a natureza dessas punições e seus efeitos e alcances, no intuito de verificar se há efetivo prejuízo ao exercício profissional da medicina pelo galeno. **Métodos:** Para a referida análise, foram levantadas as normas aplicáveis dentro ordenamento jurídico brasileiro, sua sistematização e conflitos aparentes, a fim de situar as punições associativas e sua conformidade com a ordem jurídica vigente. **Resultados/Conclusão:** Verificou-se do estudo que não há qualquer óbice à aplicação de tal modalidade de sanções, uma vez respeitadas as garantias legais e constitucionais da ampla defesa, contraditório e devido processo legal.

Descritores: Punishment; Medicine; Liability, legal; Social control, formal. Specialty boards; Societies, medical; Surgery, plastic.

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INTRODUCTION

The massification of medical training and the establishment of professional control mechanisms

The (positive) proliferation of medical professionals and the consequent massification of health care increased the number of social conflicts between the actors involved

in this relationship, culminating in the well-known phenomenon of the judicialization of health. In addition to the legal dispute between doctor and patient, as a rule, resulting from the most varied causes of erosion of the bond of trust between the parties - nowadays, there is also an increase in conflicts between the doctors themselves when their structures *lato sensu* associations serve as a mechanism for monitoring professional practice.

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In this sense, the punitive function of the Professional Councils is of relative notoriety, which holds for themselves the power duty granted by the State to determine the deontological beacons of medical action and, consequently, the respective penalties for non-observance of this objective standard of conduct. In addition, despite the secrecy that involves investigating ethical infractions, the publicity of some penalties and the feasibility of quantitative disclosure of punishments by the Councils themselves allow us to assess how much this expedient has been used against medical malpractice.

On the other hand, in addition to this aspect derived from the Indirect Federal Public Administration, another focus of social conflict that appears is the use - by Societies of Medical Specialties (notably the *Sociedade Brasileira de Cirurgia Plástica* – SBCP - Brazilian Society of Plastic Surgery) - of administrative processes with a sanctioning bias, to curb (and preventing) misconduct by its associated professionals.

Such an initiative, in addition to the dissatisfaction that it usually causes in the investigated/punished doctors, also causes uproar among jurists, who differ on the legal compliance of such sanctions, notably whether this expedient would be a usurpation of the legal power exclusively conferred on the Professional Councils.

Faced with this question, the objective of this study is to ascertain whether Societies of Medical Specialties have legal support to proceed with the analysis of professional conduct, notably regarding the possibility of attributing penalties to associated physicians. At first, it will be essential to look into the legal nature of Medical Societies of Specialties, their legal rules and the scope of their attributions.

Further on, it will be necessary to investigate the contours of the administrative procedures carried out by the associative entities; in general, the essential legal rules for their files and, specifically, how such a legal microsystem applies to Specialty Medical Societies. Next, the guidelines for determining the conduct of the members of the *Sociedade Brasileira de Cirurgia Plástica* will be addressed as an inductive method of analysis of the problem posed, detecting whether such norms are following the national legal system, especially regarding the competencies delegated to the Professional Supervisory Councils.

The legal nature of specialty medical societies, associative punishments and their legal limits

The evolution of the legal system in humanity made it necessary to create a figure capable of carrying out a business that distinguished itself from the personality of the citizens.

The collectivization of social relations itself forced this hypothetical and idealized model, which is the figure of the well-known legal entities. Carlos Roberto Gonçalves¹ adds that “*the raison d’être of the legal entity lies in the need or convenience of individuals to join efforts and use collective resources to achieve common goals, which transcend individual possibilities.*” The Brazilian Civil Code² has a clear and unequivocal guideline that it can only be configured as a legal entity, therefore having its own legal personality, those that are expressly configured in the legislation; therefore, only legal entities are:

Art. 41. The following are legal entities governed by internal public law:

- I - the Union;
- II - the States, the Federal District and the Territories;
- III - the Municipalities;
- IV - municipalities, including public associations; (Wording provided by Law No. 11,107 of 2005)
- V - other public entities created by law.

Single paragraph. Unless otherwise stated, legal entities governed by public law, to which a structure of private law has been given, are governed, as far as applicable, in terms of their functioning, by the rules of this Code.

Art. 42. Foreign States and all persons governed by public international law are juridical persons governed by external public law.

[...]

Art. 44. The following are legal entities governed by private law:

- I - associations;
- II - the companies; III - the foundations.
- IV - religious organizations; (Included by Law No. 10,825, of 12.22.2003)
- V - political parties. (Included by Law No. 10,825, of 12.22.2003)
- VI - individual limited liability companies. (Included by Law No. 12,441 of 2011)

It follows from this scenario that - in parallel with the individual work performed by the optional - medical activity is also exercised, primarily in the form of or in favor of legal entities, whether in favor of the Unified Health System provided by public entities (Union, States and Municipalities), either through hospital institutions or medical service providers (societies), or through the

Federal Council of Medicine (autarchy), or even through the most various medical specialty societies that, despite their name, are the characteristic of associations, in the exact terms of art. 198 and 199 of the Federal Constitution³.

As stated earlier, the object of study of this work will take induction as a scientific method; that is, it will start from the analysis of a specific example in order to create a general hypothesis; for that, the observation will come from the *Sociedade Brasileira de Cirurgia Plástica* (SBCP), given that it is the medical specialty society with the greatest notoriety regarding the problem now faced: the application of associative punishments.

At the outset, it is clear that the SBCP has the guise of a legal entity since it presents itself as a collectivity of individuals suitable for a specific purpose, as well as conforms to one of the detailed configurations, more specifically that of associations, since it is the union of persons for non-economic purposes (art. 53, Civil Code). The entity's own Statute⁴ provides this provision expressly in its article 1st when it adds that the *Sociedade Brasileira de Cirurgia Plástica* (SBCP) is a non-profit civil association, of a scientific nature, of national scope, registered in the National Council of Social Service of the Ministry of Education and Culture. As a legal entity in the form of an association, the SBCP – like all medical societies of specialties – comes together, without seeking economic bias, to achieve certain ends provided for in its organizational statute. The art. 3rd of that document lists such purposes:

Article 3rd - The SBCP has the following purpose at the national and regional levels:

I) Represent Brazilian Plastic Surgery and its areas of activity before the Brazilian Medical Association (AMB), of which its Department of Plastic Surgery, as well as before any other medical, paramedical, similar or similar entities, national or foreign, with which it is in your interest to maintain contact, exchange, correspondence or representation;

II) To care for the reputation and concept of Plastic Surgery, as well as to contribute to its progress, promoting the improvement of specialized knowledge and encouraging the training of specialists;

III) Provide moral and ethical-professional protection to regularly enrolled members, when requested, in order to protect the exercise of the specialty;

IV) Create and organize continuing education programs;

V) Sponsor, organize, support, guide and assist National and International Congresses and other scientific events of interest to the SBCP;

VI) Create awards, regulating their granting;

VII) Supervise and guide activities related to the exercise of the specialty;

VIII) Organize, edit and distribute publications;

IX) Accrediting Plastic Surgery Services and their areas of activity for training and specialization of doctors, as provided for in its own Regulation;

X) Provide the technical means and approval criteria for Obtaining the Specialist Title, as well as its periodic revalidation with AMB and CFM, following legal rules;

XI) According to opportunity and convenience, (i) maintain, (ii) participate and/or (iii) sign agreements and contracts with institutions linked to the SBCP, which have a care and/or scientific purpose, related to plastic surgery;

XII) Sponsor, organize and promote the provision of voluntary medical services related to plastic surgery.

Once the associative purposes have been established, it is natural that the community's interest gathered there is to achieve such goals, ruling out any conduct that meets the idealized standard.

In fact, the SBPC has a document parallel to its own Statute detailing a list of behavior standards – the Internal Rules of Conduct⁵. In this sense, and reproducing an established social model of punishment as a pedagogical mechanism, associations usually have an internal system for ascertaining responsibilities for misconduct accusations; in the case of the SBCP, such attribution is the responsibility of DEPRO – Department of Professional Defense, created by art. 65th of its Statute. Further on, the same statutory document lists – in its art. 68th – what are the possible punishments, within its legal scope, for those associates who behave in disagreement with the model created by their peers:

Article 68th - A MEMBER, ASPIRANT TO MEMBER, INTERNATIONAL MEMBER and TEMPORARY FOREIGN INTERN of the SBCP that violates the reputation and concept of the specialty, as well as infringes the rules contained in this Statute, in the Regulations and Rules of the national SBCP, will be subject to the following penalties:

I) Confidential notice;

- II) Public censorship, with publication in an official body of the SBCP;
- III) Suspension of rights and prerogatives for a period of 6 (six) to 12 (twelve) months, with publication in an official body of the SBCP;
- IV) Exclusion from membership, with publication in an official body of the SBCP, with recourse to the General Meeting.

In summary, the SBCP's reasoning – which is reproduced in several associations of an identical or different nature – is that (i) there is a meeting of people with common goals and that it is through their union that such goals will be achieved; (ii) likewise, it is in the association's interest that the members maintain an adequate posture to the standards chosen by themselves, under penalty of prejudice to the achievement of these goals; (iii) as a way of pedagogically discouraging breaches of this gold standard of conduct, the SBCP has a list of punishments for associative deviations committed by its members.

This line of ideas is reasonably simple, and it is believed that there are no controversies around the possibility that the SBCP, as well as any association, has its own mechanisms to guarantee internal organization and respect for the guidelines chosen by its own community. . The points of doctrinal tension - which already border/bordered the Brazilian Courts - usually concern the limits concerning the power to punish conferred on these legal entities.

The biggest, and undoubtedly the most notorious legal clash concerns what is conventionally called, in legal doctrine, the “horizontal effectiveness of fundamental rights.” The consecration of this theory came, in Brazil, through the judgment by the Federal Supreme Court of the Extraordinary Appeal n° 201.819/RJ6, which dealt with the incidence or not of the fundamental guarantee of the adversary and the broad defense in associative procedures of exclusion of members by violation of the statute. The Court understood that, even though the organization has a privatized character, one cannot lose sight of applying the most basic principles, rights and fundamental guarantees. In practice, the Praetorium Excelso said that *“in certain situations, the norms, especially the constitutional ones, relating to due process of law, to the adversary system, can also be invoked in these so-called horizontal relationships [between individuals].”*

It can be seen, therefore, that the principled and material incidence of fundamental rights to private relationships imposes that even private entities need to follow a minimum of legal-guarantee guidance, including in the internal process of punishment, under penalty of converting such an act into arbitrariness.

If the greatest sanctions that may be imposed on citizens within the constitutional sphere are criminal penalties, and such punishments need to be accompanied by a series of guarantees, let alone the internal administrative process that takes place within the scope of a private association, whose penalty is much less burdensome to the dignity of the human person, as well as the acts practiced are also less offensive to the community.

In summary, even in the determination of associative responsibility, it is necessary to guarantee to the associate a fair process following the institution's rules; that it is known in advance which conducts are allowed and which are prohibited and that even the list of punishments is previously described, in order to avoid surprises to those who are exercising the sacred right of defense.

The legal conformity of the coexistence of sanctioning microsystems of medical activity

Once the legal framework guiding the punitive procedure within an association has been verified, it is necessary to focus on other aspects equally relevant to understanding the cause. It is well known that the supervision of the ethical exercise of professions is the responsibility of units formed by the professionals themselves, organized in Councils created by law and maintained with fiscal resources collected from these same supervised. Specifically to Medicine, it is the Ordinary Federal Law n° 3.268/1957⁷, approved by the 1988 Constitution, which, in addition to implementing the professional qualifications necessary for the exercise of the profession in Brazil, also creates the respective Federal and Regional Councils, true autarchies under a special regime. , components of the Indirect Public Administration of the Union - in this sense, see Direct Action of Unconstitutionality n° 1.717-6 DF judged by the Federal Supreme Court. It is, therefore, legitimate that the Professional Councils – and, more specifically, the Federal and Regional Councils of Medicine – can use disciplinary power against those doctors who deviate from applied medical ethics.

Implementing the guidelines explained above, Law No. 3,268/1957 creates and regulates the exercise of the Federal Council and the Regional Councils of Medicine in Brazil. Among the various rules established in the aforementioned law, one can see – in particular – those contained in art. 15th and 22nd of the aforementioned diploma, here they are:

Art. 15. The Regional Councils are responsible for the following:

[...]

c) to supervise the exercise of the medical profession;

d) knowing, appreciating and deciding on matters relating to professional ethics, imposing the applicable penalties;

Art. 22. The disciplinary penalties applicable by the Regional Councils to their members are as follows:

- a) confidential warning in a reserved notice;
- b) confidential censorship on reserved notice;
- c) public censorship in official publications;
- d) suspension of professional practice for up to 30 (thirty) days;
- e) revocation of professional practice, ad referendum of the Federal Council.

§ 1 Except in cases of manifest gravity that require the immediate application of the most serious penalty, the imposition of penalties will obey the gradation of this article.

It was seen lines ago that it is the right of the citizen to gather collectively in their own entities, to be organized by the associative model, and that such association, in the effort to protect their common interest, can punish associates who deviate from their standard of conduct. As the case in question deals specifically with associated specialist physicians, the SBCP has a list of punishments that has a certain similarity – not to say almost complete identity – with those sanctions imposed by the CFM/CRM. Hence, is there a legal shelter for the SBCP's performance? The answer, under the prism above, is positive.

The core of the debate takes place in two perspectives: the legal nature of the act of acceptance of associative/deontological norms and, mainly, the scope of the punishments eventually imposed by such bodies. The SBCP, as fully explained, is a private association that brings together doctors who are specialists in plastic surgery, per its statute.

Practicing medicine, or declaring yourself as a specialist in plastic surgery, does not need to be associated with the SBCP or not; being a member of the association is not an essential requirement for the development of work activities, either as a doctor or as a propagator of their specific knowledge in a specialty, since the completion of a medical residency in a training program recognized by the Ministry of Education and the National Commission of Medical Residency guarantees such degree (article 6, Federal Law n° 6.932/1981⁸). On the other hand, the Brazilian legal system does not allow a citizen to practice medicine in Brazil without being enrolled in a Regional Council of Medicine, under penalty of incursion into the crime provided for in art. 283 of the Penal Code⁹.

Reasoning retroactively, a punishment carried out by a Professional Council to the doctor necessarily has consequences for his work since a more serious penalty - such as suspension or revocation of the registration - implies an absolute impediment (except for occasional exceptions) for the medical activity. From another angle, an associative punishment, even if the most severe of all (expulsion from the SBCP staff), cannot prevent - per se - this same doctor from continuing to act in his office nor failing to disclose himself as a specialist.

This subtle, but essential difference, denotes that there is no usurpation of the SBCP in the prerogative of the CFM/CRM to investigate eventual deontological deviations. In fact, the conclusion adopted in one sphere (deontological or associative) does not necessarily imply a hierarchy and obedience to the conclusion of the other, given the lack of legal provision in this regard. That is to say: an associative condemnation does not imply an automatic ethical-professional condemnation and vice versa since there is no legal provision that commands in this sense. However, art. 71 of the SBCP Statute, even without legal support, allows the SBCP to replicate the penalties imposed by CRM within its organization automatically. The absence of details on the correlations and procedure, however, raises questions about the validity of this point.

This is because, despite different opinions on the doctrine, the similarity of punishments does not inexorably imply the impossibility of applying said penalty; the legislation is abundant in this sense. By way of example, criminal law – the *ultima ratio* in the legal system, whose power to punish reaches the bodily sphere of being inclusive – has a fine penalty among its afflictions (art. 32, CP). In the same way, the civil system can also expedient pecuniary aggression to the desidious doctor (art. 789, CPC) and the associative sphere itself. Although deontologically, Medicine does not contain an ethical pecuniary punishment, other Professional Councils do, such as the Brazilian Bar Association itself (art. 35, EOAB¹⁰).

In the same line of ideas, would not the partial punitive identity be a single and absolute criterion to configure the usurpation of administrative power, notably because the SBCP penalties are restricted to the merely associative scope. In contrast, the ethical-professional penalties reach the exercise of the medical profession, whether within the scope of the specialty or not. Hence, it is said that, by way of example, a suspension of associative rights with the SBCP cannot resemble, except in the nomenclature, the effects of a professional suspension determined by the CRM, given the manifest discrepancy of the effects of said penalties to the rights of the doctor and their professional practice.

Without this interference in the sphere of others' attributions, once the due legal process is respected and the adversary and full defense are offered to the associate, the conclusion of misconduct and the imposition of an associative penalty does not represent, in itself, any legal deviation, serving since it is yet another legal instrument for the inspection of medical action and its incessant search for excellence.

CONCLUSION

The proposed study analyzed the conflicting phenomenon that has been gaining support in society, leading to the practice of medicine, which has been the target of lawsuits and other litigious forms due to estrangement in the doctor-patient and doctor-doctor relationship. It was seen that the medical class is also organized in specialty societies, which are nothing more than associations provided for and described by the current civilist legislation. It was pointed out, in turn, that the social organization is a collective tool for achieving objectives and that, in order not to harm the common interest, sanctions are allowed within the entity, provided that the current norms are respected and the constitutional rights of broad defense and contradictory. It also analyzed the fact that many penalties have an identity of nomenclature but with effects that are not always identical, whether in the civil, criminal, deontological, associative and administrative spheres. The divergence in the effects produced between such penalties allows us to assess whether or not there was an invasion of legal competence between such spheres of punishment, which is why associative punishment - notably those imposed by the SBCP - for not inflicting the professional practice of the physician, cannot be considered as usurpation of the power to punish of the Professional Councils.

COLLABORATIONS

CVSP Research, Writing - Preparation of the original

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