



Online Mediations as an **Effective Tool** to **Reduce Family Case Backlog**

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During the Coronavirus pandemic of 2020, many courts throughout the nation shut down in the interest of that highest law: the public health.¹ In different parts of the nation, different courts were closed for different durations.² Over the past few months, many of these courts have re-opened, in whole or in part. Some have returned to nearly normal operations, while some have forged ahead into the uncharted territory of online-only case processing – with Zoom or equivalent programs becoming the primary mode of motions, hearings, and even evidentiary presentation and trials.

Few, if any, courts have returned to full efficiency as they deal with depleted or distanced staff. As courts and professionals adjust to the demands of keeping things moving amid the shutdown, online mediation of

family law matters, especially divorce and dissolution actions, should be a consideration as courts look to effectively manage any backlogs created by the shutdown.

While online mediation has been gaining in popularity over the past decade, it is still often overlooked or disregarded as an effective tool when resolving litigated cases. This is a mistake. The hallmarks of mediation – speed, cost reduction, risk mitigation, and collaboration – continue to be available online. Mediation in an online format allows mediators and parties to remain socially distant while still allowing those involved to meet privately when required. It also remains an effective way to resolve cases.³

As we utilize the tool more frequently, mediators,

1 Salus populi suprema lex esto.

2 Nevada, for example, quickly shifted to remote and telephonic hearings and kept cases processing with many cases delayed by a few weeks. By contrast, in many California courts, months would pass with motions and requests being treated as “unfiled” and the court on technical “holiday” status to prevent deadlines from lapsing.

3 Overall, I have not seen a decline in resolution rates of cases as a result of practitioners and their clients electing to mediate online as opposed to in person.

parties, and their counsel have been able to appropriately adjust protocols to account for challenges initially presented in online mediation. Early on it became clear that managing the number of people in a virtual room and protecting confidentiality would require more careful examination in a virtual setting than would otherwise be required in an in-person mediation. To remedy this, a series of questions to each party requiring them to verbally confirm who is in their room, along with carefully watching for any abnormalities, has been effective in most instances. Similarly, an admonition to parties and counsel against recording the session, either via video or on some other smart device, is recommended. Adding a password to sessions and creating a unique meeting identification code helps to address concerns about security and ensures that portals remain free from interference or uninvited intrusion.

While many of the early concerns related to online mediation's limitations have been resolved, it is important to note that some limitations cannot be overcome. Although mediation remains an effective tool, it is not a panacea. Some cases referred to online mediation will not settle in the course of one session. Some parties, especially self-represented litigants, may lack the technological resources to participate in online mediation. Mediation in any format will not be right for a certain set of facts that will be presented in some family law cases.⁴ While clearing the court backlog is a good goal, it must be balanced against those individuals seeking protection of the court.

As courts and judges begin working through the cases that may have been put on hold during the shutdown, effective case management may require considering the utilization of outside mediators and their services to help resolve cases. Doing this will allow the courts to focus on truly contested issues that require judges to exercise their core adjudicatory function.

Of note for those resolving family matters, particularly dissolution of marriage actions during COVID-19, is the importance of creating well-rounded agreements. While mediation's speed is an attractive attribute, quality of the process and outcome should remain high. So many things are still uncertain, and parties may be inclined to make an agreement that works for their current situation, but perhaps that same agreement will not remain workable as they physically return to work in their places of employment. Another example of this may be agreements that address which party will pay for childcare. Imagine a scenario where the family has their children at home and has no immediate need to address this. However, once they begin to return to work, and childcare is needed, do they have an agreement or understanding as to how those costs will be shared? Topics like this merit discussion to avoid putting parties in a situation where multiple modifications are required. Crafting language that addresses the concern and provides some flexibility to the parties in its execution may be one answer to this. Though this may not be an available avenue to explore in all cases, it will go a long way in keeping families from having to re-enter the court system right away once circumstances change.

While it is true that courts of general jurisdiction seeking to resolve their civil backlog in particular would benefit from the same model described here, family law in particular is a time-sensitive area. A month of an unsettled custody schedule will cost a parent irreplaceable time with their child. A month's delay in support payments can risk housing instability. Courts should never sacrifice justice in the name of speed, but in the current moment, online mediation of family law matters – in whole or in part – can provide additional bandwidth to an overstrained judiciary in its attempts to clear the backlog.

⁴ For example, cases involving domestic violence, neglect of children or other similarly situated issues would not generally be appropriate for mediation.