



# MIDEATE

**Madhyastham: End litigation; embrace mediation**

## Oh, the lockdown extends...

There was an air of expectancy that the national lockdown that was announced to operate from 23<sup>rd</sup> March would be recalled on 3<sup>rd</sup> May and we were ready to go full throttle for an active life again. Now the announcement today is that there will be an extension by another fortnight.

We are caught in a strange part of history where we have been collective witnesses to experience a global scare of the pandemic Covid-19. It is difficult to imagine how we would have fared if we had not advanced in communication

technology the way we have done at this point of time when social distancing has become the new norm.

The significant redeeming factor is that the courts have tried out possibilities for opening a new window for online dispute resolution within the existing court system.

The e-courts project have never gone beyond duplication of e-filing along with regular filing of hard copies of documents and the best that courts could do in some places was giving option for judges to declare their own courts as paperless, where the

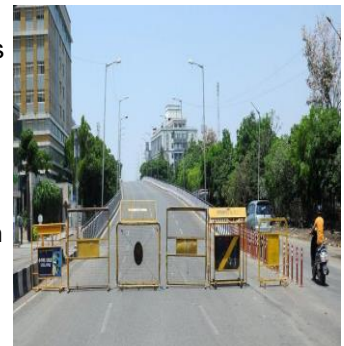
judge had a digital screen through which s/he could access documents, call cases from list displayed through computer screen, note down arguments of counsel and pass orders the usual way. There are perhaps just a handful of judges across India at the High Court level to adopt this practice.

All this is sure to change. Judges and lawyers are sufficiently primed to try new modes of hearings virtually and it is expected that there will be some dedicated sections among courts which will permanently feature hearings through video conferencing.

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## Preparing to address court online

The first lesson after the Jaipur episode of a lawyer presenting an argument from home wearing a *baniyan*, and the judge adjourning the case after a verbal reprimand is, Remind yourself that your just

not at home. You are at WORK.

In another encounter, the lawyer seemed well attired but his head was scraping the wall that seemed like ceiling or car upholstery. When the judge asked if he was sitting in the car,

the lawyer slid out of bed which had been drawn close to the wall and when he was holding the laptop on his belly in his reclining position! Make sure, you sit right up and face the camera when you are addressing the court.



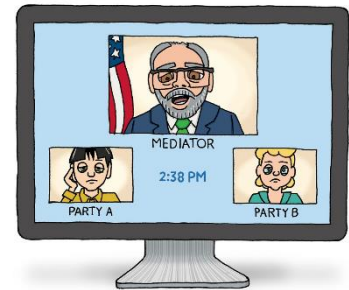
## Online mediation, stages when it could be effective

It will be wrong to imagine that all talks in mediation could be conducted online. Situations when the contentions of parties could be concluded only through documents and email communications are very little. The very purpose of mediation and the efficacy of the system will be compromised if there is no physical presence of the parties, with the mediator not being immediately available to help conversations taking place.

The following however, will work well through online communications: (a) Convening

parties and getting familiar with disputants. (b) when approval from higher authority is expected or when someone in the company or family whose presence is likely to improve the quality of the conversation and s/he is unable to come at the venue of mediation and (c) When a provisional settlement has been effected and parties desire to finalise the draft after taking additional inputs from lawyers or seniors or other members of the family/company. The last occasion shall not be made as ruse to wriggle out of

obligations concluded at the meeting. It is only to add sheen to the draft by appropriate legal expressions and some refinements that the parties might desire.



### Stages of arbitration, when online process could be effective

Just like mediation, arbitration could also work well through online process, even travel restrictions are removed and normalcy returns.

Procedural order, declaration and statutory disclosures of arbitrator, fixing arbitrator's fees

Interim orders, when documents filed are sufficient to take a decision.

Scheduling communications with the secretarial staff or arbitrator.

Evidence of witness whose presence could not be obtained on

account of age, disability or distance.

Determining seat of arbitration by the arbitrator, where parties are situate in different cities and the arbitrator decides to name the seat of arbitration.



In a virtual environment, there could be distortions of your personal image. Mind how you are seen and heard by the otherside.

- Look into the camera. See where you have the small eye in your system.
- Maintain a strong voice. Hear yourself speak and see how you sound.

- Frame yourself correctly. Head and shoulder to occupy the screen.



## Some styling tips

- Remind yourself that you are just not at home. You are at WORK.
- Mute or turn off camera when you do not want to be seen or heard.
- Set the back ground neat. In many an App, you have a virtual background. Go for while background with minimal furnityre.

## Limitations of online practice

You need to know that there are some inherent limitations to online practice. There will be difficulty of reading people not in physical proximity. Reading the temperaments and emotions during mediation sessions are crucial to navigate conversations amicably. Brace yourself for cross talks that are imminent and go for pre-determined signals when one person shall be made to stop, by crying halt by raising your hand or sending message in the chat box and at worst, mute the person who shall stop.

Reading the body language will also be lost. Words, words, words, that alone will fill the room. Ensure that you arrange for sufficient breaks, if the conversations could get long. Rivet the parties' attention to the conversations by encouraging them to take notes when the other is talking.

Sharing the warmth of presence of parties and your ability to rub influence of amiability through personal handshake and radiant smile will be lost. You will up the deficit by cutting long narrations of parties by witty interludes or

summing up the conversations at reasonable intervals so that everyone is kept on track and remain fresh.



## Bargaining with the devil

Ask **what** the problem is, you have learnt to **hear** the other side.

Ask **why**, you have known the **reason** for the behavior.

Ask **how**, you will **find** the way to resolve.

**Always** assess your **BATNA** and your **walk away point**.

**Allow difficult people to shout themselves out.**

**Postpone negotiation, if everyone is tired.**

**If you need to walk away, prepare the other party**

**"Sometimes, a deal with the devil is better than no deal at all."**

**Suggest mediation/ arbitration if no deal is made.**



## Sounding like a Pro



Take control of the discussions by **explaining** at the outset, the way you see the problem and how you expect the conversation to continue.

Exploring the other side will consist of finding the expectation of the other party, her bargaining point and how your offer made by you can impact the conversation.

Even you propose, always use the expression 'We' instead of 'I', such as, can we accept this figure? Can we assume that supplies will be made by the end of the week.

When the talks are in terms of financial recompense, keep a note book, make the calculation on a sheet of paper or work your calculator, even if it can be done mentally, and give a figure that is

not necessarily a round, wholesome figure. Use some unusual odd figure, such as 135,000 or 765 to give the impression that you have some basis of calculation when you quote a figure.

When you agree, sound warm and real to state, 'I am happy with that', 'I think, it is great' or some such warm words of mutual appreciation.

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## Madhyastham

Chennai 600 017

Phone: +91 44 2815 4145

E-mail:

[kannan@madhyastham.com](mailto:kannan@madhyastham.com)



*End litigation; Embrace mediation.*

We're on the Web!

[www.madhyastham.com](http://www.madhyastham.com)

Madhyastham is founded as a one stop portal for conflict resolution. The endeavour has been to introduce people to methods that we have not accustomed to accept in normal situations. We have a whopping figure of 32 million cases pending in courts. The legal professionals as lawyers and judges account for, perhaps, the largest numbers amongst professionals. We do not need to start a separate system for conflict resolution. We need to identify the courts themselves to take the initiative to open a new channel of communication, just not physically but by establishing virtual courts. We need to identify certain types of cases to be consigned only to online resolution. The lawyers will develop new skills of negotiation and adopt cooperative approach to burying the hatchet. Madhyastham will offer training sessions for teaching lawyers with new skill sets and help courts design systems for identifying classes of cases that are fit for non-litigative model along with online court processes. Reach out by visiting the official website and identify for yourself how we can collaborate for fruitful action.

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## Status of courts post Covid19 lockdown

**If schools and colleges could have online classes, why not online courts without any let up?**

Lectures are normally one-way process, though interactions with doubts and clarification are, to a limited extent, two way affair between the teacher and the taught. Courts do not work that way. Every trial work is an elaborate process, from the stage when pleadings are drawn, to production of documents with vital parts of examination in chief and cross before taking to the final stages for arguments to enable judgment. Of these, some stages could operate on line but

not all. There cannot be therefore any comparison.

**Have there not been some online adjudication now? Can we not make them a permanent feature?**

What has been happening now is to take some important urgent issues where public interest issues arising *out of* Covid19 lock down phenomenon are being taken up, such as transporting migrant labour, feeding the stranded, providing them shelter, etc. Regular court work is not being taken up at all. And that accounts for the whole lot of litigation. The existing infrastructure and training are

designed only for physical appearance parties, lawyers and judges.

**Do we see no chances of online adjudication in courts?**

There surely is a scope. Identifying the genre of cases fit for such adjudication is the priority issue all across India.

