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Using Short-Term Mediation While Courts Are Closed Due To Coronavirus

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Mediator Nicole K. Levy

explains how litigants are turning to mediation while courts closed by Covid-19.

Massachusetts recently announced that the state's courts would remain closed for most non-emergency matters [until at least June 1, 2020](#). Given that courts were initially slated to reopen on May 4, 2020, it now appears possible that Probate & Family Courts could remain closed to most business until well into the summer. For divorce litigants

with divorce cases on hold, *mediation is a strong option during the coronavirus pandemic*. What is certain is that Probate Courts will not be operating at pre-COVID-19 levels – i.e. with hundreds of hearings a week, packed courtrooms, and the ability to have court dates whenever necessary – anytime soon. (Indeed, even when courts do fully re-open, simply catching up with the huge backlog of delayed cases is likely to take months.) The new normal is affecting litigation by drastically limiting access to the court system. Parties considering litigation need to plan and prepare accordingly.

Mediators are Available when Judges Are Not

Mediation is often thought of as a soft service that only works for people who “get along” or “already agree” on most issues. This is *not always the case*. Using a mediator is a strong option for parties seeking to settle their differences amicably, but mediation also works in *high conflict cases* ranging from highly contested *child custody disputes* to *complex financial cases*. The coronavirus pandemic has pushed more litigants towards mediation than ever before. With the courthouses closed and judicial resources *earmarked for emergencies*, parties engaged in litigation are faced with fewer options, especially if they are seeking the speedy resolution of their claims. A mediator can break the litigation log jam that Covid-19 has caused.

Meditating a Case that is Already in Litigation

Parties who are involved in a contested divorce or family law case do not give up their litigation case simply because they participate in mediation. Indeed, targeted mediation often works best when *parties agree to “pause” their litigation* long enough to explore settlement with a mediator. If an agreement cannot be reached – or if one or both parties decide the mediation process is not for them – they can always *return to litigation*. Because *mediation is completely confidential*, no offer or statements made during the mediation process is admissible in the court case. Mediation during “paused” litigation can also be helpful for parties seeking to resolve a narrow, temporary issue along

the path to a final resolution. For example, parents with a contested *child custody* case might each view their case as destined for trial before a Probate & Family Court judge. With courts not hearing most motions for temporary orders, however, the parties might turn to a mediator to establish a temporary parenting plan, which the parties can follow as they await the re-opening of the courts. In other words, parties in litigation can use mediation to resolve short-term issues within the litigation itself.

With Judges Unavailable, Mediators Provide a Neutral Outside Voice

Parties who are struggling to reach agreement in litigation frequently say, “let the judge decide.” But what happens when a judge is unavailable to decide for weeks or months on end? There are important differences between a mediator and a judge, but an important thread connects both roles: Judges and mediators are each neutral, experienced third parties who are tasked with fairly considering the positions of both parties in an unbiased fashion. When litigants present their case to a judge, they vest the judge the authority to decide issues on their behalf. The role of a mediator is somewhat different. Instead of deciding matters for the parties, the mediator facilitates resolution through agreement. This approach is known as *facilitative mediation*. Mediation participants have a significant level of control of how their mediator conducts the process. However, parties who want their mediator to take a stronger role in fostering resolution can *request evaluative mediation*, in which the mediator uses his or her expertise and experience to evaluate each party’s position and provide feedback on how a judge would likely decide their issue. An evaluative mediator is not a “private judge”, like an *arbitrator*. A mediator never decides a case for the parties. However, many parties locked in conflict benefit from hearing the perspective of an experienced professional who is well positioned to evaluate each party’s position and explain how and why a judge would likely rule on the issue in question. If parties reach an agreement in mediation, even on temporary issues during ongoing litigation, the written stipulation

can be *filed electronically with a court* and quickly approved by a judge – giving the agreement the full force and effect of a court order.

Mediation for Temporary Orders and Short-Term Mediation

The challenges posed by the coronavirus pandemic have largely closed Massachusetts courtrooms to self-represented parties (also known as “pro se” parties). Prior to the pandemic, pro se parties could visit the Probate Court, speak to the lawyer of the day or a staff member behind the desk, and generally navigate the procedure for filing pleadings and motions. As we have covered extensively in our blogs, the coronavirus has not closed Massachusetts Probate Courts completely. However, the pandemic has forced courts to replace their usual rules with a *dense and complex patchwork of temporary rules and orders* that even experienced attorneys struggle to navigate. For self-represented parties, the web of rules has essentially locked them out of the court system. Attorneys do not face such restrictions. The combination of professional knowledge, an understanding of court rules, and personal and professional connections with court staff has allowed attorneys to *continue moving matters through the courts*, albeit in a more limited fashion than usual. At South Shore Divorce Mediation, all of *our mediators* are active and *experienced family law attorneys*. When our mediation clients reach agreement, we rely on our skills and connections as attorneys to ensure that the mediated agreement is presented to a judge, approved and incorporated in a court order or judgment as quickly as possible. This includes temporary orders that are entered at the earliest stage of the litigation process. Since the coronavirus outbreak begun, we have been offering clients mediation sessions as short as one-hour, in order to help individuals to navigate the challenges of a world without easy access to the courts. For some individuals, these short sessions include mediating temporary orders for custody and visitation, child support and/or alimony. For parties who know they need a divorce, but do not know where to turn with the courts closed, a short mediation session can serve as a kind of pressure relief valve, allowing parties to avoid emergency motions and short-term crises. Not every short-term

mediation results in a binding agreement for temporary orders. Struggling spouses or parents who are just looking to survive quarantine without a severe blow-up are not necessarily seeking a formal order. However, sometimes it is enough for parties to use a mediator to informally agree on the “rules of the road” during the pandemic. For parties struggling to communicate, the mediator can facilitate the critical exchange of concerns and ideas that parties cannot achieve on their own. There are numerous family law issues that do not [qualify for an emergency hearing](#) in the Probate Court, but nevertheless require some guidance from a neutral party to prevent catastrophe. Short-term mediation offers parties the opportunity with a guiding hand during an exceptionally difficult moment.

Even After Re-Opening, Probate & Family Courts will Struggle with Massive Backlog

Even after Probate Courts re-open their doors, the [backlog of cases that have piled up](#) during the shutdown, coupled with the [rush of filings](#) that will come as soon as the state’s lock-down relaxes, will prevent litigants from receiving speedy hearings for months. Even if courts fully re-open on June 1, 2020 – a prospect that most attorneys feel is unlikely – the “new normal” for the remainder of 2020 is likely to include lengthy delays for non-emergency hearings. The longer the lock-down goes on, the more severe the courts’ backlog grows. With [state tax revenue plummeting](#), courts are unlikely to receive additional staff or funding when they need it most. Moreover, until scientists develop a reliable vaccine, courts will continue to struggle with the loss of staff and temporary closures due to positive test results among court staff. Post-pandemic, courts will need to carefully ration the length and frequency of hearings as they dig out of the hole created by Covid-19 with limited resources. Alternative dispute resolution will be a crucial tool for parties to move their matters forward in a timely manner. Whether you are seeking a final resolution of your case, or find yourself dealing with challenging short-term issue, mediation (even a one-hour session) can help now and in the future.

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Coronavirus Mediation Services

*We are continuing to serve our clients during the coronavirus pandemic with specialized services including [video mediation](#), filling assistance with pleadings and agreements, and mediation of temporary orders and other non-emergency issues that are not presently being heard by Massachusetts Probate & Family Court. For more information, please visit our [Coronavirus Mediation Services Page](#). **Schedule a mediation with Nicole K. Levy today at (781) 253-2049 or send her an email.***

Nicole is a divorce mediator and mediation coach for South Shore Divorce Mediation, with offices in Hingham, Massachusetts and East Sandwich, Massachusetts. She is also a collaborative law attorney Senior Associate Attorney for Lynch & Owens, P.C., where she specializes in divorce and family law issues. Nicole is a statutory mediator under [M.G.L. Ch. 233, s. 23C](#) and a proud member of the Massachusetts Council on Family Mediation. To read more from Nicole, check out her [content on the Lynch & Owens blog](#).

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