

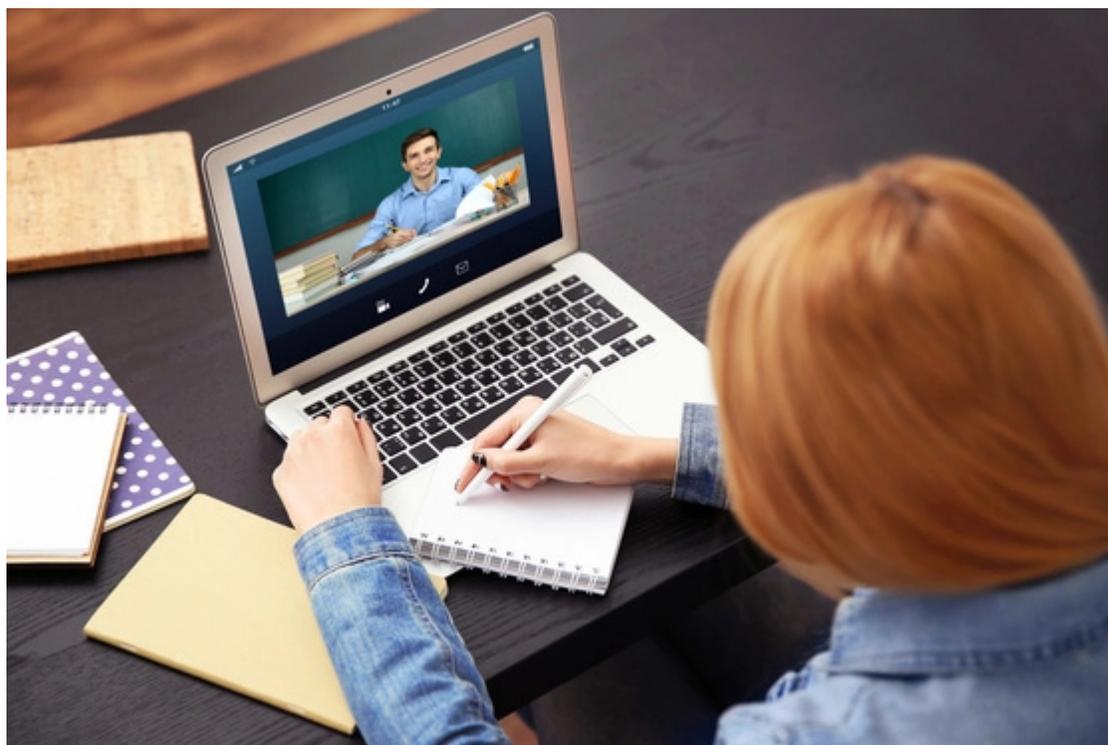
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Online Mediation of Matrimonial Matters? It WORKS

A discussion of the benefits of online mediation for matrimonial disputes.

By **David B. Saxe and Joaquin Ezcurra** | October 05, 2020



Courtesy photo

It should come as no surprise that, during the time the courts were largely shut down due to the COVID-19 pandemic, resort to mediation increased significantly as a way of reaching legal resolutions of pending or urgent matters. Angela Morris, *Business is Booming for Mediators as COVID-19 Cools Courts*. Texas Lawyer, April 2, 2020. <https://www.law.com/texaslawyer/2020/04/02/business-is-booming-for-mediators-as-covid-19-cools-courts/> (<https://www.law.com/texaslawyer/%202020/04/02/business-is-booming-for-mediators-as-covid-19-cools-courts/>).

Now that the courts have begun to reopen, one might at first believe that the pre-pandemic status of courts dealing with a steady flow of matrimonial cases is being slowly but inexorably restored. However, not only is online mediation still as desirable an alternative as it was during the pandemic's darkest days, it remains an attractive option specifically in the area of matrimonial law, where disputed issues are often personal and sensitive.

First, mediation generally is a much more cost-effective option than formal litigation. Clients want cost-effective processes, and the ability to reach resolutions quickly and efficiently results in more satisfied clients who are more likely to provide repeat business or referrals and less likely to complain about the process. There is no need to create and submit formal filings, no procedural requirements that must be strictly followed and that drive up expense, and no need for clients and their attorneys to spend time sitting around in court, waiting for their case to be called.

Attorneys and their clients can address the mediator directly, without having to frame their disputes in the context of a legal cause of action. Posturing by attorneys is reduced, leading to greater candor and efficiency. Further, the clients' risk in mediation is managed, as no one is obliged to accept the mediator's proposals. On the other hand, if the clients decide that they want certainty, they can combine mediation with arbitration so that if the mediation is not successful the mediator will have the ability to arbitrate the dispute and render a final decision.

Online mediation has become especially popular due to the lockdown requirements across the country. Olivia Covington, *Working It Out Online: Mediation Goes Digital Amid COVID-19*. *The Indiana Lawyer*, April 29, 2020. <https://www.theindianalawyer.com/articles/working-it-out-online-mediation-goes-digital-amid-covid-19> (<https://www.theindianalawyer.com/articles/working-it-out-online-mediation-goes-digital-amid-covid-19>). Although recent online mediation may have been largely born of necessity, this option still maintains many advantages even as pandemic restrictions have started to relax. Online mediation requires no set physical location for the parties to meet and no need to travel to that location, reducing time and expense. Clients and their attorneys may participate from wherever is most convenient for them, and have a greater ability to attend to other pressing matters during waiting times.

The dormancy of the court system has resulted in a significant backlog of cases (or at least a backlog more significant than usual), so resort to online mediation avoids the need to wait one's turn in the system. And of course, the threat of COVID-19 continues to be present, so the risk of exposure occasioned by in-person meetings is entirely obviated by online mediation.

Development of sophisticated videoconferencing technology such as Zoom and others has made online mediation particularly enticing. As those who have participated in this process know, a mediator has the ability to engage the parties more quickly and flexibly online than if the mediator had to shuffle between rooms in person. A mediator can provide virtual break-out rooms and may share the screen with whatever parties thought expedient at the moment. Documents and proposals can be shared in real time. Parties retain the ability to chat among themselves but can also send electronic notes to the mediator that they believe would assist in resolving the matter. And video usually has a remarkable ability to pick up on emotional cues. Thus, technology has reached a sufficient level of advancement as to equal or, in many instances, improve upon the various facets of an in-person mediation.

Naturally, there are some potential drawbacks to online mediation as well. A mediator must take care to ensure confidentiality in the wake of technological phenomena such as "Zoombombing." Apart from confidentiality issues, there is always the possibility of technical glitches that must be remedied before an online mediation can proceed. And there is, perhaps, a greater likelihood that non-verbal cues may be misinterpreted or simply overlooked on camera as opposed to an in-person meeting.

But these shortcomings can be anticipated and addressed, and they seem fairly trivial in the face of the advantages afforded by online mediation which many attorneys and clients alike have discovered. In fact, the familiarity with online mediation that has resulted from its proliferation during the pandemic period may ultimately prove to be the greatest factor in the endurance of this practice.

Not only does online mediation continue to serve as a worthwhile alternative to traditional litigation, it can be especially valuable in matrimonial cases. The stress of couples living together in closed-up environments during the COVID-19 pandemic, often under less than ideal conditions, will undoubtedly lead many to re-

examine their relationships and seek marital dissolution. This will likely lead to a greater number of matrimonial actions being filed as the lockdown period ends and will contribute to the court backlog that makes online mediation an even more attractive alternative.

Properly safeguarded, online mediation provides greater protection and privacy for clients than options that would require in-person appearances at a specified venue. Parties and their attorneys who are discussing sensitive issues concerning their personal lives and families would be especially attuned to this advantage. Further, parties who have family issues would also find it advantageous to be able to set the schedules for their mediation sessions among themselves, their attorneys and the mediators, without having to grapple with the vicissitudes of a court docket.

Combined with the fact that a party can participate in online mediation from home, this would maximize a party's ability to deal with any pressing family issues, especially those that may involve children, while still advancing the goal of resolving the instant dispute. Finally, to the extent that parties, their attorneys, the mediator and others who may participate in the resolution of the dispute reside at different locations, the option of online mediation permits all who need to be involved to participate from the comfort of wherever suits them best. There is no need to inconvenience the parties or their families by requiring them all to travel to one place along with the mediator and the attorneys.

Thus, despite the gradual restoration of legal services in the wake of easing COVID-19 restrictions, a party is not automatically advised to rush to court in an effort to assert a claim that has lain dormant during the pandemic. Mediation, and in particular online mediation, continues to be an appealing option for resolving disputes without undergoing the added expense and hassle of navigating through a backlogged court system. In matters involving matrimonial law, online mediation can be especially beneficial by affording more privacy and flexibility in resolving issues that are often personal and delicate in nature. Parties with such disputes are well-advised to consider online mediation prior to instigating a more formal proceeding.

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