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Training the magistrate for his/her interaction with the parties:

**How to train the civil judge
to behave appropriately between two parties, including to facilitate
mediation?**

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Web site of the Lisbon Network: www.coe.int/lisbon-network

How to train the civil judge to behave appropriately between two parties, including to facilitate mediation (as a mediator or to propose a mediation procedure)?

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1.- In civil cases, particularly in those that involve family matters, conciliation represents an important and necessary step of the proceedings.

Generally speaking, the Portuguese Code of Civil Procedure envisages conciliation as a stage in the proceedings that must be observed at the beginning of each trial, if not before. In that respect, article 652 asserts that, in all cases where settlement is allowed and where there is no basis for a continuance, the presiding judge should start the trial with an attempt to conciliate the parties.

Aside from that necessary judicial attempt to seek settlement, Civil Procedure Law also envisages the possibility of conducting a conciliatory conference at any stage of the proceedings when requested by both parties or if the judge concludes that such a conference would be useful and of value. The conference is presided over by the judge of the case and is oriented towards a settlement that will provide an equitable resolution of the suit (article 509 of the Civil Procedure Code).

In the particular case of family law, the first procedural act in all divorce cases is the «conciliation attempt», in which the judge will start by trying to reconcile the couple and, if that is not possible, to convert the litigious divorce into an «amicable no-fault divorce», in which spouses

must reach certain agreements, namely with respect to parental responsibilities for their children, maintenance of the spouse who is in need of financial support and the future use of the family residence (article 1407 of the Code of Civil Procedure).

As such, family judges are indeed expected to play an active role in promoting conciliation of the parties and, when it is necessary and appropriate, to send them to mediation services, in order to reach an agreement.

Conciliation is a crucial stage of the proceedings that deal with parental responsibilities, particularly those that are a consequence of separation or divorce of the parents, such as the determination of child custody, contact rights of the non-custodial parent and maintenance.

The Portuguese procedural law that governs this type of cases («Organização Tutelar de Menores») provides that any case should start with a conference with the parents, in which the judge must address the possibility of reaching an agreement on the above mentioned aspects of parental responsibilities. Any settlement that is reached should always serve the best interests of the children involved and will be subject to judicial confirmation through an agreed judgement.

Also, according to the same procedural rules, mediation plays a very important role in such cases, as the law encourages the possibility of intervention of public or private mediation services at any time of the procedure.

As we can see from this brief summary, judges in civil cases should have good conciliation skills and should be open to a mediation-based solution of the case when it is appropriate.

The ability to conduct court proceedings in such a fashion requires

that members of the judiciary have a number of important qualities:

First, independence and impartiality are ethical values that should never be affected by the exercise of the conciliatory function. Although it is appropriate for a judge to assist the parties on moving towards agreement in matters that might otherwise be contested, a judge should never appear to advocate for one side or the other, nor should a judge attempt to secure agreement by suggesting how he or she might rule should the matter remain contested. A judge must always recognize the boundary between helping others to reach an agreement and maintaining his or her own decisional independence and impartiality.

Second, although equally important, a judge must be skilled at interpersonal communication, which includes being a good listener as well as a clear communicator. A judge involved in conciliation or mediation must use his or her communication skills in order to help the parties achieve a sustainable consensus that will form the basis for their future conduct.

Third, judges should be open to develop their skills in conciliation and mediation and training should be provided to support the improvement of their capacity in this respect. Although conciliation and mediation by judges may go beyond the judicial function as traditionally defined, it is now commonplace for such strategies to be used. In helping to bring cases to a conclusion, they serve the same purpose as the more routine practice of trying cases and delivering judgments.

2.- It is clear that training plays a key role in developing judicial capacity regarding conciliation and mediation. Consequently, one must reflect on how such training can be improved to better serve the

educational needs of the judiciary.

The Centre for Judicial Studies - «Centro de Estudos Judiciários» (CEJ) - is the institution that in Portugal is exclusively responsible for the training of judges and public prosecutors.

All candidates for either the judicial or public prosecution service, who each year are recruited according to a competitive selection process, must receive the initial training provided by the Centre, which lasts for 32 months.

The theoretical and practical phase of initial training consists of a joint training for both future judges and public prosecutors and is divided into three segments:

1- From September 15th to March 31st of the following year, at the Centre for Judicial Studies, in Lisbon;

2- From April 1st to March 31st of the following year, in the Courts of First Instance;

3- From April 1st to July 15th, again at the Centre for Judicial Studies.

The first cycle at the Centre is aimed at the technical and judicial formation of the trainees, with the purpose of not only consolidating the theoretical knowledge acquired at Law Schools, but also, and above all, applying this knowledge to practical situations. This is done in order to refine their human and judicial sensibilities so that they become fully capable of making decisions in the cases presented to the courts.

Training is given by a teaching body composed by 14 judges and 12 public prosecutors, in a way that allows the development of critical abilities of trainees, along with the capacity to reflect and debate. These capabilities, if pursued reasonably and prudently, will ensure that CEJ trainees will have

the necessary skills and professional autonomy required to carry out their complex and demanding judicial responsibilities.

Technical training is focused on issues of civil law and civil procedure, commercial law, criminal law and criminal procedure, family and juvenile law, and labour and corporate law. Trainees are divided into groups (of 15 to 20 each) and are given sessions lasting on average 1 hour and 30 minutes each.

In addition to these technical areas, training also includes other relevant subjects such as fundamental rights and constitutional law, European and international law, judicial organization, methodology and legal language, ethics and deontology, public speaking (voice and expression), information and communication technologies, forensic medicine and forensic psychology.

These other *curricula* are developed in working groups and in joint sessions, conferences, seminars and workshops. Training at CEJ also involves study visits (e.g., to prisons, police departments, foster care institutions) and research activities on various subjects.

During the second cycle of training, trainees receive training in the courts, for periods of 6 months in each judicature (judicial and public prosecution service), under the direct guidance of an instructor magistrate appointed by the respective Council, monitored by a regional director and supervised by two Deputy Directors of CEJ (one from each judicature).

This training internship with judges and public prosecutors involves several tasks, such as assisting the trainers in criminal investigation activities, drafting decisions, and observing hearings, conferences along with the parties, trials and judges' deliberations.

The theoretical and practical stage of training ends with a third cycle

held at CEJ from April 1st to July 15th. This stage continues as a joint training for both the judicial and prosecutorial sectors and, at its conclusion, trainees will decide whether to pursue the judicial function or the public prosecution service. Trainees are then appointed as judges or public prosecutors for a probationary period and assigned by the respective Higher Councils to first instance courts.

The probationary period runs from September 15th of one year to July 15th of the next and judges/public prosecutors will perform their duties in accordance with their own competence and professional responsibility, although under the assistance and supervision of a mentor judge/public prosecutor.

At the end of this probationary phase, magistrates are definitively appointed as judges/public prosecutors.

In the above-described training system, conciliation and mediation are presented to trainees as relevant tools to resolve civil disputes. The deep analysis of civil procedure's dynamics that is made during group sessions, which are held during the first cycle of training, will allow trainees to have a good perspective on the advantages of judicial settlement efforts.

Also, in what concerns family law sessions, trainees have the opportunity to perform simulations of court conferences, held in cases dealing with the regulation of parental responsibilities. These simulations provide trainees the possibility of a first contact with judicial proceedings that demand good interpersonal communication abilities, as well as conciliation skills.

The outcome of these training activities is very positive and I must admit that only the limited time available for family law sessions prevents a more frequent use of such method.

Nonetheless, mediation - as well as alternative dispute resolution (ADR) in general - is the subject of study and analysis throughout the training process. This is true with respect to not only the general *curriculum* that deals with judicial organization, methodology and legal language, but also a specific training unit that is exclusively dedicated to the subject and that is normally held during the third cycle of training activities. This unit includes criminal, juvenile, family and labour mediation, and its main purpose is to deepen the trainee's understanding of ADR, to better know how that process is being developed both nationally and abroad, and to identify the ethical principles that should govern mediation activity.

In addition to all that, ethics and deontology sessions will help trainees to enhance the understanding of their future judicial duties and the rules governing their professional conduct, in which the values of independence and impartiality are, by definition, core principles.

Although the subject is treated in various perspectives during the training actions held at CEJ, there are no specific activities that, using a practical approach, are exclusively aimed at the development of conciliation and mediation techniques. In my opinion, such practical activities would be of great value in developing the skills needed for the future exercise of judicial functions.

The learning of these techniques should be clearly oriented to the judicial function of conciliation, bearing always in mind that this activity cannot be confused with the one that is provided by mediation services, although similar tools should be used in both practises.

It is true that the development of a "practical view" can be enhanced during the second cycle of initial training, which is held at courts and

involves the observation of judicial activity on a daily basis. This experience, along with the guidance of the instructor magistrate in charge of training internship, is a very important asset for the improvement of the communication and conciliation skills of those who are beginning their judicial careers.

However, in my opinion, there is still a gap to be filled with technical training that should be provided by certified experts in the field, in order to boost the experience acquired at the above-mentioned internship level. Similarly, steps should be taken to enhance the amount of practical knowledge developed during the first cycle of training.

Such a technical approach should be complemented with emphasis on the ethical aspects of judicial conciliation. As I have previously remarked, this is important so that judges are effectively able to identify and respect the boundaries between their settlement efforts in civil cases and the basic necessity of impartiality and independence required to ensure a fair trial in the event that conciliation fails.

Conciliation training should take place during the third cycle of activities at the Centre, if not before.

3.- Finally, this training approach can also be of great value for those who already perform judicial functions. Such court actors can only benefit from the further development of such technical skills, as this will improve their capacity in this field, which is often based mainly on the experience obtained from the constant challenges presented by court cases and contacts with parties, their attorneys and the public in general.

Therefore, on-going training must also address the need for the enhancement of conciliatory skills, by providing educational activities that

will serve that purpose adequately and in an appropriate way.

In conclusion, it is clear that conciliation and mediation are two strategies that can be expected to play an even greater role in our courts in the future. Not only will they help to settle cases that would otherwise require trial, but they will also be an added value in order to ensure that important issues, especially those involving families, will be resolved by consensus rather than through adversarial proceedings. To ensure that conciliation and mediation achieve these goals, judges and others involved in the process must receive adequate training of both an academic and a practical nature. If such training is appropriately supported and resourced, then it will help to ensure that those judges involved in conciliation and mediation will be in a position to play a truly useful and meaningful role in the process.