

DIVORCE MEDIATION IN THE ERA OF COVID-19

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I. INTRODUCTION

During the early days of 2020, lawyers' schedules were fully booked and set with trials, depositions, mediations, and everything in between. To many lawyers, it was obvious that these practices would be held in person, as they had been for years and years prior. Specifically for mediation, holding those meetings in person allows mediators to read body language, listen to clients, and get face-to-face with people to build trust, empathy, and rapport, which is essential to an effective mediation.¹ Yet in March of that year, those schedules that had been set since the year prior were suddenly cleared and came to a quick halt.

One of the many consequences that precipitated from the seemingly never-ending pandemic was the complete shutdown of the justice system. Along with widespread illness, COVID-19 caused unprecedented court closures, trial calendar continuances, and interruptions in the dispute resolution process on a scale never seen before.² Virtual alternative dispute resolution (ADR) processes, or online dispute resolution (ODR), were rarely used by lawyers, mediators, arbitrators, and judges before these unprecedented shutdowns.³ Yet suddenly, ODR was not just one of the many options available to professionals in the legal field but became the only option for dispute resolution, and consequently became a widespread practice.⁴

Divorce mediators and attorneys were not immune to this change in practice either. In general, during divorce mediation, a client and their spouse meet with a trained, neutral mediator to resolve issues, such as child custody, child support, and property division, in their divorce.⁵ While mediation does not necessarily work for many couples and is not possible for some domestic relationships or situations, judges often order it in family law cases before

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¹ Jean R. Sternlight & Jennifer K. Robbennolt, In-Person or Via Technology?: Drawing on Psychology to Choose and Design Dispute Resolution Processes, 71 DEPAUL L. REV. 701, 707 (2022).

² Kristi J. Paulson, *Mediation in the COVID-19 Era: Is Online Mediation Here to Stay?*, 51 S.W. L. REV. 142, 143 (2021).

³ Meredith McBride, *ODR in the Era of COVID-19*, A.B.A. (Oct. 27, 2020), https://www.americanbar.org/groups/family_law/committees/alternative-dispute-resolution/odr/.

⁴ *Id.*

⁵ Melissa Heinig, *Divorce Mediation Basics*, NOLO, <https://www.nolo.com/legal-encyclopedia/divorce-mediation-basics-36180.html> (last visited Oct. 31, 2022).

litigation of the issues.⁶ Mediation is much less expensive than litigation and offers couples more control over their settlement and the resolution of their issues.⁷ Before the pandemic hit, mediations would most often take place in an informal office setting, which allowed couples to meet face-to-face with their attorneys and a mediator. Traditionally, it was widely accepted that if everyone involved in a divorce proceeding is put together in a room, there is a greater chance that the case can be resolved through those alternative methods.⁸ Yet, with the decreasing desire to be physically together with other individuals, has the effectiveness of such proceedings decreased? Or are online divorce mediations just as effective as in-person mediation, even if clients are not, in the traditional sense, face-to-face with each other?

II. THE EFFECT OF COVID-19 ON DIVORCE MEDIATION PROCEEDINGS

A. *Mediation Versus Litigation*

There is significant research and statistics on the effectiveness of mediation in divorce proceedings. Overall, mediation costs a total of \$2,000-\$5,000, while litigation may cost upwards of \$20,000 per person.⁹ In addition, mediation only takes three to six months, while litigation takes an average of two years from start to finish.¹⁰ Finally, statistics show that divorce mediation produces agreement in 50%-80% of cases.¹¹ Yet, because of the newness of ODR, researchers have not differentiated the effectiveness of in-person proceedings versus online divorce mediation proceedings.

⁶ *Id.*

⁷ *Id.*

⁸ McBride, *supra* note 3.

⁹ BJ Mann, *Why Choose Divorce Mediation: An Infographic*, BJ MANN DIVORCE MEDIATION, <https://bjmediationservices.com/why-choose-divorce-mediation-an-infographic/> (last visited Oct. 31, 2022).

¹⁰ *Id.*

¹¹ *Id.*

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B. *Advantages of Online Dispute Resolution in Divorce Proceedings*

Despite the ambiguity of its effectiveness, in months since the rise and fall of COVID-19 across the country, many dispute resolution professionals have welcomed virtual divorce mediation with open arms.¹² Such professionals claim that the benefits of virtual divorce mediation far outweigh the costs of limiting these traditionally face-to-face interactions.¹³ These benefits include ease of access, convenience, flexibility, and increased amicability between parties.¹⁴

More specifically, conducting a virtual divorce mediation session is much easier than going to a face-to-face meeting with a soon-to-be ex-spouse.¹⁵ Couples can conduct sessions from wherever they happen to be.¹⁶ Parties can join a session from anywhere around the world, as long as they have access to a computer with a good-quality web camera, microphone, and internet access, which saves travel costs for themselves and their attorneys.¹⁷ Therefore, ODR makes it easier and more efficient for attorneys, parties, experts, and mediators to gather and help resolve a dispute.¹⁸

In addition, traditional business hours have shifted due to the pandemic, as countless Americans are now permanently working from home. As such, it is easier to schedule virtual mediations for off-hours or on weekends due to reduced business hour restrictions.¹⁹ Online mediation also breaks the bounds that parties often face when selecting a local mediator for their in-person session.²⁰ Parties are now able to retain mediators from

¹² See generally *7 Benefits of Online Divorce Mediation During COVID-19*, DRV L. (Dec. 2, 2020); <https://www.drvetranolaw.com/blog/2020/december/7-benefits-of-online-divorce-mediation-during-co/>; *Online Divorce Mediation*, JACOBSON FAM. L. (Mar. 9, 2020), <https://jacobsonfamilylaw.com/online-divorce-mediation/>; Erin Birt, *Benefits of Online Family or Divorce Mediation*, BIRT L. (June 2, 2021); *The Benefits of Online Divorce Mediation*, GIBSON MEDIATION GRP., <https://www.birtlaw.com/benefits-of-online-family-or-divorce-mediation/>; <https://gibsonmediationgroup.com/the-benefits-of-online-divorce-mediation/> (last visited Oct. 31, 2022).

¹³ *Id.*

¹⁴ Roseann Vanella, *Online Virtual Divorce Mediation: How it Works and Who it Benefits*, ADVANCED MEDIATION SOLS. (Jan. 30, 2018), <https://www.advancedmediationsolutions.net/online-virtual-divorce-mediation-how-it-works-and-who-it-benefits/>.

¹⁵ *7 Benefits of Online Divorce Mediation During COVID-19*, *supra* note 12.

¹⁶ *7 Benefits of Online Divorce Mediation During COVID-19*, *supra* note 12.

¹⁷ *7 Benefits of Online Divorce Mediation During COVID-19*, *supra* note 12.

¹⁸ *Online Divorce Mediation*, *supra* note 12.

¹⁹ *Online Divorce Mediation*, *supra* note 12.

²⁰ Birt, *supra* note 12.

anywhere in the country.²¹ Finally, it is not surprising that parties often feel tension, anxiety, and animosity towards one another during divorce proceedings, which can significantly heighten when meeting in person. Therefore, proponents of online mediation claim that virtual settlements can mitigate those negative feelings and allow for a safer and more effective method of resolution.²²

C. Cons of Online Dispute Resolution in Divorce Proceedings

Despite all the pros in favor of online divorce mediation, many legal professionals have called out the many cons of such practices. For example, conducting an hours-long mediation online might seem daunting if a client is inexperienced in using video-conferencing technology.²³ However, most video-conferencing programs are quite user-friendly, and most mediators are happy to walk clients through the process.²⁴ Also, the percentage of the population that is unfamiliar with such programs has significantly decreased as such technology has become a common practice in almost every aspect of daily life.

In addition, as explained above, these meetings were traditionally held in person because they allow mediators to read body language, listen to clients, and get face-to-face with people to build trust, empathy, and rapport, which is essential to an effective mediation.²⁵ Yet, taking away the face-to-face aspect of divorce mediation presents a challenge for mediators, attorneys, and clients to “read the room”.²⁶ If, for example, a mediator relies heavily on people’s body language to effectively communicate with the parties, online divorce mediation may be challenging. Dissidents of ODR have also suggested that online divorce mediation proceedings might not be confidential, depending on the software used and therefore, major privacy issues arise when moving such mediation online.²⁷

²¹ Birt, *supra* note 12.

²² 7 *Benefits of Online Divorce Mediation During COVID-19*, *supra* note 12.

²³ Ann O’Connell, *Online Divorce Mediation*, DIVORCENET, <https://www.divorcenet.com/resources/online-divorce-mediation.html> (last visited Oct.31, 2022).

²⁴ *Id.*

²⁵ Sternlight & Robbennolt, *supra* note 1.

²⁶ O’Connell, *supra* note 23.

²⁷ Paulson, *supra* note 2; Jennifer Winestone, *Online Mediation: The Good, the Bad, and the Necessary* (Apr. 11, 2020), <https://www.winestonemediation.com/online-mediation-the-good-the-bad-and-the-necessary>.

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Finally, some pros of online mediation, such as the ability to participate from home, might also work against individuals involved in the proceedings.²⁸ Many individuals may not be able to really focus on the task at hand from home at the same level they would be able to as though they were sitting in an office setting with a mediator.²⁹

III. CONCLUSION

Virtual proceedings and mediation can keep courts moving at a time when people fear gathering together and allow for the resolution of disputes in that process. As restrictions are lifted and people begin to gather again, there is a strong pull to return to the past. This turn to traditional legal processes raises new issues related to online mediation.

There are numerous advantages to resolving disputes online. Mediation online provides for not only cost effectiveness, but ease of access, convenience, flexibility, and increased amicability between parties. However, there are many disadvantages to such practices, such as technology illiteracy, distractions that come with conducting mediation at home, and the mediator's ability to read body language during the proceedings.

Therefore, should online divorce dispute resolution be abandoned? Some mediators craving in-person contact would argue that it should be.³⁰ However, most parties, counsel, and mediators remain in favor of using an online mediation method, or at least offering it as an alternative.³¹

Changes in how we think about dispute resolution methods as well as how we conduct them will be one of the great legacies of the COVID-19 era. Online mediation has quickly evolved as a result of the pandemic, and it is expected that this progress forward will continue.³² Mediators and participants have embraced technology and allowed it to propel the mediation process forward. While online mediation is not perfect for every case, the demonstrated success suggests we will see greater evolution as more and more people begin and continue to embrace online mediation in all areas of the law.

²⁸ Winestone, *supra* note 27.

²⁹ Winestone, *supra* note 27.

³⁰ Joshua Javits, *Virtual v. In-Person Hearings in a COVID World and Beyond*, MEDIATE.COM (Apr. 5, 2021), <https://www.mediate.com/articles/virtualvsinpersonhearingsincovid.cfm>.

³¹ *Id.*

³² Phillipa Beck & Zoe de Courcy Arbiser, *Further Evolution of Remote Mediation Expected Post-Pandemic*, PINSENT MASONS (May 24, 2021), <https://www.pinsentmasons.com/out-law/analysis/remote-mediation-post-pandemic>.

