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“MEDIATING FAMILY CASES WITH ODR”

First of all, it is worth remembering that I only work with private clients - not in courts and tribunals, where the work functions very differently because of the lack of infrastructure.

It is very important to realize that simply using online mediation already requires specific precautions. During the pandemic, we were all forced to work online, and just like the professionals, the clients were also forced to migrate to this environment. What used to be restricted to the corporate environment - tools and information already used in offices - started to happen also in the homes of the clients that came looking for mediation in the family law conflict resolution area.

The technology to solve conflicts brings us the great possibility of meeting people wherever they are, and the very means of conflict resolution have the mission to "fit the forum to the fuss". In this way, even in family conflicts, we have to verify the possibility of bringing them to the online environment, because eventually, in our analysis as professionals, we will identify cases in which it will not be possible to use the online environment according to the profile of the clients that require the service.

Online mediation can bring many advantages: people tend to feel more comfortable, we avoid time spent traveling, and individuals can express themselves in their environment of choice. On the other hand, our brain is already so used to face-to-face encounters that we need to feel safe, so much so that the human body misses the senses, the greetings, and the touch. All this makes the online environment a strange, out-of-the-ordinary space in which our dialogues and relationships take place, and in which more attention and care will be required during the negotiation.

To compensate for this strange environment we put ourselves in when working with Online Dispute Resolution, the professional must practice, study, and rehearse a lot in order to operate with certainty and confidence in this space. In addition, the ODR professional will have new responsibilities, from creating a safe online environment to teaching the parties how to speak up during the session, prepare for the technology, and understand the content.

To do this, it is necessary to think about the task and the goal to be achieved, and then choose the most appropriate tool for the process.

I make a note to make it clear that here I speak exclusively about my experience with private clients under the assumption that they have already adhered to mediation and also have the resources to work online (computer, tablet, broadband, etc.). However, it is worth saying that cyber vulnerability is, yes, a reality in many countries, including Brazil, where we have more than 33,000 people living in vulnerable situations, and that this is a point that must be taken into consideration by professionals who, like me, work with Online Dispute Resolution.

To start the work, I would like to suggest a checklist to find out who will be the professional team we will work together, who are the lawyers will act in the case, if we will work in co-mediation or alone, if the professional team that will be part of the process is already used to work online, if each lawyer will advise his/her own client in preparation for the digital environment or if this is an action expected from the mediator and, if necessary, a test or training can be scheduled to know if everyone is prepared and comfortable to work in a given platform. Of course, the tools or platforms adopted at the beginning of the mediation do not have to be the same until the end of the process, especially since this will be adapted according to the needs that may arise during the negotiation.

As for the choice of media, we have audiovisual, audio, or even just text, which could be done through the client's own cell phone - either by email or messaging applications. Often, the three methods will be used during the process, according to the need and situation, in which the most appropriate tool will be analyzed and defined. While meetings are usually done through audiovisual resources, calls between the professionals in the case can happen, and texts are more used for scheduling or practical issues, to make small checklists or minutes, always seeking that this text is well taken care of and worked out for everyone.

Once the means is chosen, we have several ADR platforms available in the market today, allowing for all the management of a mediation meeting - from messaging, videos, documents, texts, dialogues, and live conversations. Text messaging can occur, but with great care - quoting the Co-Founder of ODR Foundations, Ana Maria Maia Gonçalves, "text messaging is a brilliant way to miscommunicate how you feel and misinterpret what other people mean." In Brazil, especially, where WhatsApp is very common, extra care is also needed, because using this messaging application can imply that the professional will be available at all times, and may interfere with your schedule outside of work.

When choosing the audiovisual platform, it is important that the process takes place as transparently as possible; from asking the parties and professionals involved if they already know the proposed tools, to informing them if you have any relationship with the particular platform (for example, if you are a subscriber to a specific service). In online service, it is necessary to consider a number of possibilities for the platforms and tools used:

- how the dialogue will occur;
- whether it is possible to share information and documents during the mediation;
- whether there is the possibility to separate the parties in online rooms for small group conversations;
- whether there are options to create a brainstorm where all parties feel comfortable and can visualize the information;
- decision making and confirmation environment;
- the possibility of a digital signature of the agreement.

For each of the steps, we will use combined platforms for document exchange, security with encryption, information exchange, brainstorming, and signing. For accessibility, there are many free applications and platforms that do not require a subscription for access, ensuring that parties and teams can use them without major problems.

It is also very important that we can think about the physical environment to work online, not only our own, but also thinking about where the client will be during mediation. Personally, I have been discovering the things that I consider most important throughout my experience with Online Dispute Resolution; in which having natural lighting, two screens, a stand for a notebook, water (and coffee) always available, papers for note taking, a comfortable chair, a warm coat, and, most importantly, headphones (to also assure the client that what is being said is only being heard by me) are essential for a comfortable meeting without unplanned interruptions.

Besides the physical environment, we also have very useful accessories for online work: extension cables, mobile modem, external charger, and, working with a computer, I also recommend no-break equipment (electronic protector, stabilizer, and battery), to avoid uncomfortable situations in cases of power failure, allowing you to explain to your client what is happening before a sudden interruption.

A plan B agreed upon in advance with the teams and the mediated parties is always very important. During an online meeting, in case of a bad connection or power failure, for example, how long will they wait for someone to return? Who can be absent from the meeting? Is the person responsible for notifying by message or phone? Who should be notified? - These agreements should be made before the meeting starts and can be written

down in a text message or email, which should be forwarded to all participants along with the meeting link.

And be very careful! Now comes golden tips that I always repeat:

- Check your internet connection before the meeting;
- Check your appearance on the video before you enter the room;
- Watch your surroundings and what appears on the recording;
- Always wear headphones out of respect for the client;
- Keep water near you, avoid leaving the meeting;
- Have pen and paper nearby for any notes you may need to take;
- Make this checklist and instruct clients to do the same things!

In family cases, there are still other arrangements to be made. If the parties are a couple, for example, will they be together in the same room? Will they each have their own equipment or will they share the same screen? Are there small children on site? Will someone eventually have to leave the meeting to attend to the children?

If each party will be in their own space, with their own equipment, it is also important to make sure that, in no case, will there be a third party next to either party that can interrupt the negotiation. A third party behind the cameras can either hinder the conflict resolution process by interrupting it, or by breaking the trust and secrecy that has been placed there. Another agreement that can be made is to keep the camera on at all times, and if it is necessary to turn it off for any specific reason, that it is warned in advance, as well as the use of basic tools of the platform, such as raising your hand to ask to speak.

I work always making an arrival ritual; everyone together reviewing the agenda, establishing the order of speech, checking that everyone is comfortable (if they remembered to get the water and note papers), and always thinking about proposing breaks - especially because online work ends up creating certain fatigue such as pain in the eyes or by poor posture - and always take care of the duration of the meetings, respecting from the start time to the end. Within this role, the mediator must always adjust the communication in order to compensate for the fact that the online meeting is not a complete sensory experience:

- Do more summaries ("redundancy is meaning");
- Reinforce the visual with the oral: narrate your actions that cannot be seen by the camera;
- Look at the camera (especially if you work with two screens);
- Speak more clearly and slowly;
- Be attentive to the clients and ask questions if you think someone might be uncomfortable;

- If possible, in co-mediation, divide the tasks like who takes the minutes and who will take care of the technology.

You can't guarantee privacy and confidentiality in an online mediation, but these precautions will prevent many situations. Before a meeting, it is important to remember that it is agreed that neither party will record the meeting, that what is said will remain between the parties, and that it is a good faith commitment since there is no way to be absolutely sure that this covenant is being kept. Documents and files, on the other hand, can be protected. Information is protected by professional secrecy and contract.

For mediators, especially those who work with families, there are also added ethical duties in Online Dispute Resolution that go beyond following court rules and applicable case law, mandatory codes and parameters of conduct, professional and ethical obligations of the consensual resolution practitioner, institutional ethical parameters or standards, and ethical opinions. Remember that ethical principles are living and flexible elements that aim to inform, guide, and inspire us towards good mediation practices by encouraging the professional's responsibility, especially now that we have another party at the table: technology.

So online mediation is not analogous to face-to-face: there are changes in the nature of interaction and the skills required to manage communication and information exchange that impact the team we are working with. It is not enough to just log on to some video calling platform, turn on the camera and microphone, and start talking. We need to be aware that we are working in a space that is not our natural one, talking and interacting in a language that is not our native one, and we have to be very careful to better accommodate the needs of our clients who, unlike us, may not be as familiar with technology as we are.

I invite you to learn about the 17 ethical principles of Online Dispute Resolution (NCTDR): accessibility, accountability, competence, confidentiality, empowerment, fairness, equity, honesty, impartiality, informed participation, innovation, integration, legal obligation, neutrality, do no harm, safety, and transparency. Studying these principles, understanding them, and reflecting on them is part of our work with mediation and they guide us in this service.

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