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Health mediation - the aseptic system for conflict management in health

La mediación en salud - el sistema aséptico para la gestión de conflictos en materia de salud

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Abstract

Alternative Dispute Resolution Mechanisms (ADRM) are a possibility to resolve conflicts without the need to go to trial. The most used are mediation, conciliation, and arbitration. In this review we will focus specifically on mediation as an alternative for the resolution of medical legal conflicts. Where the history of the ADRM in Mexico and the evidence of the failure of the adversarial method for the resolution of doctor-patient conflicts will be reviewed. In addition, the incomplete role of the application in our country of the ADRM in the legal field will be highlighted and finally the successful experience of mediation to resolve this type of conflict in other countries of the world will be presented. In this way, the objective of this narrative review is to show that mediation can be an effective and beneficial option to resolve medical conflicts in a fair and equitable manner for all parties involved.

Mediation, Health Mediation, Healthcare Mediation, Alternative Justice, medical-legal conflicts

Resumen

Los Mecanismos Alternativos de Solución de Controversias (MASC) son una posibilidad para resolver conflictos sin necesidad de ir a juicio. Los más utilizados normalmente son la mediación, la conciliación y el arbitraje. En esta revisión nos enfocáremos específicamente en la mediación como una alternativa para la resolución de los conflictos medico legales. Donde se revisará desde la historia de los MASC en México y la evidencia del fracaso del método adversarial para la resolución de los conflicto médico-paciente. Además, se destacará el papel hasta el momento incompleto de la aplicación en nuestro país de los MASC en el ámbito legal y por último se presentará la experiencia exitosa de la mediación para resolver este tipo de conflictos en otros países del mundo. De esta forma, el objetivo de esta revisión narrativa es mostrar que la mediación puede ser una opción efectiva y beneficiosa para resolver conflictos médicos de manera justa y equitativa para todas las partes involucradas.

Mediación, Mediación en Salud, Mediación sanitaria, justicia alternativa, conflictos médico-legales

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Introduction

Alternative Dispute Resolution Mechanisms (ADR) are a possibility to resolve disputes without the need to go to court. The most commonly used are mediation, conciliation and arbitration. Mediation is an alternative in conflict resolution, recognised by the culture of peace, which facilitates the understanding and comprehension of the interests and needs of the conflicting parties, seeking the best way to reach an agreement with the intervention of a neutral and impartial third party (mediator), the guiding thread to the dialogue, based on the principles of voluntariness and confidentiality.

Mediation is a voluntary process of conflict resolution, which takes place through ethical communication during which people strive to resume dialogue in order to find a solution to their problems. During this process, a mediator accompanies them in an impartial manner and without influencing the outcome, while ensuring respect for the interests of each participant and the confidentiality of the exchanges"[1].

Mediation is seen as an alternative means of dispute resolution to reach a fair agreement that satisfies all parties and this depends largely on their willingness during the process. Mediation can result in an agreement that is considered a final and complete judgment, eliminating the need for a trial. The strength of the agreement lies in the will of the parties, and its enforcement is supervised by a judge. The agreement acquires the authority of res judicata, which means that it can be enforced in court if the parties do not comply with it voluntarily. If not complied with, the agreement can be challenged in court. The aim of this narrative review is to show that mediation can be an effective and beneficial option for resolving medical disputes in a way that is fair and equitable for all parties involved.

The history of ADR in Mexico

From a legal point of view, seven key historical points in the development of ADR can be identified:

- 1812 - Constitution of Cadiz: It imposed the conciliation of lawsuits as a compulsory mechanism before launching the judicial machinery, establishing the figure of conciliators in the town mayors and imperatively ordered that the conciliation instance had to be exhausted, prior to trial[2].
- 1824 - Constitution of Mexico: Articles 155 and 156 reaffirmed the provisions of the Cadiz Constitution.
- 1864-1843 - Within the framework of the seven laws: the concept of conciliation and arbitration as a priority method for the resolution of conflicts is raised once again.
- 1853 - Constitutional reform: Alternative Justice disappears from the constitutional provisions.
- 1997 - Ley de Justicia Alternativa de Quintana Roo (Alternative Justice Law of Quintana Roo): Measures related to alternative dispute resolution mechanisms are established and the first Legal Aid Centre is created, a decentralised body of the Judiciary[3].
- 1997 to 2017 - Conciliation stages: Conciliation is established as a preliminary stage of arbitration or administrative proceedings (creation of different bodies: CONDUSEF, PROFECO, CONAMED) and mediation and restorative justice are promoted as an institutional policy of local judiciaries.
- 2017 - Constitutional reform in the area of substantive conflict resolution: Alternative Dispute Resolution Mechanisms are proposed as a means to directly address the substance of the conflict[4].

[1] Definition agreed by the Council of Europe in 2015 following research led by Michelle Guillame-Hofnung 4(Munuera Gómez, La mediación sanitaria en Chile., 2020) (Pilar Munuera Gómez. (2020).

[2] The history of ADR in Mexico).

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Figure 1

Lack of access to justice in Mexico

"There is a general consensus, which crosses all borders, about the ineffectiveness of justice delivery systems: the common opinion is that they do not fulfil their objectives or the tasks they are entrusted with "5.

Lack of access to justice is a reality that affects a large number of people around the world, especially those who lack economic resources and are far from legal institutions. This situation is further aggravated in contexts of inequality, where certain social groups face additional barriers to accessing justice, such as discrimination based on gender, race, sexual orientation or migration status.

In addition, even when a certain number of people can access justice systems, there is a high percentage who do not know the legal processes, which leads to a lack of participation and knowledge in their own case, which means that they have to rely on the lawyer they can hire, subject to the lawyer's own abilities. Thus, the relationship between the court case and those involved ends up being very distant; they lose control over the matter, and the result is a huge distrust of the whole system[5]. In addition, the slowness with which cases are resolved also discourages people from going to the judicial institutions, or puts pressure on the judges, who end up issuing rulings on the spur of the moment, without a good basis.

In medico-legal disputes, resolution requires not only legal knowledge, but also an understanding of medical issues. Hence, medical knowledge becomes relevant for the resolution of these cases, as well as for the implementation and correct orientation of ADR [6, 7, 8].

Failure in medico-legal disputes

The problems that have been identified in the judicial process in medico-legal cases are: slow proceedings, lack of discretion and confidentiality leading to leakage of information and biased interpretations, rigidity of the judicial system, lack of adequate medical advice, delay in assistance by professional organisations or insurance companies, difficulty in pursuing other legal avenues after failed criminal proceedings, and discredit or damage to the reputation of the medical professional[5].

Medical care is a unique relationship in which the patient entrusts his or her health to the physician, who generally accepts the deal in exchange for financial compensation[7]. However, the patient's expectations may exceed what reality can deliver, and patient-physician communication may be hampered by a variety of factors, such as lack of time, lack of personal contact and patient mistrust.

The current culture of society privileges material satisfactions and rejects thinking about the fragility of human life and the inevitability of death and illness, leading some to assume that their ailments will always be curable and that any lack of a solution is due to errors or omissions by medical personnel[9].

In this regard, he notes that a few decades ago the medical professional was recognised by society with honour, respect and reputation. Unfortunately, however, this recognition has been lost, in principle, due to an increase in demand for medical careers, but also due to a lack of governmental support and opportunities[10].

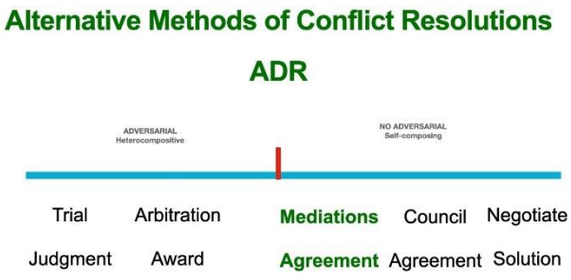

Figure 2

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Principles of Alternative Dispute Resolution Mechanisms (ADR)

To speak of the principles of ADR is to refer to the duty to be of ADR Service Providers, since these criteria establish the theory and practice of the mediator during the development of an ADR session. These principles are the values, the maxims that guide and identify the actions carried out within the alternative dispute resolution procedures.

These principles are necessary to evaluate the services provided by the mediator and for the mediator to learn to evaluate himself/herself in the course of his/her personal and professional path. It should be noted that each subject or area in which ADR is applied has principles applicable to that activity and/or subject, however, there are universal principles.

With regard to the principles governing the mediation process, it is important to highlight voluntariness as one of the most relevant.

This principle implies that both parties must express their willingness to participate in the process and that it must be in force during the entire duration of the process. Furthermore, the mediator's impartiality is essential, as he/she cannot have a biased or preferential opinion towards any of the parties, but must be neutral and conduct the process in an objective manner, enhancing the positive and connecting aspects of the relationship between the people in conflict[11.12].

Confidentiality is another fundamental principle that obliges both the parties and the mediator to keep the information derived from the mediation process secret and not to use it in any judicial or administrative proceedings.

Likewise, the mediator's neutrality implies being detached from the legal interests of the parties, while fairness creates a level playing field for both parties. Flexibility allows for changes according to circumstances, without time limits, but always in strict compliance with the law. Only disputes established by law may be dealt with, and the resulting agreement will have legal effects comparable to a judgment.

The incomplete application of ADR in Mexico

ADR is currently gaining relevance, especially in view of the increasing number of legal claims against doctors. Hence, they are considered necessary to: 1) avoid going to court and 2) to resolve medico-legal disputes promptly. Four types are recognised in legal practice: arbitration, conciliation, mediation and negotiation.

In the medical field, few results have been obtained, with the result that more and more doctors and patients are dissatisfied with these methods, although it is true that the Alternative Justice Law has not been correctly applied. In addition, it should be noted that Alternative Justice Centres generally do not deal with health-related cases (perhaps because they are not trained in this field) and when they are referred to the public option that exists, they cannot apply the methods of the Alternative Justice Law[13,14,15], as they are not accredited centres and therefore cannot have certified people and therefore cannot make agreements that are considered res judicata.

This does not mean that the restorative acts of Mediation are not carried out in Mexico, but not with an approach and with a broad application that allows the conflict to be settled in a safe, agile, fast and confidential way, among many other benefits. Therefore, it is necessary that mediation in health should be combined by at least two mediators: the doctor, with experience in the area of the matter, and the other with a family member (this only as a generality), at least at the beginning of this system.

Mediation is the obligatory step in the evolution of doctor-patient conflict resolution, as history in other parts of the world has shown[16,17].

The experience of mediation in other parts of the world

It is relevant to consider the case of Chile. Law 19.966 on the Health Guarantees Regime promotes the use of mediation as a mechanism to de-judicialise conflicts over health damages, limiting the costs of compensation and providing those affected with rapid access to justice from the State Defence Council.

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Likewise, in 2005, the "Regulation of Mediation for Claims against public institutional health care providers or their officials and private health care providers" was published. This regulation establishes the structure of the mediation process, with the aim of reaching agreements between the parties quickly and efficiently. In addition, it provides for a "Register of Mediators for claims against private health care providers".

In this regard, he highlights that the demand for mediation has increased from 2005 to 2018, going from 170 completed mediations, achieving settlements in 38 of them, to 1,274, with agreement in 277. Of the 136 cases resolved through mediation, 49% did not involve the payment of money, as the claimants waived taking legal action. The mediation method achieved settlements in 21% of cases over 13 years. 78% of mediations have no settlements. The professional's explanation or apology has increased from 3% to 21% in the period studied. In addition, a decrease in the number of settlements involving financial compensation and an increase in settlements after apologies and/or explanations has been observed over the 14 years of operation of the mediation system. This suggests that complainants have not taken legal action against the health services and hospitals involved. Although not all cases ended in settlement, about 80% of them did not go to trial, which helps to decongest the courts[16,1].

As mentioned above, ADR is the evolution of doctor-patient disputes. In the world, these conflicts have generally developed in four phases: 1) adversarial, 2) arbitration, 3) mediation and 4) restoration.

Mexico is in phase one, with an alarming increase in claims. Arbitration stands out in our country, phase two, as a stage that had its chance, but was not developed to its full potential because it belongs to an adversarial system, as its disuse is obvious, in addition to other drawbacks in the process (such as the technicality of the expert opinions on which the awards are based). Therefore, the experience of other parts of the world is of great relevance for assessing possible opportunities in Mexico.

As for the rest of the world, however, a study conducted by the Fondation Roi Baudoui hospital in 2007 analysed hospital mediation in several countries, including Canada, Finland, France, Germany, the Netherlands, Norway and the United Kingdom. The study found that four countries offered mediation services to resolve patient complaints, while six countries included mediation in the institution's quality and risk management, and in some cases also generated recommendations for new health policy. This demonstrates that mediation is an effective alternative in complaint management, even if it does not always result in settlements.

In addition, Mulcahy, Selwood and Netten conducted research sponsored by the British Department of Health over four years in the Anglia and Oxford, Northern and Yorkshire health regions, demonstrating the benefits of mediation in resolving disputes between patients and health professionals. The research highlighted that the professional's explanation of what happened generated benefits for both parties, allowing reflection on what happened and avoiding future mistakes. Patients were satisfied with the process because of the understanding of the incident in an atmosphere of dialogue, the apology by the professional and the promise of change in care policies.

In the 1980s, France started working with hospital mediators at the Paris Hospital. A medical conciliator was established to improve the relationship between health staff and patients or their families. However, Law 2002-303 abolished the conciliation commissions and replaced them with Commissions for User Relations and Quality of Medical Care. Currently, the main instances of citizen mediation in the hospital are representatives of voluntary associations, former users, doctors, retirees and patients with specific pathologies. These bodies listen to the parties and enable them to find solutions to the difficulties encountered by members of the community[16,1].

In Spain, the United States and Canada, the intervention of intercultural mediators has been favoured, which has allowed for better communication between health personnel and the diversity of patients, breaking down cultural and language barriers that may exist in order to resolve the conflict.

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Health mediation has been able to flourish in other countries. In Mexico, this possibility exists and is present, but it has not been used adequately and in a timely manner. This is especially true in the medical field because there is a reluctance on the part of the health professional to accept it in legal procedures, which, added to the patient's lack of knowledge about the scope of the mediation procedure, has generated apparent irreconcilable situations. Likewise, the lack of technical preparation in this type of alternative procedures by health professionals also constitutes an obstacle. However, in procedures involving professional mediators and medical professionals, the results have been good [17,18,19,20,21,22,22,23,24,25,26].

Conclusions

ADR is relevant because it has even been seen that the agreements reached in terms of reparation of possible or alleged harm have also shown that sometimes an explanation or an apology is enough, and in those cases where financial compensation has necessarily been needed, the figures and claims are adjusted to real and sufficient amounts. In addition, the legal costs of going to court for a long period of time are not assumed.

Mediation as a mechanism for the resolution of medico-legal conflicts is the necessary alternative for a clean and transparent practice of health professionals, with adequate knowledge of the patients, which translates into greater peace of mind for all parties, since it aims to preserve the relationship between doctor and patient, especially when a medical activity results in an undesired consequence that harms the patient.

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