

# Maryland Lawyer

News and analysis of legal matters in Maryland

**Opinion** on alternative dispute resolution

## Preparing clients for family mediation

In *The Paradox of Choice*, Barry Schwartz describes how much more difficult and time-consuming it is to buy a pair of jeans now that so many different colors, cuts, and styles are available. When presented with too many options, people often find it harder to choose and are less satisfied with their selections.

**James Ryan**

Marriage has become much more optional, with a growing percentage of Americans remaining unattached, and nearly 50 percent of spouses will choose to shed their attachment through divorce. When couples opt for this alternative, they are confronted with choices regarding every aspect of their life, from where they are going to live and whether they will retain custody of their children to who gets the flatware and the flat screen TV. Given how many choices they have to make, how significant the key choices are, how high emotions are running, and how difficult these choices are, given that their net assets are going down, not up, it is not surprising that divorcing spouses often feel overwhelmed.

One of the best choices couples can make is to mediate their differences rather than incur the time, expense, and aggravation of litigation. But for mediation to work, they must be prepared to make decisions. Based on my experience as a mediator, I believe these are the most important topics for family lawyers to cover:

- *Do you really want to settle?* Parties can have very mixed feelings about mediating. While aware of the risks and drawbacks of litigation, they may desire vindication. If parties enter mediation with a plan to prove the righteousness of their cause and punish their former spouse, the process is in jeopardy. Help

clients clarify their thinking about what it means to mediate.

- *And are you ready to settle?* Even if he or she clearly wants to settle, a divorcing spouse may not be equipped to do so. For many parties, signing an agreement is the moment of truth when talk about what the future is going to look like suddenly becomes real, and really scary. To stave off the powerful emotions this moment can trigger, parties sometimes become intransigent. They may refuse to accede to a very reasonable demand, or they may start renegeing on earlier commitments. Before entering mediation, ask clients whether they feel ready, willing, and able to bring closure to the divorce process and move on with their lives.

- *You are the decision-maker.* Particularly when the mediator's first name is "Judge" or "Retired Judge," the parties expect him or her to tell them what to do. Studies show that people are ultimately far more satisfied with decisions they make for themselves than rulings decreed by others. But that is after the fact. In the heat of a divorce, foisting responsibility onto the shoulders of a respected third party sounds very attractive. It helps if parties know in advance this is not going to happen. The mediator is going to add value in a very different way: by helping them craft alternatives for achieving what *they* want. Parties should enter the process expecting no more or less than this.

- *Do you know what you want?* As the old proverb says, a journey of a thousand miles begins with a single step. In other words, to master a difficult and complex problem, such as dissolving a marriage, the parties need to divide it into pieces small enough to get their arms around. So encourage clients to compartmentalize their concerns and focus on one issue at a time. People who disagree about generalities can

often find common ground when addressing a narrowly defined problem.

- *How can we get the ball rolling?* One set of choices divorcing couples need to make is which issues to address at the outset and which to set aside for later. It is often tempting to want to tackle the toughest issues first and get them over and done with. However, this approach can easily backfire because the parties have not yet developed a pattern of reaching agreement and the confidence that comes with a few early successes. By tackling relatively easy issues first, parties can generate the forward momentum needed to overcome contentious issues further down the line. Work with clients to assess where they can make concessions that are likely to help move the process forward, and which issues are likely to be the most difficult to resolve and are best kept for last.

### Choices can be intimidating

During mediation, in addition to serving as advisor and advocate, lawyers may need to help clients stay focused on discrete issues and the choices they need to make with respect to these issues. The opportunity for clients to make their own decisions is often touted as mediation's primary advantage. It is important to recognize that this freedom is both a blessing and a curse. Choices can be intimidating. Lawyers can ready clients for the challenge of making decisions.

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*Judge James L. Ryan, retired, joined The McCammon Group as a mediator and arbitrator in 2006 after serving as an Associate Judge of the Circuit Court of Montgomery County.*

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