

EXTRAJUDICIAL DISPUTE RESOLUTION: CONSENSUAL MECHANISMS, EFFECTIVENESS, AND PROTECTION OF HEALTH IN RELATION TO DENTISTRY

RESOLUÇÃO EXTRAJUDICIAL DE CONFLITOS: MECANISMOS CONSENSUAIS, EFETIVIDADE E TUTELA DA SAÚDE EM RELAÇÃO À ODONTOLOGIA

RESOLUCIÓN EXTRAJUDICIAL DE DISPUTAS: MECANISMOS CONSENSUALES, EFICACIA Y PROTECCIÓN DE LA SALUD EN RELACIÓN CON LA ODONTOLOGÍA



<https://doi.org/10.56238/sevened2026.008-129>

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ABSTRACT

The increasing judicialization of conflicts between dentists and patients highlights the limitations of an exclusively adjudicative approach in disputes characterized by high technical, relational, and informational complexity. This article comparatively analyzes the Brazilian and Argentinian systems of extrajudicial conflict resolution in dentistry, emphasizing mediation and the role of extrajudicial advocacy, evaluating their impacts on the effectiveness of health protection and professional civil liability. It starts from the premise that many controversies do not stem from pure technical error, but from communication and informational failures related to expectations of results, understanding of the therapeutic plan, foreseeable risks, costs, and clinical documentation. In this context, the ancillary duties of objective good faith—information, informed consent, medical records, and cooperation—are examined as structural elements capable of reducing uncertainties and favoring proportionate solutions. It concludes that mediation constitutes an appropriate method, without excluding jurisdiction when necessary.

Keywords: Mediation. Dentistry. Civil Liability. Access to Justice. Prevention of Harm.

RESUMO

A crescente judicialização dos conflitos entre cirurgiões-dentistas e pacientes evidencia as limitações de um enfoque exclusivamente adjudicativo em disputas caracterizadas por elevada complexidade técnica, relacional e informacional. O artigo analisa, de forma comparada, os sistemas brasileiro e argentino de resolução extrajudicial de conflitos na odontologia, com ênfase na mediação e na atuação da advocacia extrajudicial, avaliando seus impactos na efetividade da tutela da saúde e na responsabilidade civil profissional. Parte-se da premissa de que muitas controvérsias não decorrem de erro técnico puro, mas de falhas comunicacionais e informativas relacionadas às expectativas de resultado, à compreensão do plano terapêutico, aos riscos previsíveis, aos custos e à documentação clínica. Nesse contexto, examinam-se os deveres anexos da boa-fé objetiva — informação, consentimento informado, prontuário e cooperação — como elementos estruturais capazes

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de reduzir incertezas e favorecer soluções proporcionais. Conclui-se que a mediação constitui método adequado, sem excluir a jurisdição quando necessária.

Palavras-chave: Mediação. Odontologia. Responsabilidade Civil. Acesso à Justiça. Prevenção do Dano.

RESUMEN

La creciente judicialización de los conflictos entre dentistas y pacientes pone de relieve las limitaciones de un enfoque exclusivamente judicial en disputas caracterizadas por una alta complejidad técnica, relacional e informativa. Este artículo analiza comparativamente los sistemas brasileño y argentino de resolución extrajudicial de conflictos en odontología, haciendo hincapié en la mediación y el papel de la defensa extrajudicial, evaluando su impacto en la eficacia de la protección de la salud y la responsabilidad civil profesional. Se parte de la premisa de que muchas controversias no se derivan de errores puramente técnicos, sino de fallos de comunicación e información relacionados con las expectativas de resultados, la comprensión del plan terapéutico, los riesgos previsibles, los costes y la documentación clínica. En este contexto, se examinan los deberes auxiliares de la buena fe objetiva —información, consentimiento informado, historial médico y cooperación— como elementos estructurales capaces de reducir las incertidumbres y favorecer soluciones proporcionadas. Se concluye que la mediación constituye un método adecuado, sin excluir la jurisdicción cuando sea necesario.

Palabras clave: Mediación. Odontología. Responsabilidad Civil. Acceso a la Justicia. Prevención de Daños.

1 INTRODUCTION

The growing judicialization of the relationship between dental professionals and patients is a relevant phenomenon in the contemporary legal scenario, associated with social, economic and cultural transformations that directly impact the provision of health services. The expansion of access to information, the affirmation of the right to health as a fundamental right and the strengthening of consumer protection have contributed to the increase in claims based on allegations of poor dental practice, dissatisfaction with therapeutic results and deficiencies in professional-patient communication.

This scenario highlights the limits of the exclusively adjudicative treatment of disputes characterized by a high technical, subjective and relational load. The jurisdictional response, often centered on expert evidence and the imposition of a binary decision, tends to offer a more appropriate solution for the imputation of responsibility and the quantification of the damage than for the recomposition of the therapeutic bond, the technical clarification and the proportional adjustment of expectations.

The doctrine of access to justice, especially from the debate on "adequate methods" and multi-door justice, points out that the effectiveness of tutelage is not limited to the delivery of a formally correct state decision, requiring mechanisms compatible with the nature of the conflict and capable of producing materially satisfactory responses. Along these lines, Cappelletti and Garth highlight that access to justice must be understood from a functional perspective, oriented to results and the effective protection of rights, and not only as the possibility of resorting to the courts. In a complementary way, the conception of the *multi-door courthouse*, associated with Frank Sander, reinforces the idea that the institutional response to the conflict should privilege the most appropriate method for the specific case, avoiding the exclusive centralization of the litigation process.

In this context, consensual mechanisms — especially mediation and conciliation and, in specific cases, arbitration — gain relevance as instruments for rationalizing the justice system and qualifying health protection, especially in conflicts marked by informational asymmetries and the need for technical dialogue. Mediation, in particular, offers a structured space for communication, the adjustment of expectations and the construction of proportional solutions, preserving, when possible, the care bond.

From a comparative perspective, Brazil and Argentina adopt different institutional designs. In Brazil, consensuality is strongly encouraged by public policy and procedural and substantive legislation, preserving direct access to the Judiciary and the possibility of self-settlement before or during the process. In Argentina, mandatory prior mediation is part of the itinerary of access to jurisdiction in a wide range of civil disputes, with detailed procedural

regulation and mandatory participation of the legal profession, in a dogmatic context that emphasizes the prevention of harm.

This article aims to analyze, from a comparative perspective, the Brazilian and Argentine systems of out-of-court resolution of conflicts between dentists and patients, with special attention to the role of mediation and out-of-court advocacy, as well as the impacts of these models on the effectiveness of health protection and professional civil liability.

2 JUDICIALIZATION OF DENTISTRY AND CRISIS OF EXCLUSIVELY ADJUDICATIVE TREATMENT

The judicialization of health is manifested in a particular way in the dental field. Unlike other areas, in which judicialization is usually oriented towards guaranteeing access to medicines, procedures or hospital beds, many claims in dentistry are concentrated in claims for compensation for material and moral damages resulting from the provision of private services, especially in treatments with an aesthetic-functional component, in controversies related to retreatment, reimbursement, therapeutic continuity and the frustration of expectations.

This pattern reveals a predominantly consumerist logic, in which the dentist-patient relationship is framed as a consumer relationship, subject to consumer protection regulations. Such a framework is relevant to ensure informational transparency, good faith and the prohibition of unfair clauses, but it can reinforce an adversarial dynamic when the judicial process is triggered as an immediate and almost exclusive way to address the conflict.

The centrality of the judicial process in these disputes produces known systemic effects: increased economic and emotional costs, prolongation of the conflict, overload of the Judiciary and decisions that do not always meet the needs of the parties. In health conflicts, as the case may be, expert evidence is indispensable; However, the dependence on expert opinions, added to procedural polarization, can hinder restorative and negotiated solutions, especially when the disagreement stems from communication failures, the absence of adequately documented consent, patient insecurity, or mismatches in expectations regarding the result.

The criticism of the exclusively adjudicative treatment does not imply devaluation of jurisdiction, but reinforces the need to integrate state protection with appropriate methods, privileging communication, cooperation and the prevention of the aggravation of the conflict, according to the nature of each case.

3 DENTAL CIVIL LIABILITY: DOGMATIC FOUNDATIONS AND INFORMATIONAL ELEMENTS OF THE CONFLICT

The civil liability of the dental surgeon, in the Brazilian legal system, is structured mainly from the Consumer Protection Code and the Civil Code. Pursuant to article 14, paragraph 4, of the CDC, the personal liability of liberal professionals is determined by verifying fault, preserving the subjective nature of liability and requiring the demonstration of culpable conduct, damage and causal link. In the Civil Code, arts. 186 and 927 provide the general basis of the unlawful act and the duty to indemnify, and article 932 acquires relevance when the provision occurs in a business context (clinics, societies and acting through dependents), in which case the organizational dynamics can influence the attribution and management of risk.

Although the normative framework is sufficient for the legal framework, practical experience shows that dental disputes often originate less from a "pure technical error" and more from informational and communicational failures: expectations of results, understanding of the therapeutic plan, biological limits, foreseeable risks, alternatives and costs. From this perspective, the contemporary dogmatics of civil liability has reinforced the centrality of the ancillary duties derived from objective good faith — especially the duties of information, loyalty, cooperation, and protection — with a direct impact on the legitimacy of consent and on the degree of predictability of the therapeutic result.

3.1 DUTY OF INFORMATION AND INFORMED CONSENT: CONTENT, FUNCTION AND PROOF

The duty of information in dental services is not reduced to the mere delivery of a form. It is a legal duty that conditions the patient's self-determination and qualifies the rational choice in the context of technical asymmetry. The civil doctrine, when dealing with objective good faith, understands information as an element of correction of the structural imbalance of the relationship: the patient decides based on what he understands; If understanding is incomplete, conflict becomes predictable.

The function of informed consent is twofold: (1) ethical and clinical, as it allows free and informed decision-making, adjusting expectations and preserving autonomy; (2) legal-evidential, as it organizes the standard of transparency required of the professional and documents the informational path.

To avoid weaknesses in any litigation, informed consent must include: description of the procedure and the stages of the therapeutic plan; typical and relevant risks (including complications and limitations of the result); therapeutic alternatives and consequences of not

performing it; aftercare and the need for controls; possibility of retreatment, biological limitations and margins of variation of the result; foreseeable costs and hypotheses of additional costs, with due justification.

The specific literature on dentistry and civil liability highlights that consent should not be "standard and generic", under penalty of losing evidential effectiveness. The document is more robust when it dialogues with the concrete case, uses accessible language and records the doubts clarified.

3.2 DENTAL RECORDS: ETHICAL-LEGAL DUTY, CONTINUITY OF CARE AND EVIDENTIARY SUPPORT

The medical record is a central element of contemporary dental practice for three reasons: (1) it enables continuity of care and clinical safety; (2) evidences diligence, planning, decisions and conduct; (3) it provides evidentiary support in controversies, reducing uncertainty and polarization.

In indemnity claims, the evidence is often structured based on what is documented: anamnesis, examination, treatment plan, evolution, complications, orientations, controls, exams and images. The absence or precariousness of records tends to amplify the conflict, hinder forensic examination, and increase the perception of communication failure — even when the technical conduct was adequate.

Here lies a relevant point: mediation becomes more viable when there is minimally organized clinical documentation, as the parties can discuss solutions without fully depending on a late expert judgment. In terms of preventive policy, an adequate medical record and informed consent work as a true "infrastructure of the agreement": they reduce noise, stabilize the facts and allow proportional proposals.

In view of the growing complexity of professional accountability in dentistry, it is proposed to strengthen the ethical, legal and documentary training of dental surgeons from graduation. The consolidation of educational practices aimed at the correct preparation and use of clinical documentation is essential for the prevention of legal conflicts, for adequate patient information and for the demonstration of professional diligence proper to the obligations of the environment that characterize the dental activity. Thus, it is recommended the incorporation of specific pedagogical strategies that promote the understanding of the evidential role of dental documentation and encourage preventive action by the professional, contributing to greater legal certainty in clinical practice.

3.3 DUTY OF COOPERATION AND MANAGEMENT OF COMPLICATIONS: FROM CONFLICT TO THE DESIGN OF CONSENSUAL SOLUTIONS

Dental litigation often arises from complications, persistent discomfort, recurrences or results below expectations. In these situations, the legally relevant conduct is not only the technical one, but also the communicational management of the intercurrent, the patient's guidance, the offer of alternatives and the recording of the decisions adopted. Objective good faith — understood as a standard of behavior — is the basis for a duty of cooperation that does not imply "assumption of guilt", but transparent and diligent action to reduce damage and avoid the escalation of the conflict.

From a practical point of view, this is directly related to typical consensual solutions: partial retreatment with defined deadlines and clinical milestones; proportional reimbursement conditioned on objective criteria (e.g. steps not taken); independent evaluation (second opinion) agreed; adjustment of the therapeutic plan and economic conditions; closure agreement with preservation of the medical record and reciprocal commitments.

This perspective is consistent with the notion of adequate protection: when the dissent is informational and relational, the appropriate method is the one that allows the reconstruction of expectations and a proportional solution, without reducing the case to the binary logic of "fault versus indemnity".

4 CONSENSUAL MEANS IN HEALTH: DOCTRINAL FOUNDATIONS APPLIED TO DENTISTRY

Consensual means are part of a movement to reconfigure access to justice, in which it seeks to replace the single response of the litigation process with a set of "doors" capable of responding proportionally to different types of conflicts. This logic, associated with the *multi-door courthouse* (Sander) model, finds a privileged field in health, as many care disputes are marked by technical asymmetries and interests that are not resolved only through a conviction.

4.1 NEGOTIATION FOR INTERESTS: WHEN THE CONFLICT IS NOT "MONEY", BUT "RECOGNITION" AND "SECURITY"

Interest-based negotiation, developed by Fisher, Ury, and Patton, is especially useful for understanding dental conflicts. In many cases, the patient's stated position is "indemnity"; The underlying interest may be the recognition of suffering, security as to what has occurred

and what may yet occur, the predictability of costs, the possibility of completing treatment, as well as the preservation of dignity and autonomy.

When the professional responds only in terms of positions ("there was no mistake" versus "there was a mistake"), the conflict tends to escalate. Consensual methods make it possible to work on interests: technical clarification, continuity agreements, proportional compensation and independent evaluation.

4.2 MEDIATION: STRUCTURE, CONFIDENTIALITY AND COMMUNICATIONAL RECONSTRUCTION (MOORE)

Moore describes mediation as a structured process of assisted communication, in which an impartial third party facilitates the identification of issues, interests, and alternatives, without imposing a decision. In dentistry, this design reduces three typical risks of litigation: (1) narrative polarization ("malpractice" versus "inherent risk"); (2) the exclusive dependence on expertise as the only form of technical understanding; (3) emotional crystallization, which transforms therapeutic frustration into permanent hostility.

Confidentiality, when properly agreed, is particularly useful in the health sector, as it protects professional reputation and allows patients to expose their vulnerabilities without fear of being exploited. This favors realistic agreements that would hardly be proposed "under the spotlight" of the judicial process.

4.3 TRANSFORMATIVE MEDIATION: AUTONOMY AND RECOGNITION (BUSH AND FOLGER) IN HEALTH CONFLICTS

The transformative theory (Bush and Folger) is valuable for dental litigation because many conflicts constitute experiences of loss of control: the patient feels that he did not understand the risks, that he did not participate in the decision, or that he was not heard. Mediation can produce: *empowerment*, giving the patient back informed autonomy; and *recognition*, allowing the professional to recognize the patient's experience without necessarily admitting guilt.

This point demonstrates that mediation is not only an "economic agreement", but a mechanism that addresses subjective dimensions of conflict, which are fundamental in the field of health.

4.4 CRITERIA FOR THE ADEQUACY OF THE METHOD: WHEN MEDIATION IS BETTER AND WHEN IT IS NOT

To avoid an "idealization of consensuality", it is necessary to recognize its limits. Mediation is appropriate when: the conflict involves expectations, communication, costs and continuity of care; there is scope for a proportionate solution; the parties have a minimum capacity for dialogue (even if mediated); and the object is predominantly patrimonial or available (or at least negotiable as to the form of compliance).

Mediation tends to be inappropriate when: there are strong indications of violence, coercion or decision-making incapacity; there is urgency for injunctive or anticipatory relief to avoid serious damage; the litigation is essentially probative as to a central technical fact without a minimum documentary basis; or there is absolute resistance to any form of dialogue.

The delimitation avoids the indiscriminate use of mediation for all types of conflicts.

5 THE BRAZILIAN MEDIATION SYSTEM AND EXTRAJUDICIAL ADVOCACY

5.1 PUBLIC POLICY AND NORMATIVITY: CNJ RESOLUTION NO. 125/2010, CPC/2015 AND LAW NO. 13,140/2015

In Brazil, mediation was institutionalized as a public policy from CNJ Resolution No. 125/2010, which instituted the National Judicial Policy for the Adequate Treatment of Conflicts of Interest and structured the NUPEMECs and CEJUSCs. The notion of "adequate treatment of the conflict", associated with the Brazilian doctrine (especially Kazuo Watanabe), presupposes the choice of the method most compatible with the nature of the litigation, overcoming the idea that the litigation process is always the most efficient way.

The 2015 Code of Civil Procedure consolidated this guideline by providing that the State shall promote, whenever possible, consensual settlement and that conciliation, mediation and other methods must be encouraged by magistrates, lawyers, defenders and members of the Public Prosecutor's Office (art. 3, §§ 2 and 3). In theoretical terms, this guideline dialogues with the idea of adequate protection: the effectiveness of access to justice is not to be confused with the simple entry into the courts, but with obtaining a response compatible with the substantive law and with the particularities of the case.

Law No. 13,140/2015 regulated judicial and extrajudicial mediation, consolidating principles such as autonomy of will, confidentiality, and good faith. For Tartuce, mediation is especially appropriate in continuous or asymmetrical relationships, in which the solution constructed tends to be more sustainable and satisfactory than the external imposition of a decision.

5.2 JUDICIAL MEDIATION AND CEJUSCS

Judicial mediation occurs, as a rule, within the scope of the CEJUSCs. In dental conflicts, judicial mediation can be used in compensation claims to discuss reparation alternatives before the production of complex expert evidence, which tends to reduce costs and procedural time. If there is an agreement, judicial approval with the force of an enforceable title is possible.

5.3 EXTRAJUDICIAL MEDIATION AND SPECIALISED PRIVATE CHAMBERS

Extrajudicial mediation depends on the will of the parties and can be carried out in private chambers, specialized institutions or conducted by qualified mediators. Its usefulness in the dental field is high, as it allows: (i) the composition of retreatment and proportional reimbursement; (ii) continuity of care and technical correction agreements; (iii) instruments with confidentiality and non-recognition of guilt clauses, when legally appropriate and without prejudice to inalienable rights.

5.4 ARBITRATION IN DENTAL SERVICES: DOGMATIC AND JURISPRUDENTIAL LIMITS

Arbitration is governed by Law No. 9,307/1996, but in consumer relations, there are relevant limits. The CDC prohibits the clause that determines the compulsory use of arbitration (art. 51, VII) and, in adhesion contracts, it is required that the clause only produce effects if the adherent takes the initiative to initiate arbitration or expressly consents to its institution, with formal requirements.

The case law of the STJ consolidated this orientation, highlighting the need for real voluntariness of the consumer:

1. **STJ, REsp 1.189.050/SP (2010)**: admits an arbitration clause in a consumer/adhesion contract as long as it is not imposed; the effectiveness depends on the consumer's initiative or his subsequent express agreement.
2. **STJ, REsp 1.628.819/MG (2016)**: reinforces the prohibition of compulsory arbitration and conditions the initiation to the initiative or express agreement of the consumer.
3. **STJ, REsp 1.778.456/SP (2019)**: admits arbitration in property disputes, with reinforced caution in health/consumption, prohibiting its use to remove controversies about personal rights and damage to health.

It is necessary to explain that, in dental contracts, arbitration clauses require maximum caution. In general, it is safer to adopt staggered clauses (negotiation → mediation → arbitration/justice), preserving voluntariness and qualified information, which dialogues with

the arbitration doctrine (such as Carmona) and with the consumerist doctrine (such as Cláudia Lima Marques) in the protection of vulnerable consumers.

5.5 EXTRAJUDICIAL ADVOCACY IN BRAZIL: QUALIFICATION AND LIMITS OF OPTIONALITY

In Brazil, the role of the lawyer in mediation is optional, but recommended in complex and technically specialized conflicts. Extrajudicial advocacy contributes to: (1) reducing asymmetries; (2) evaluate risks and alternatives; (3) formalize a valid and enforceable agreement. However, optionality can maintain inequalities when one of the parties has technical or economic superiority, which requires attention to procedural design and informational transparency.

5.6 DENTAL ETHICS AS A PREVENTIVE AXIS

The Code of Dental Ethics (CFO) establishes duties of information, informed consent, maintenance of medical records and professional zeal. These duties act as a preventive axis: they reduce litigation, raise the quality of communication and serve as a reference for proposals for solutions in mediation, in line with the dignity of the patient and with objective good faith.

6 THE ARGENTINE MODEL OF MANDATORY PRIOR MEDIATION, THE DUTY TO PREVENT HARM AND THE CENTRALITY OF EXTRAJUDICIAL ADVOCACY

6.1 MANDATORY MEDIATION AND ACCESS TO JUSTICE: INSTITUTIONAL RATIONALITY

Argentina instituted mandatory prior mediation as a condition of proceeding for the initiation of a wide range of civil actions, through Law 26.589/2010. In this design, mediation is an institutional gateway to the system and formally integrates the itinerary of conflict treatment, without representing a waiver of the right of action.

The normative option shifts the focus from "access to the judge" to "access to the appropriate response", giving centrality to preventive, dialogical and proportional solutions before the initiation of judicial litigation. In health conflicts, including dental ones, this structure can contain the escalation of the conflict, preserve space for recomposition, and reduce the adversarial crystallization of the claim.

6.2 PROCEDURE, CONFIDENTIALITY AND FRUSTRATION CERTIFICATION

The procedure begins with a formal request, with the designation of a hearing before a registered mediator, subject to registration and supervision rules. The initial hearing delimits the conflict, identifies underlying interests and inaugurates an assisted negotiation.

The parties appear assisted by lawyers, and unjustified absence can generate procedural and economic consequences, giving effect to the duty of participation. The procedure is guided by confidentiality, favoring a frank presentation of expectations and possibilities of reparation — a sensitive aspect in dental disputes that may involve reputation, therapeutic frustration and the need for technical clarification.

If there is an agreement, it is formalized in writing; In its absence, a certificate of frustrated mediation is issued, enabling entry into the courts. Even so, the stage tends to qualify the information, reduce the litigious object and stabilize the controversy, making any subsequent process more rational.

6.3 CCYC AND DAMAGE PREVENTION: PREVENTIVE FUNCTION

The Civil and Commercial Code of the Nation (CCyC, Law 26.994) enshrines, in arts. 1710 and following, a general duty to prevent damage. Argentine dogmatics emphasizes a paradigm shift: from a responsibility focused only on reparation to a logic of avoidance and mitigation of harm, especially relevant in professional activities with foreseeable risks, such as health practices.

In dental services, this preventive axis directly focuses on the duties of information, informed consent, follow-up and management of complications. In addition, the CCyC regulates contracts for the provision of services (articles 1641 et seq.), emphasizing ancillary duties such as loyalty, cooperation, and information — dogmatic bases that support both accountability and proportional consensual solutions.

6.4 CENTRALITY OF EXTRAJUDICIAL ADVOCACY: QUALIFICATION OF CONSENSUS AND REDUCTION OF ASYMMETRIES

The mandatory participation of the legal profession in mediation is a distinctive element of the Argentine model. Legal assistance qualifies the proposals, reduces asymmetries and increases the formal security of the agreement.

6.5 APPROVAL AND ENFORCEABILITY

The judicial ratification of the agreements strengthens their enforceability and stability. This mechanism does not denature the extrajudicial nature of mediation, but evidences a

functional integration between consensuality and jurisdiction, preserving autonomy and ensuring effectiveness.

7 MEDIATION, OUT-OF-COURT ADVOCACY AND SYSTEMIC EFFECTS

7.1 OPTIONALITY AND OBLIGATION: IMPACT ON ACCESS TO JUSTICE

In Brazil, self-settlement is encouraged, but does not condition, as a rule, the right of action; Freedom of choice is preserved, although conflicts potentially solvable by consensus may enter directly into the courts. In Argentina, mandatory prior mediation reorganizes the itinerary of the conflict, functioning as an institutional stage aimed at preventing litigation, without suppressing the right of action.

7.2 LEGAL CULTURE AND BEHAVIOR OF ACTORS

In Brazil, the litigation tradition still prevails despite the normative framework of consensuality; The judicial process remains a way perceived as "safer" by many actors. In Argentina, mandatory mediation tends to consolidate a culture of prevention and negotiation, in which consensual settlement constitutes an ordinary stage in the treatment of conflict.

7.3 ROLE OF EXTRAJUDICIAL ADVOCACY AND INFORMATIONAL ASYMMETRY

The optionality of legal assistance in Brazilian mediation can preserve autonomy, but in health conflicts, it can maintain asymmetries and compromise the quality of the agreement. In Argentina, the obligation of legal aid reinforces the technical balance and predictability, attributing to it an institutional function.

7.4 CIVIL LIABILITY AND TIMING OF THE DISPUTE

In Brazil, mediation is usually triggered after a significant rupture and with a predominantly pecuniary expectation. In Argentina, mandatory prior mediation operates before adversarial crystallization, favoring solutions for correcting the service, restoring the bond and proportional reparation, especially in dialogue with the prevention of damage.

7.5 EFFECTIVENESS OF HEALTH PROTECTION

The effective protection of health requires timely, proportional, and humanized responses. Models that expand the space for dialogue tend to reduce costs and time of conflict, but effectiveness depends on institutional quality and professional culture. Thus, the comparison does not authorize an automatic transposition: it allows the identification of functional elements that can inspire improvements in Brazil (qualified pre-procedural

mediation, specialized chambers, strengthening of extrajudicial advocacy), preserving access to justice.

8 MEDIATION, HARM PREVENTION AND PROFESSIONAL ETHICS

The integration between mediation, professional ethics and public health policies is a central element for the effectiveness of consensual mechanisms. In dentistry, conflict prevention depends on clear communication, properly documented consent, a complete medical record, and adequate follow-up of complications.

In Brazil, the ethical duties established by the CFO function as normative parameters that guide the evaluation of professional conduct and can support proposals for solutions in mediation. In Argentina, the duty to prevent positive damage in the CCyC reinforces the ethical-preventive dimension of civil liability, bringing it closer to the logic of mediation: preventing, mitigating and avoiding the aggravation of the damage.

9 IMPACTS ON HEALTH PROTECTION AND PUBLIC POLICIES

9.1 MEDIATION AND EFFECTIVE GUARDIANSHIP IN DENTAL CONFLICTS

Effective protection, in addition to judicial redress, involves informational transparency, preservation of the patient's dignity and solutions compatible with the complexity of the case. Mediation allows for agreements that include retreatment, proportional reimbursement, independent technical evaluation, adjustments to deadlines and reparation modalities, which can be more satisfactory than purely monetary decisions.

9.2 CIVIL LIABILITY AND DAMAGE PREVENTION: POSSIBLE CONVERGENCES

In the Argentine legal system, the duty to prevent harm offers an explicit normative basis for preventive solutions. In Brazil, although without an equivalent systematization, principles such as objective good faith, the social function of the contract and the duty of cooperation provide a dogmatic basis for a preventive reading, reinforcing the legitimacy of consensual mechanisms in the field of health.

9.3 EXTRAJUDICIAL ADVOCACY AS AN ELEMENT OF QUALITY

Extrajudicial advocacy qualifies consensual solutions, reduces asymmetries and strengthens the validity and enforceability of the agreement. The comparative analysis suggests that legal assistance plays an especially relevant role in health conflicts, due to the technical vulnerability of the patient and the sensitivity of the rights involved.

10 SYSTEMATIZED TABLE: WHAT SHOULD GO TO MEDIATION AND WHAT SHOULD GO TO THE JUDICIARY (BASED ON THE STJ)

The systematization seeks to offer a decision-making map applicable to dentist-patient conflicts, preserving jurisdictional protection when necessary and indicating mediation or conciliation as an appropriate way when the object admits a proportional solution. The Brazilian normative-jurisprudential axis requires special attention to consumer protection and the prohibition of undue restrictions on access to the Judiciary, in addition to the limits of arbitration in adhesion contracts.

10.1 SORTING MATRIX: NATURE OF THE ORDER AND AVAILABILITY OF THE OBJECT

1) Conflicts typically suitable for mediation/conciliation (high suitability)

- a) Proportional reimbursement (total or partial) for steps not performed or for partial frustration of expectations, when there is room for adjustment of values and obligations.
- b) Retreatment, including technical adjustments, replacement of materials or partial redoing of the procedure, with a previously agreed schedule and conditions.
- c) Continuity of care, including definition of referral, agreed second opinion, transition of the medical record and agreement to terminate the bond.
- d) Ancillary contractual divergences, such as installments, terms, discounts, additional costs, warranty and maintenance terms.
- e) Requests for clarification and relational recomposition, when satisfaction results from an adequate technical explanation, recognition of the malaise and agreement on the measures to be adopted.

2) Conflicts that can be mediation, but with caution (medium adequacy)

- a) Cases with allegations of moral damage at a negotiable level, without the need for complex technical evidence as a precondition.
- b) Cases in which the expert opinion is relevant, but there is sufficient documentary basis for entering into agreements by bands, such as payment conditioned to an independent report.
- c) Conflicts with high reputational risk, in which confidentiality is decisive, but which require effective legal assistance to preserve the balance between the parties.

3) Conflicts that tend to require judicial action (low suitability for mediation as an exclusive route)

- a) Situations that require urgent relief to avoid serious or irreversible damage, such as immediate need for reparative treatment or removal of materials in critical situations.
- b) Allegations with a strong component of personality rights and damage to health, in which the central technical controversy requires structured judicial expertise.
- c) Hypotheses involving allegations of document fraud, coercion, incapacity or serious violation of rights, which make a minimally safe negotiation unfeasible.

In summary, the classification as "low adequacy" does not imply a prohibition of mediation, but indicates that it cannot replace state jurisdiction when the need for effective judicial protection and the production of robust technical evidence are present.

10.2 ARBITRATION IN DENTAL CONTRACTS: LIMITS IMPOSED BY THE CASE LAW OF THE STJ

In dental contracts, often of adhesion and consumption, arbitration faces relevant limits. The axis is the effective voluntariness of the consumer, according to the jurisprudential interpretation:

1. **REsp 1.189.050/SP (2010)** and **REsp 1.628.819/MG (2016)**: the arbitration clause cannot impose arbitration; it depends on the consumer's initiative or his subsequent express agreement, excluding compulsoriness.
2. **REsp 1.778.456/SP (2019)**: reinforces cautions in health and consumption, distinguishing available property litigation from sensitive issues related to personal rights and damage to health.

Practical consequence:

1. In dentistry, mediation and conciliation tend to be more compatible, as they do not restrict access to the Judiciary and allow proportional solutions.
2. In the case of arbitration, it is recommended to limit it to equity aspects and adopt a staggered clause, with clear information and effective consent.

10.3 "STAGGERED CLAUSE" AND AGREEMENT DESIGN: HOW TO AVOID NULLITIES AND INCREASE ADHERENCE

Based on the consumer system and the precedents of the STJ, the clauses and consensual agreements must:

1. clearly inform the procedure (costs, deadlines, location, choice of mediator);
2. preserve the patient's real faculty (without threat of loss of rights);

3. provide for mediation before any attempt at arbitration;
4. expressly exclude topics not suitable for arbitration (damage to health, personality rights);
5. contemplate evidentiary mechanisms in the agreement: independent report, second opinion, full delivery of the medical record and retreatment schedule.

11 CONCLUSION

The extrajudicial resolution of conflicts between dentists and patients is a legally relevant instrument for the qualification of health protection and for the rationalization of the justice system, especially in view of the growth of the judicialization of dental relations. The technical, relational and subjective nature of these disputes highlights the limits of exclusively adjudicatory responses and reinforces the relevance of mechanisms aimed at qualified communication, proportionality and the prevention of aggravation of damage.

In the Brazilian legal system, the institutionalization of mediation and conciliation as a public policy and normative guideline represents a relevant normative advance. However, cultural factors and the possibility of direct access to jurisdiction still hinder the practical consolidation of consensuality in conflicts involving dental practice, especially in the context of consumer relations and professional civil liability.

In Argentine law, in turn, mandatory prior mediation, articulated with the duty to prevent damage enshrined in the Civil and Commercial Code of the Nation and with the centrality of the practice of law, promotes the reorganization of the conflict itinerary and favors a more dialogical initial treatment. Such an institutional design, however, does not authorize the affirmation of the model's automatic empirical superiority, but rather evidences relevant normative alternatives for the initial treatment of health litigation.

In this context, the improvement of the Brazilian system can be promoted through structural measures, such as the strengthening of pre-procedural mediation, the creation of specialized health chambers, the institutional qualification of extrajudicial advocacy, and the integration between professional ethics, adequate clinical documentation, and damage prevention.

Finally, it is necessary to strengthen the ethical, legal and documentary training of dental surgeons since graduation, as an essential preventive axis for the reduction of conflicts and the promotion of legal certainty in clinical practice, in line with the effectiveness of the fundamental right to health.

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