Revista Bioética
Print version ISSN 1983-8042 | On-line version ISSN 1983-8034

Rev. Bioét. vol.32 Brasília 2024

# Judicial reversal of sentences imposed by the Regional Council of Medicine

*Camila Kitazawa Cortez* [1], *Aluisio Marçal de Barros Serodio* [1], *Gaspar de Jesus Lopes Filho* [1]

**1.** Universidade Federal de São Paulo, São Paulo/SP, Brasil.

## Abstract

This study proposed to identify and analyze the basis of judicial decisions that declare the nullity of the ethical-professional process and/or the penalty applied by the Regional Council of Medicine of the state of São Paulo, as well as to investigate the proportion of legal actions granted, in the first instance, and relate the origin of the action with the type of ethical penalty, in the period between 2008 and 2018. The study was of a retrospective documentary type, using a qualitative and quantitative approach. The quantitative data underwent a descriptive statistical approach, and the qualitative data underwent content analysis. Of the 78 actions proposed to review the ethical-professional process and/or the penalty applied, 19.23% of valid sentences were identified. Six categories emerged as the basis for the decision to recognize nullity, two of which stand out: lack of justification for the decision and denial of due process.

**Keywords:** Ethics, medical. Ethics, professional. Codes of ethics. Bioethics.

## Resumo

**Reversão judicial de penas aplicadas por Conselho Regional de Medicina**

Este estudo propôs identificar e analisar a fundamentação de decisões judiciais que declaram a nulidade do processo ético-profissional e/ou da pena aplicada pelo Conselho Regional de Medicina do Estado de São Paulo, assim como averiguar a proporção de ações judiciais procedentes, em primeira instância, e relacionar a procedência da ação com o tipo de pena ética, no período compreendido entre 2008 e 2018. A pesquisa realizada foi do tipo documental retrospectiva, empregando-se abordagem qualiquantitativa. Os dados quantitativos foram submetidos a abordagem estatística descritiva, e os qualitativos passaram por análise de conteúdo. Do total de 78 ações propostas para revisão do processo ético-profissional e/ou da penalidade aplicada, identificaram-se 19,23% de sentenças procedentes. Seis categorias emergiram como embasamento da decisão de reconhecimento de nulidade, destacando-se duas: ausência de fundamentação da decisão e cerceamento de defesa.

**Palavras-chave:** Ética médica. Ética profissional. Códigos de ética. Bioética.

## Resumen

**Anulación judicial de las sanciones impuestas por el Consejo Regional de Medicina**

El objetivo de este estudio fue identificar y analizar los fundamentos de las decisiones judiciales que declaran la nulidad del proceso ético-profesional y/o de la sanción aplicada por el Consejo Regional de Medicina del Estado de São Paulo, así como conocer la proporción de acciones judiciales estimadas en primera instancia y relacionar la estimación de la acción con el tipo de sanción ética, en el período comprendido entre 2008 y 2018. La investigación fue de tipo documental retrospectiva, con enfoque cualitativo-cuantitativo. Los datos cuantitativos se sometieron a un enfoque estadístico descriptivo, y los datos cualitativos se analizaron mediante análisis de contenido. Del total de 78 demandas interpuestas para revisar el proceso ético-profesional y/o la sanción aplicada, el 19,23% de las sentencias fueron estimatorias. Surgieron seis categorías como fundamento de la decisión de reconocer la nulidad, entre las que destacan dos: falta de motivación de la decisión y indefensión de la defensa.

**Palabras clave:** Ética médica. Ética profesional. Códigos de ética. Bioética.

Research

The authors declare no conflict of interest.

## Regional Councils of Medicine and their responsibilities

The Regional Councils of Medicine (CRM), through delegation granted by Law 3,267 of September 30, 1957 [1], have the prerogative to supervise physicians and apply sanctions to them. In this way, physicians and medical companies duly registered in the CRM of their states have legal authorization to practice the profession and, consequently, are subject to inspection of their ethical conduct. The Regional Council of Medicine of the State of São Paulo (CREMESP) is the largest in the country, currently responsible for the ethical and professional supervision of more than 172 thousand physicians [2].

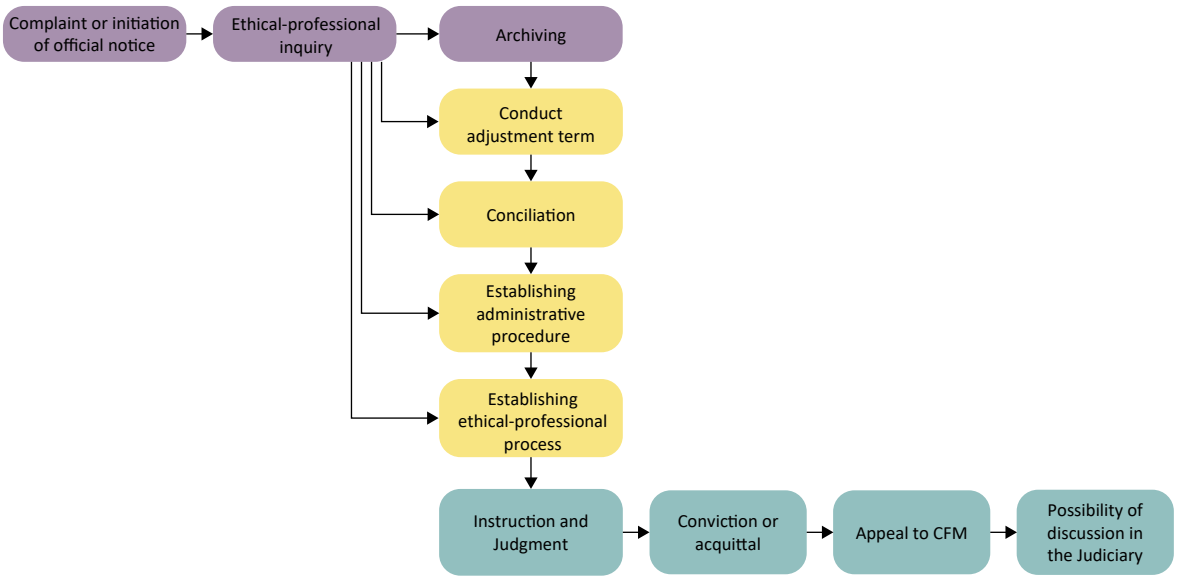
The Federal Council of Medicine (CFM) is hierarchically superior and serves as an appeal body for judgments handed down by the CRM. It is also responsible for creating standards that regulate the profession, the most important of which are contained in the Code of Medical Ethics (CEM) [3].

In Brazil, ethical-professional inspection of physicians can occur *ex officio*, i.e., at the instigation of the Council itself or through a complaint. CRMs must investigate any complaints that come to their attention, even if the complainant withdraws during the procedure. This is because the Councils are committed to the truth and protecting society, and not to those who presented the facts.

Once the complaint is received, an investigation is initiated to determine whether or not there is evidence of a violation of the CEM. If there is no evidence, the investigation is archived. However, if there is one, among the possible outcomes, the most common is the opening of an ethical-professional process, whose conduct is governed by the Code of Ethical-Professional Process, also prepared by the CFM [4].

Figure 1 schematically shows the flow of procedures between the initial complaint and the possible outcomes.

**Figure 1.** Flow of procedures between the initial complaint and possible outcomes




In case of conviction after the ethical-professional process, the physician is subject to punishment with one of five penalties:

1. confidential warning in reserved notice;
2. confidential censorship in reserved notice;
3. public censorship in official publications;
4. suspension from professional practice for up to 30 days;
5. revocation of professional practice, *ad referendum* of the CFM.

In private sentences (1 and 2), publicity is restricted to the physician through a letter without

any note on the ethical background check. In public sentences (3, 4, and 5), publication is in a widely circulated newspaper and the official gazette, with dissemination to all citizens [5].

Law 3,268/1957 [1], in addition to establishing the penalties applicable to physicians, also regulates how they should be imposed. There will be compliance with the gradation of penalties, starting from the least serious to the most serious, except for cases of manifest seriousness, in which the direct application of a more serious penalty to physicians with no prior record is permitted.

A relevant fact is that, despite the significant number of complaints in recent years, physicians who violate the profession's ethics are still the minority in our society. In São Paulo, out of 172,063 registered physicians, only 492 were penalized in 2022 [2].

For example, in 2022, 798 physicians were judged by CREMESP in 587 cases. Of this total, 492 (61.65%) were convicted of some ethical-professional infraction with the consequent application of a penalty [2]. Usually, the convicted ones appeal to the CFM, in compliance with the double degree of jurisdiction, for an attempt to reverse or reduce the sentence.

## Review of the decision of the ethical-professional process by the Judiciary

In cases where the appeal to the CFM remains unsuccessful, the Judiciary can be used to discuss the procedure's legality and/or constitutionality. Supervisory authorities, i.e., professional councils, follow the rules of public law, according to which the penalty applied and/or the regularity of the procedure can be challenged in court [6].

Notably, two legal instruments are used for this type of demand: the writ of mandamus and the discovery process—the latter, in turn, can be proposed through a summary or ordinary/common procedure. Such actions must be proposed in the location where the public administration body responsible for the judgment is based. Thus, considering that the CRM and CFM together form a federal authority, the Federal Court of each state is competent to judge this type of action [7].

It should be noted that, in this type of questioning, only possible deviations, abuses, or inaccuracies in the disciplinary process are analyzed, and it is not up to the Judiciary to make a value judgment on whether it is or not an unethical conduct. Both doctrine and jurisprudence have already consolidated this understanding, which has as its theoretical basis Montesquieu's separation of powers, i.e., the Judiciary cannot delve into the merits of the acts of other powers, as a guarantee of the democratic rule of law [8].

However, the independence of the Powers and the division of functions between the bodies is not absolute [8], so deviations, excesses, and lack of motivation can be questioned. In addition to the formal analysis of administrative acts, Law 9,784/1999 [9] provides guidelines that must be observed in these processes, among which proportionality (adequacy between means and ends) and motivation (indication of the factual and legal assumptions that determine the decision) stand out.

Failure to comply with these principles can lead to unreasonable or disproportionate penalties, giving rise to judicial review. The application of the penalty is within the concept of administrative discretion, which gives the administrator (CRM) a certain freedom to carry out the act. The greater the discretion of the act, i.e., the greater the administrator's freedom, the more control will be granted to the Judiciary [10].

Therefore, the punished physician may no longer have the sentence executed, which removes the effectiveness of CRM decisions when the proposed action is judged valid, i.e., if the judge agrees with the request for the illegality or unconstitutionality of the procedure processed in the ethical sphere.

In this research, the reasons that led to the recognition of the nullity of a process or an imposed sentence were studied and extracted from several legal proceedings within a period. It should also be noted that when searching in the leading banks of dissertations, theses, and articles, including PubMed, EMbase, LILACS, LLMC Digital, Congress.gov, Scopus, and Web of Science, no research was found addressing this object of study, but only related topics.

This article aims to investigate the proportion of legal actions proposed in the first instance and relate the origin of the action with the type of ethical penalty applied. Furthermore, the reasons presented by the first-degree judge when declaring the nullity of the ethical-professional process and/or the penalty applied by CREMESP are analyzed.

## Method

This is retrospective documentary research with a qualitative and quantitative approach. The data were collected in the electronic public files of the Federal Court of São Paulo [11] and the Federal Court of the Federal District [12], i.e., federative units chosen considering the addresses of the headquarters of CREMESP and CFM.

Cases processed on paper from 2008 to 2018 were selected, as they had first-instance court decisions due to the longer processing time. Only the so-called common procedures, such as the writ of mandamus and summary procedure, were maintained, as they cover the type of action that is the subject of the research.

The collection was carried out as follows:

1. On the Federal Court of São Paulo website [11] (Forum – São Paulo capital – Civil) – "Regional Council of Medicine of the state of São Paulo" on the defendant's side;
2. On the Federal Court of the Federal District website [12] – "Regional Council of Medicine of the state of São Paulo" on the defendant's side; and
3. On the Federal Court of the Federal District website [12] – "Federal Council of Medicine" on the defendant's side.

Letter precatory, interlocutory appeals, unnamed precautionary measures, popular action, notification, accountability action, enforcement of judgment, public civil action, protest, *habeas data*, civil petition, and letter of order were excluded from the searches. The common procedure, writ of mandamus, and summary procedure were maintained. Actions whose object is the discussion of the ethical-professional process were separated, from which those judged valid were selected, where the procedure and/or penalty nullity was declared in the first instance.

For analysis, the number of legal cases and the proportion of valid decisions were presented according to a descriptive statistical approach, and the correlation of these decisions with the type of ethical penalty applied. The basis for the plaintiff's judgment underwent content analysis [13]. Two researchers carefully read each sentence separately, creating analysis categories (*a posteriori* categorization) based on the sentence's main argument. A third researcher resolved discrepancies in the categorization of sentences.

## Results and discussion

### *Quantitative data*

Through the searches described above, 731 processes were located, of which 214 were related to common procedure, writ of mandamus, and/or summary procedure, and only 78 concerned an ethical-professional process. Of the latter, only 15 had successful sentences in the first instance, i.e., they recognized the nullity of the ethical-professional process or the penalty applied, which means a 19.23% success rate (Table 1).

**Table 1.** Number of cases located (Federal Justice of SP and DF, 2008 to 2018)

| Legal Actions | No. |
|---|---|
| Total processes located | 731 |
| Common procedure, writ of mandamus, summary procedure | 214 |
| About ethical-professional process | 78 |
| Sentences considered valid in the first instance | 15 |

Of the 15 sentences that obtained a favorable decision in the first instance, 14 directly or indirectly questioned the application of the penalty. Only one case was proposed before the trial, so there is no express mention of a penalty in the sentence. Table 2 shows the penalties related to the sentences deemed valid.

**Table 2.** Penalties related to sentences deemed valid (Federal Justice of SP and DF, 2008 to 2018)

| Type of penalty | Number |
|---|---|
| Confidential censorship in reserved notice | 1 |
| Public censorship in official publications | 8 |
| Suspension from professional practice for 30 days | 2 |
| Revocation of professional practice | 3 |
| There was no penalty imposed (proceeding proposed before trial) | 1 |

Of the 14 penalties subject to judicial inquiry, 13 were public, and only one was private. It should be noted that the 15 sentences researched were appealed in the second instance, i.e., they were sent for reanalysis by the Federal Regional Court of the 3rd Region (São Paulo) or the 1st Region (Federal District). Four appeals remain pending trial, which makes it impossible to produce statistics on second-instance trials.

Of the total of 11 sentences whose appeals have already been judged, only four were reversed, i.e., the Court recognized that there was no nullity, unlike the judge of the first instance. It was not assessed whether the cases were forwarded to higher courts.

The data demonstrate that, in the period covered, CREMESP mainly had successful results when its decisions were submitted for analysis by the Judiciary. It is essential to highlight that the number of decisions questioned is meager in the general context of decisions made by CREMESP. For example, between 2018 and 2022, 3,770 physicians were tried in 2,790 cases, i.e., on average, 754 trials per year [2].

Even though the period studied in this research is different (2008 to 2018), assuming that the number of judgments is the same, the rate of judicialization and origin of these actions is minimal, which indicates that, for the most part, decisions issued by CREMESP have been efficient. Despite this being a low number compared to the total number of decisions made by CREMESP in ethical-professional processes, the results indicate the possibility of improving processing and judgment to further improve the effectiveness of decisions.

## *Qualitative data*

After reading each sentence, the main arguments brought by the judges were identified, and the following categories of analysis were created:

1. Lack of competence of CREMESP (Sentence 1);
2. Lack of justification for the decision (Sentences 2, 11, 13, and 14);
3. Denial of due process (Sentences 3, 8, 12, and 15);
4. Failure to comply with the principle of proportionality in the application of sentences (Sentences 4 and 9);
5. Prescription (Sentence 5);
6. Presumption of innocence (Sentences 6 and 7);
7. Failure to comply with the principles of isonomy and reasonableness (Sentence 10).

### *Category 1: Lack of competence of CREMESP*

*Even though the act that generated the penalty involves medical professionals, it falls outside the responsibilities of the class council, as it is conduct adopted within the scope of the administration of the health plan operator company. Any irregularity in this conduct, while taken within the scope of administration, may thus be considered within the scope of the contractual, civil relationship between physician and company* (Sentence 1).

Art. 2 of Law 3,268/1957 establishes that *the Federal Council and Regional Councils of Medicine are the supervisory bodies of professional ethics throughout the Republic and, at the same time, judges and discipliners of the medical profession, being responsible for ensuring and working by all means within its reach, for the perfect ethical performance of medicine and for the prestige and good reputation of the profession and those who practice it legally* [1].

Therefore, only some facts related to physicians must be submitted for consideration by the Councils of Medicine, but only those that relate to the exercise of the profession. Even if they are absolutely reprehensible facts or acts, including those corresponding to the Penal Code, they should only be investigated if they are

related to the individual in his role as a physician. Upon declaring its inability to investigate, the Council of Medicine must forward the report to the competent body.

In the case addressed by Sentence 1, despite the agents being physicians, the judge understood that the facts discovered were in the area of administration of the health plan operator and not in the practice of medicine, which is why he declared the nullity of the ethical-professional process, as well as the penalty applied. In this sense, it is not just an inadequate sentence or an act that needs to be redone but a null process from its origin, as it should not have existed in the first place.

### *Category 2: Lack of justification for CREMESP's decision*

*A reading of the grounds set out in both the decision of the Regional Council of Medicine of the State of São Paulo and also in the decision of the Federal Council of Medicine reveals that none of them indicated any concrete and determined facts falling within the conduct described in the provisions considered to be violations of the Code of Medical Ethics.* [...] *they limited themselves to exposing, in the justification of the judgments they handed down, the mere generic and abstract enunciation of the conduct* [...], *without specifying, concretely, based on empirical data* [...] *the determined facts that characterized such infractions* (Sentence 11).

All acts carried out by the Councils of Medicine are included in administrative acts. Therefore, they are subject to the guidelines established in Law 9,784/1999 [9], among which the motivation requirement for the act stands out, indicating the facts and legal foundations.

Motivation is essential for citizens to clearly understand the arguments that led the Council of Medicine to decide. Failure to indicate the motivation for the administrative act is a breach of law. It may also make control by the Judiciary Branch unfeasible, leading to the declaration of the decision's nullity.

Motivation assumes particular and transcendental relevance when the administrative act deprives someone of their rights, restricts freedoms, or limits movements [6]. However, motivation alone is not enough; it must be clear and congruent with the decision. This is one of the minimum guarantees of the democratic rule of law so that the defendant is not the target of personal, political, or other motivations that divert the act's purpose.

Bringing these concepts to the scope of the study, when deciding on the physician's guilt and the application of a penalty, the Council of Medicine must present, based on the decision, all the documentation necessary for the Judiciary's analysis. Otherwise, there is a real risk of the decision being annulled.

It should be noted that the norm that governs the conduct of ethical-professional processes and the dynamics of trials expressly establishes the need for adequate justification, both when describing guilt and the articles imputed and for the dosimetry of the penalty [4].

In the four sentences studied in this category, the lack of justification motivated the first-degree judge to determine the nullity of the ethical-professional process. Of the three sentences that have already been reevaluated in the second degree, there was a reversal—i.e., removal of the occurrence of lack of justification – in only one; in the others, the nullity was maintained.

### *Category 3: Denial of due process*

*From the report above, there is no doubt that the author had made, in his previous defense, a request for a new medical examination to be carried out, this time with his participation. The request remained forgotten until the legal department pointed it out. In response, the Instructing Counselor rejected the production of the expert opinion because "the evidence collected in the files was sufficient." The opinion of the legal department and the decision to reject the evidence took place when a date had already been designated for trial. This sequence demonstrates that the procedure underwent a phase reversal. Procedure compliance is the least that can be done to guarantee a fair trial* (Sentence 12).

One of the constitutional guarantees that cannot be renounced is providing all

means of defense for the accused physician. The 1988 constituent provided, in its Art. 5, item LV, that litigants in judicial or administrative proceedings and defendants, in general, are guaranteed contradictory and total defense, with the means and resources inherent to it [7].

From broad defense derives the right of the accused to participate in all acts of the process actively: to be aware of the facts that are being imputed to them, to produce evidence, to be present at trials and hearings, and to make allegations. When taking the case to trial, steps are occasionally omitted or reversed to avoid a statute of limitations, which generates nullity due to non-compliance with the broad defense. The doctrine calls this action a denial of due process.

Therefore, a reasoned justification must be presented when rejecting a request made by the person being investigated. When denying someone from producing evidence or being present at the trial, as in the cases now dealt with in the sentences analyzed, the justification must be sustained, and evasive or generic decisions must not be accepted. Therefore, the rule to be followed is that all means of defense are provided, and all process phases are duly observed, making it possible to reject requests made on an exceptional basis only if there are justification and plausible grounds.

In this category, the second instance judgment maintained the decision of denial of due process on the three sentences already judged.

## *Category 4: Failure to comply with the principle of proportionality in the application of sentences*

*The plaintiff complains against the application of the penalty of revocation, as it was attributed to her based on the criterion of gradation of the penalty due to previous convictions. She alleges that the application of such a penalty was not substantiated, with no indication of these previous convictions or their definitiveness (res judicata). At this point, I understand that the Plaintiff's non-conformity is valid since in order for the maximum penalty foreseen to be applied to her (revocation of professional practice), it would be necessary to specify, in the operative part of the decision, the antecedents that would justify the application of this penalty. I also consider that the revocation of professional practice was applied disproportionately to the conduct considered in isolation* (Sentence 9).

The principle of proportionality's primary purpose is to control and limit the actions of the Public Power. The maxim of proportionality is expressly stated in some countries' legal systems; in others, it arises from the rule of law itself [14]. Some jurists tend to recognize that the constitutional status of proportionality must be sought in the due process clause, provided for in Art. 5, item LIV, of the Federal Constitution [7].

The principle of proportionality unfolds into three aspects: proportionality in the strict sense, adequacy, and enforceability [15]. The criteria of proportionality allow for assessing the adequacy and necessity of a particular measure and inferring that others less harmful to social interests could not be carried out in replacement of that undertaken by the public authorities. It is about seeking a compromise solution in which, in certain situations, one of the principles in conflict is more respected, seeking to disrespect the other as little as possible and never disrespecting it.

When the Council of Medicine understands that the reported physician has violated medical ethics and is entitled to a penalty, the process must observe current norms and constitutional principles, balancing the public interest (of society) and the private interest (of the physician).

It can be seen that there is no interference from the Judiciary regarding whether or not the physician is culpable, but only regarding the appropriateness of the penalty applied from the perspective of proportionality. It is also worth noting, as well mentioned by the magistrate in Sentence 9, that the penalty gradation system does not represent an option for the administrator but rather a linked criterion brought by law, as in any punitive system, the dosimetry of the penalty must be applied in a manner to make it reasonable and proportionate to the offense committed.

Law 3,268/1957 [1] expressly brings this obligation by providing that, as a rule, the application of the penalty to the physician must comply with the gradation of penalties

(penalty A, then penalty B, and so on according to the physician's recurrence). Only in cases of manifest seriousness, duly demonstrated, is it justifiable to apply a more serious penalty without observing this gradation [1].

The Code of Ethical-Professional Process supports this understanding, stipulating that, when applying the sanction, the vote must contain adequate grounds for dosimetry [4]. When the intention is to select and punish prohibited behaviors, the state must obey legal certainty and present coherence and unity of criteria. It should be noted that Sentence 4 was reversed in the second instance by the Federal Regional Court, which understood that the principle of proportionality was observed.

### *Category 5: Prescription*

*Therefore, in the case under examination, the prescription of the punitive claim is evident since the count began on 04/09/2003, and the decision to apply the suspension sentence took place only on 08/14/2009. In other words, between the date of the defense's presentation and the trial, more than five* (five) *years elapsed* (Sentence 5).

The prescription of punitive claims originates from the principle of legal certainty, as no one can be subjected to judicial and/or administrative actions for an indefinite period [6]. Punitive claims can be conceptualized as the loss of the right to punish on the part of the State due to the passage of time established by law. While the Code of Ethical-Professional Process establishes that this period is five years (five-year statute of limitations), some peculiarities on the subject need to be clarified.

The first point to be brought up is that the counting of this period starts from the Council of Medicine's knowledge of the facts and not from their occurrence. This guideline was taken from Law 6,830/1980 [16], which also establishes that throughout the five years to carry out the investigation and eventual application of a penalty, there are two interruptive milestones, i.e., the period resumes its count from the beginning: notification of the professional and written defense presentation.

It turns out that the Code of Ethical-Professional Process in its latest editions also includes as an interruptive cause the appealable conviction decision, not provided for in Law 6,830/1980 [16], but in Law 9,873/1999 [17], which deals with the statute of limitations for the exercise of punitive action by the federal public administration, direct and indirect.

Therefore, according to the ethical, procedural standard, three causes interrupt the statute of limitations, i.e., upon its occurrence, the period is counted again from the beginning:

1. By express knowledge or summons to the accused, including through a notice;
2. By the prior defense protocol; and
3. By appealable conviction decision.

The first two are based on Law 6,830/1980 [16], while the third is based on Law 9,873/1999 [17]. This information is relevant because the judge precisely used this argument when recognizing the prescription: only Law 6,838/1980 would apply to ethical-professional processes, as it was created for this specific purpose.

There is a rule in law called the Introduction Act to Brazilian Law Rules [18], which determines that if there is a conflict between a general and a special rule that deals with the same topic, the special law provisions prevail. By this reasoning, therefore, the judge understood that the last interruptive cause in question, i.e., the date of the appealable conviction decision, could not be considered, leaving the summons of the accused and the presentation of a prior defense as valid interruptive causes.

Thus, counting the five-year statute of limitations, five years have passed since the last interruptive cause was considered (presentation of a prior defense), which led to the recognition of the prescription and the annulment of the sentence imposed on the physician. This issue is not pacified, as are many other legal issues with contrary understandings. Freitas [19] understands that, due to the analogous application of the principles and norms of criminal law to the ethical sphere, due to the punitive nature of both, the first-instance decision would once again interrupt the prescription.

Regardless of this discussion about the interruptive causes of the ethical-professional

process, it is inevitable that the prescription period must be observed. Once the five years have been exceeded, counting from the occurrence of the last cause, there is no other way except to recognize the prescription. Another relevant aspect worth remembering is the institute of intercurrent prescription, which occurs when the ethical-professional process, or inquiry, remains pending for order or judgment for more than three years and must be archived.

Both prescriptions, whether five-yearly or intercurrent, when detected by the Council of Medicine, must be recognized *ex officio*. Otherwise, the holder of this right may file a judicial measure to recognize the occurrence, thereby archiving the case definitively.

It should be noted that Sentence 5 was reversed in the second instance by the Federal Regional Court, which understood that the punitive claim was not prescribed and validated CREMESP's decision.

### *Category 6: Presumption of innocence*

*In short, there is no evidence in the records of the ethical-disciplinary process to reveal that the author was responsible for the infractions, whose burden lies with the Regional Council of Medicine of São Paulo. It was not up to the author to produce proof of her innocence. Both proving the materiality of the infraction and its authorship were the burdens of the Regional Council of Medicine of São Paulo* (Sentence 6).

Following the entire constitutional framework of guarantees and fundamental rights, for someone to be administratively punishable, they must be shown guilty [6]. Thus, given its punitive nature, the ethical-professional process must be conducted so that the penalty applies once guilt is proven.

The sentences analyzed in this category indicate the possibility of non-observance of one of the main principles of the 1988 Federal Constitution, the presumption of innocence ("Fundamental rights and guarantees," Art. 5 of the Federal Constitution) [7]. In the case of a punitive process, whose roots are found in criminal law, it is *sine qua non* that the existence of guilt or intent on the offender's part is proven.

In this sense, the presumption must always be that of innocence and not guilt, so the process needs to gather complete evidence that that physician was responsible for the act. When in doubt, the physician must be absolved.

Proving guilt is a constitutional guarantee and the burden of the Council of Medicine. The existence of materiality does not exclude the need to prove authorship, i.e., even if some signs and elements prove that the ethical infraction existed, it is necessary to find out who the agent was.

Observation is here to reflect on the ethical-professional responsibility of physicians in charge of the technical direction of a health institution or clinic. Such positions respond to countless questions related to the provision of medical activity. In general terms, it is possible to say that the technical director is responsible for the functioning of the unit, while the clinician represents the clinical staff. It is essential to highlight that these professionals cannot be presumed guilty when judging ethical violations simply because they hold these positions.

Sentence 6 was reversed in the second instance by the Federal Regional Court, which understood that there was evidence of authorship and confirmed CREMESP's conviction.

### *Category 7: Failure to comply with the principles of isonomy and reasonableness*

*It should not be forgotten that, when condemning the author for committing violations of the CEM and acquitting another accused who suffered similar charges and, again, was unable to remove them, the authorities violated the principle of isonomy insofar as they applied the law to the specific case in a way that created or increased arbitrary inequalities. The violation of the principle of reasonableness is even more evident. The conduct attributed to the author ultimately revealed itself as follows: a physician who, in his role as technical or clinical director in a hospital, fails to take measures to end the offense commits ethical misconduct. However, it is observed that if the perpetration of an offense by one of the physicians who performed the surgeries, considered, initially, to be illicit and unethical, as with a purpose contrary to the CEM, was ruled*

*out, it does not seem reasonable to condemn the author, as, absent the antecedent conduct, also absent the subsequent omission* (Sentence 10).

The principle of isonomy states that everyone is equal before the law, without distinction of any kind. It inaugurates the chapter of the Federal Constitution that deals with the constitutional principles and guarantees of Brazilian citizens, establishing that it is mandatory to treat equal situations equally. In the case of unequal treatment by the judge of similar or identical situations, there is express non-compliance with one of the most important guarantees of a democracy.

Therefore, the ethical-professional process subject to judicial control revealed a situation in which two physicians in similar circumstances received different treatments. While one received the maximum penalty of revocation of professional practice, reduced to a public censure in an official publication by the CFM, the other was acquitted.

The records showed that both performed similar acts violating the Code of Medical Ethics. However, the Council of Medicine, understanding that one of the physicians collaborated with the investigations, decided to acquit him despite the existence of evidence regarding his participation. This decision was considered arbitrary, which is why it was annulled.

In this sense, it is up to the judge, in exercising the powers conferred by law, to apply the ethical standard in an isonomic manner to all those who practice the same or similar acts. The Federal Constitution granted this guarantee and cannot, under any argument, be placed in doubt.

## Final considerations

Contrary to the hypothesis regarding the topic, namely, that the Judiciary recognized a high number of nullities, the analysis of quantitative data from the search demonstrated that only 19.23% of the total number of actions proposed over eleven years reversed, in the first instance, the decision given by CREMESP.

From the data analysis perspective, two leading causes with a greater incidence were the lack of justification for CREMESP's decision and the denial of due process. It was also possible to verify that almost all sentences concerned a public penalty (3, 4, or 5).

Finally, it should be noted that all fifteen sentences analyzed were appealed in the second instance, i.e., sent for reanalysis by the Federal Regional Court of the 3rd Region (São Paulo) or the 1st Region (Federal District). Four appeals remain pending judgment, which makes it impossible to produce statistics on second-instance judgments.

Despite the low number of nullities recognized by the Judiciary, especially considering that CREMESP concludes around 800 trials per year, the research data demonstrate the possibility of improving the processing and judgment of cases to improve the effectiveness of decisions further.

The demands regarding the fairness of ethical-professional processes increase due to the training of lawyers who work in medical law and the advancement of legal studies and theses. Therefore, the Councils of Medicine should continually offer training, mock trials, and preparatory courses so that advisors, delegates, and collaborators become even more prepared to conduct ethical-professional processes with excellence, considering technical and medical issues, laws, and constitutional guarantees for all citizens. As a result, the number of reversals could become even smaller, increasing the credibility of the class body whose primary function is the protection of society.

*This article is based on author Camila Kitazawa Cortez's master's thesis.*

Research

## References

1. Brasil. Lei nº 3.268, de 30 de setembro de 1957. Dispõe sobre os Conselhos de Medicina, e dá outras providências. Diário Oficial da União [Internet]. Brasília, 1 out 1957 [acesso 19 ago 2023]. Disponível: https://tny.im/e5cLr

2. Conselho Regional de Medicina do Estado de São Paulo. Prestação de contas do exercício 2022: registros profissionais. Cremesp [Internet]. 2022 [acesso 18 ago 2023]. Disponível: https://tny.im/eCv8i
3. Conselho Federal de Medicina. Resolução CFM nº 2.217/2018. Aprova o Código de Ética Médica. Diário Oficial da União [Internet]. Brasília, 1 nov 2018 [acesso 18 maio 2024]. Disponível: https://tny.im/cHS2h
4. Conselho Federal de Medicina. Resolução CFM nº 2.306/2022. Aprova o Código de Processo Ético-Profissional (CPEP) no âmbito do Conselho Federal de Medicina (CFM) e Conselhos Regionais de Medicina (CRMs). Diário Oficial da União [Internet]. Brasília, 25 mar 2022 [acesso 18 maio 2024]. Disponível: https://tny.im/X43lB
5. Cortez CK. A responsabilidade civil, penal e ética do médico no Brasil. In: Carvalho PCA, organizadora. Direito médico: temas atuais. Curitiba: Juruá; 2019. p. 37-62. p. 58
6. Osório FM. Direito administrativo sancionador. 6ª ed. São Paulo: Revista dos Tribunais; 2019.
7. Brasil. Constituição da República Federativa do Brasil. Diário Oficial da União [Internet]. Brasília, 4 out. 1988 [acesso 2 jan 2023]. Disponível: https://tny.im/aq5tf
8. Silva JAD. Curso de direito constitucional positivo. 28ª ed. São Paulo: Malheiros; 2007. Dos princípios constitucionais do estado brasileiro; p. 97-122.
9. Brasil. Lei nº 9.784, de 29 de janeiro de 1999. Regula o processo administrativo no âmbito da Administração Pública Federal. Diário Oficial da União [Internet]. Brasília, 1 fev 1999 [acesso 18 maio 2024]. Disponível: https://tny.im/S374x
10. Cunha LJC. A fazenda pública em juízo. 5ª ed. São Paulo: Dialética; 2007. Controle judicial da atividade administrativa; p. 471-84.
11. Brasil. Justiça Federal. Seção Judiciária de São Paulo. Justiça Federal [Internet]. [s.d.] [acesso 18 maio 2024]. Disponível: http://www.jfsp.jus.br/foruns-federais/
12. Justiça Federal. Seção Judiciária do Distrito Federal. Justiça Federal [Internet]. [s.d.] [acesso 18 maio 2024]. Disponível: https://tny.im/P4ioE
13. Franco MLPB. Análise de conteúdo. Campinas: Autores Associados; 2021.
14. Cristóvam JSS. Colisões entre princípios constitucionais. Curitiba: Juruá; 2006. A colisão entre princípios constitucionais e a máxima da ponderação; p. 196-265.
15. Guerra Filho WS. Processo constitucional e direitos fundamentais. 4ª ed. São Paulo: Celso Bastos; 2005. Sobre o princípio da proporcionalidade; p. 83-122
16. Brasil. Lei nº 6.830, de 22 de setembro de 1980. Dispõe sobre a cobrança judicial da Dívida Ativa da Fazenda Pública, e dá outras providências. Diário Oficial da União [Internet]. Brasília, 24 set 1980 [acesso 18 maio 2024]. Disponível: https://tny.im/xvB3d
17. Brasil. Lei nº 9.873, de 23 de novembro de 1999. Estabelece prazo de prescrição para o exercício de ação punitiva pela Administração Pública Federal, direta e indireta, e dá outras providências. Diário Oficial da União [Internet]. Brasília, 24 nov 1999 [acesso 18 maio 2024]. Disponível: https://tny.im/kwJrr
18. Brasil. Decreto-Lei nº 4.657, de 4 de setembro de 1942. Lei de introdução às normas do direito brasileiro. Diário Oficial da União [Internet]. Brasília, 9 set 1942 [acesso 18 maio 2024]. Disponível: https://tny.im/UyxrB
19. Freitas VPD. Conselhos de fiscalização profissional: doutrina e jurisprudência. 3ª ed. São Paulo: Revista dos Tribunais, 2013. Conselhos: controle profissional, processo administrativo e judicial; p. 250-343.

Research

**Camila Kitazawa Cortez** – Master's student – camilakcortez@gmail.com
0000-0001-6729-5382

**Aluisio Marçal de Barros Serodio** – PhD – lulabra@yahoo.com
0000-0003-4769-1016

**Gaspar de Jesus Lopes Filho** – Associate professor – gasparlopes@uol.com.br
0000-0002-9344-6479

**Correspondence**
Camila Kitazawa Cortez – Rua Manoel Gomes, 114 CEP 03349-045. São Paulo/SP, Brasil.

**Participation of the authors**
All authors participated in the article planning. The first author produced the final draft, and the others reviewed, corrected, and approved the manuscript.

**Received:** 9.19.2023
**Revised:** 5.2.2024
**Approved:** 5.14.2024