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MEDIATION IN BRAZIL: A WAY FOR THE SOLUTION OF PATIENT-MEDICAL CONFLICTS

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Abstract

The problem of excessive litigation in Brazil is a reality that compromises the management of the Judiciary. The lawsuits brought by patients against doctors, involving medical malpractice in the provision of health services, fit the reported procedural delay critic panorama. In order to verify the efficacy of an substitute method for the judicialization of the doctor-patient relationship, the research aims to analyze the feasibility of judicial or extrajudicial mediation as alternative medicine judicialization in Brazil. For this study, It was adopted a deductive and theoretical methodological, the analysis of legislation and documentation, as well as the bibliographic survey; the qualitative data presented were collected from documentary sources statistics. The investigation results confirm the mediation as a useful strategy for solution for the self-composition of conflicts involving patients and doctors, in order to preserve access to justice and the social pacification. Concludes that the judicial or extrajudicial mediation constitutes an environment that enables dialogue and interaction of the parties involved and effectiveness of civil procedure

post-modern. The learning flows in future work, with the aim of studying the papers of the patient, the doctor and the mediator by optical the theory psychoanalytic.

Keywords

Medical-Patient Conflict, Judicialization of Medicine, Brazil Mediation

1. Introduction

Judicialization of health and medicine is a reality in Brazil. The patients have assumed the role of consumers of health services and are increasingly demanding public and private health and also with the professionals working in this provision, like for example, the doctors.

The current study focuses on the phenomenon of judicialization of medicine in Brazil, based on the context of the doctor-patient relationship. As social responses to excessive demand by the Judiciary, Oliveira (2017, pp. 53-54) highlights the evolution of a conscience of empowerment of patients, as well as the difficulty of dialogue in the doctor-patient relationship.

Statistical data of the Superior Court of Justice reveal that between 2004 and 2014 there has been an increase in the number of lawsuits against doctors: an average of 1,600% (Cardoso, 2014). The administrative processes cataloged by the Federal Council of Medicine also increased significantly.

By the way, in the context of the current civil procedure, the conflict of interest should be enjoyed like the final decision and execution, which act as a State-Judge's response to the litigants. It's called "judicial protection of the right", in the words of Marinoni (2013, p. 115).

The National Council of Justice - CNJ is a public institution dedicated to the operability of the judicial system optimization in Brazil and its fronts "the control and administrative and procedural transparency" (CNJ, 2018). Costa (2018, p. 09) news one report by CNJ dated 2014, which reveals that "procedural delay in the Judiciary is the complaint of almost half of the citizens who sought the Ombudsman's Office of the National Council of Justice". Civil actions proposed by patients against doctors fit this panorama, when it takes into account the average time the outcome of the process.

So, it is imperative reflect if the patient-doctor conflicts mediation can be an effective alternative instrument for facilitating access to justice and the reasonable duration of the process, on issues related to private law.

2. The Doctor-Patient Relationship in Brazil

The practice of medicine in Brazil has undergone major changes in recent decades. The general practitioner ceded place to specialist, in a panorama of high impact of increasing technology.

The Law n° 12.842/2013 delimits the actions of medical professionals, the good of the health of the human being and of human groups. To this end, the medical act must be geared to the promotion, protection and recovery of health; the prevention, diagnosis and treatment of diseases as well as to the rehabilitation of sick and disabled people (art. 2, single paragraph).

By law, the medical profession meets privately related activities to nosological diagnosis, understood as the assessment of the disease. In addition, the doctor is able to perform surgery, prescribe drugs, driving the treatments and to determine the prognosis to the patient.

In Brazil, the Consumer Defense Code - CDC, established by Law n° 8078/1990, is considered an important building of Legal Post Modernity. This is standard-principle of public policy, pointed to as an example of genuine rights of third dimension. The CDC seeks social peace from the tutelage of the consumer, under the cloak of constitutional dignity of the human person, great axiological vector and Foundation of the Federative Republic of Brazil (art. 1, (III) of the Federal Constitution).

The relevance of the CDC is such that the III Civil Law of 2002 Journey, led by the Council of the Federal Court and the Superior Court of Justice, has developed the Statement number. 167. Such exegesis recognizes the principle approach of the consumer defense code with the new Civil Code of 2002, "with regard to the contractual adjustment, since both are developers of a new general theory of contracts".

It is understood the patient-doctor relationship as contractual and complex, as played by personality rights. We agree with the possibility of application of the consumer defense code in these legal relations and we emphasize current of authors who argue that this type of relationship is eminently consumer. Souza (2017, p. 33) points out that "not being free, the activity of the doctor, as a rule, will be inserted into the CDC". The cited author (2017) proposes the following formula that depicts the duty doctor to compensate the patient: "a defect or addiction (quality or quantity) of the product or service or a faulty information on the service provided (+) the presence of a damage (+) the existence of the nexus causal linking defect, vice or the information deficient, to the damage = duty to indemnify."

3. Judicialization of the Medical Act in Brazil as a Legal Problem

As a rule, the patients while authors of civil lawsuits, seek to repair of material damage, moral and aesthetic, resulting from medical malpractice. Fonseca and Fonseca (2016, p. 61) conceptualize didactically the medical error as "a way of identifying a conduct performed by the doctor, due to your job, causing injury or damage to your patient, as a result of an action or omission, fault so that is identified, negligence or malpractice recklessness and causal link between the conduct and the damage".

Policastro (2013, p. 02) lists the following common errors in conflicts between patients and doctors: "error of diagnosis, procedural error, error in the choice of therapy, lack of therapeutic procedure, error in prescribing or administering medication, failure to answer, deficiency in services [...]".

The publication of the Justice in Numbers on 2017 issued by the CNJ (2018), registers the following indexes: "the Judiciary ended the year 2017 with 80.1 million of ongoing processes, pending any final solution. Of these, 14.5 million, i.e. 18.1%, were suspended or interim file, awaiting some future legal situation [...] The accumulated growth in the period 2009-2017 was 31.9%, i.e. increase of 19.4 million of processes".

It is understood the dissatisfaction with respect to the medical act has entailed a legal problem in Brazil, the extent to which patients and doctors, to carry out the roles of authors and defendants, have their individual interests affected with the lengthy Judiciary.

In this context, it is timely to reflect on the viability of other avenues for resolving legal conflicts involving patients and doctors.

4. Mediation as a Method of Legal Conflict Resolution in the Patient-Doctor Relationship

Mediation is considered a subspecies of the appropriate methods of solutions of conflicts, also called Alternative Dispute Resolution-ADR.

In Brazil, the mediation was regulated by Law nº 13.140/2015. This is modern law, which deals with the private mediation as a means of settlement of disputes and on the auto-composition of conflicts within the framework of the public administration.

By legal provision, mediation is a procedure founded on the principles of "I - impartiality of the mediator; II - equality between the parties; III - orality; IV - informality; V - autonomy of will of the parties; VI - search for consensus; VII - confidentiality; VIII - good-faith" (art. 2).

The Code of Civil Procedure - CPC, supported by Law n° 13.105/2015, is recognized by the legal community as a tool advanced by valuing the mediation as a mechanism of conflict auto-composition. In mediation, the mediator acts to bring the parties to the dispute. Unlike conciliation, in mediation the parties do not receive proposals for solutions. The mediator facilitates the parties to seek, together, by consensus and by itself, the solution to the conflict.

The third paragraph of 165 article of the CPC, allows the use of mediators negotiating techniques that act as support for auto-composition environment of the persons concerned. Mediation can occur in the context judicial, through judicial centers of conflict resolution and citizenship, installed by Brazilian Courts (judicial mediation), as can occur in private mediation Chambers (extrajudicial mediation).

For Rodrigues (2017, p. 90) judicial mediation represents an aggregation of multi-port system additional to legal aid, since the own involved in conflict can build practical solutions.

In Brazil, scholars argue that mediation is an appropriate route for the solution of conflicts involving doctors and health issues. Victorinus (2017, p. 27) considers that mediation can interfere positively in the actions for medical malpractice, exactly to be able give a faster response to possible victims. One of the benefits of that mediation, Fucco (2015) notes the possibility of conflict solution for multiple parts.

The provision of medical services of health, significant part of the conflict comes from the commitment of the rights to information, to consent freely savvy and to self-determination. From the experiences of medical malpractice studied by Nascimento (2016, p. 209) and resolved via mediation between patients and professionals, the author records that:

both are suffering emotions after a situation; patients need emotional support and apologies of the profession; professionals want to apologize, but fear consequences of legal admission of guilt; revelation of error and apology often reduces negative emotions and results in cancellation of actions judicial or arbitration and disclosure of error that does not cause damage increases the level of trust in the relationship

Hablitschek (2012, p. 61) indicates the adoption of planning of the courts by judicial mediation in the health area, as a strategy for the rapid solution of judicial causes and, above all, to ensure "the humanization of Justice, social peace and the satisfaction".

4. Conclusion

Judicial and extrajudicial mediation is a way for the solution of conflicts between patients and doctors.

The procedure is founded on the principles that underpin the access to justice and advances procedural to the pacification and social co-responsibility and autonomy of those involved. In this way, the conflicts arising from the provision of medical services can be addressed through health dialogical participation of those involved, with the assistance of the mediator.

Therefore, it is important the practical of an optimized management of conflicts. In this respect, we agree with the recommendation of Claro (2014, p. 98), by suggesting the "qualification of health professionals in conflict management and also the introduction of an Conflict Mediation Office in hospitals, to serve the patients, family members and professionals involved."

Considering the mediation still to be a recent institute in Brazil, dating only from December 2015, and based on the present research, it is recommended as future studies, which can be conducted surveys based on data collection directly on Judicial Sticks and Mediation Chambers, with a view to ascertain whether judicial or extrajudicial mediation is being effective and effective as an alternative to the judicialization of medical-patient relations, and we also suggest conducting research Studies compared with other countries that already apply mediation in medical-patient conflicts.

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