



# Mediation at Maryland's Court of Special Appeals

By Mala Malhotra-Ortiz

When Chief Judge Peter B. Krauser began developing the mediation program at the Court of Special Appeals (COSA) in 2009, his goal was to create the most successful state appellate mediation program in the country. After 2 years of operation, the Court of Special Appeals' civil mediation program is well on track to meeting that goal.

"The experience of our own trial courts and civil appellate mediation programs in other states suggests that this new program offers the potential to resolve cases before the parties incur the expense and burden of preparing an appeal," said Chief Judge Krauser. "Mediation provides an opportunity for litigants to devise solutions of their own accord. Because parties in mediation determine the outcome of their controversy, mediated agreements have been shown to be more sustainable than court-mandated resolutions. Overall, we hope that this program will benefit all Marylanders by improving outcomes, increasing the Court's efficiency, reducing the cost involved in appeals and, in general, improving access to justice."

### Program Background

In February of 2010, the Court of Appeals and COSA issued an administrative order that provides guidelines for the operation of the mediation program within COSA's pre-existing prehearing conference program created and authorized by Maryland Rule 8-206.

Maryland's Mediation and Conflict Resolution Office (MACRO) supported the program by providing a grant beginning July 1, 2009, to develop and operate the mediation component of the pre-existing prehearing conference program. By July of 2011, the Administrative Office of the Courts began funding the program directly.

### Case Selection

Approximately 1,300 civil cases are filed annually with COSA. Most civil cases (with exceptions being juvenile causes, guardianships terminat-

ing parental rights, and applications and appeals by prisoners seeking relief relating to confinement or conditions of confinement) are eligible for mediation. While cases may go to mediation upon request or consent of the parties at any stage prior to a final opinion and order of the court, cases are generally selected for mediation shortly after the appeal is filed. Pursuant to Maryland Rule 8-205, upon initiation of an appeal, appellants must file an information report with the clerk of the court. Office of Mediation staff reviews these information reports to identify cases that may be appropriate for a mediation or prehearing conference. Relevant information includes the nature of the case, positions of the parties, continuing negotiations, prior mediations, willingness to mediate, and other factors. The Office of Mediation oftentimes calls counsel or self-represented parties to have confidential discussions regarding the potential settlement of the underlying dispute. The case is then either advanced to appeal or recommended to the Chief Judge to be ordered to mediation or to a prehearing conference.

Since, in most cases, parties are not required to submit briefs or order transcripts until the mediation is completed, the savings could be substantial if settlements are reached at that time. Cases resolved prior to oral argument save additional public resources by decreasing the judiciary's workload. Mediations are completed, in most cases, within 60 days of the order to mediation.

### Mediation Process

Appeals are co-mediated by one retired judge and one attorney from the COSA Office of Mediation. The

co-mediation model provides the advantage of having two perspectives and often two styles of mediation working together and complementing the session for the benefit of the participants. Further, the COSA mediator is able to provide continuing support to the litigants in procedural matters regarding settlements achieved during the appeal process. Oftentimes, for example, a settlement will require post-mediation teleconferences with counsel to discuss progress of discussions, remand of the case, or stay of the appeal. The program's co-mediation model is based on the appellate mediation program in Arizona's Court of Appeals for the Second Division (Tucson), which Chief Judge Krauser had identified as a successful program.

The judge-mediators (including retired Circuit Court, COSA, and Court of Appeals judges) have prior mediation training and experience, including specialized training in appellate mediation. The office staff, including the director, the deputy director, and an attorney-mediator, conduct mediation screening and intake, pre-mediation negotiations, co-mediations, and post-mediation services.

COSA mediators serve as neutral facilitators, generally using a facilitative mediation approach. The mediators may also provide neutral case evaluation upon the request of the parties to help them consider possible outcomes of the appeal and explore possible terms for settlement. With very limited exceptions, all communications in the mediation, as well as any pre- and post-mediation communications with the Office of Mediation staff, are confidential.

COSA mediations are provided without charge. All involved par-



ties and counsel are required to participate. The mediations are normally conducted at the Judicial Education and Conference Center in Annapolis and are scheduled for four hours.

### Mediation Statistics

From the program's inception through December 31, 2011, the program concluded 288 mediations and ordered mediation in 300 cases (12 of the 300 cases ordered to mediation are currently pending). Overall, 69 percent (or 198 cases) were settled through mediation. The program achieved full settlement in 173 cases (60 percent) of the total cases concluded. Out of the 288 concluded cases, 26 (9 percent) resulted in partial settlements, eliminating some issues and leaving those remaining to proceed through the appellate process.

The primary legal areas of cases mediated during this period were

domestic (30 percent), contracts (24 percent), tort (13 percent), real property/zoning (12 percent), foreclosure (10 percent), worker's compensation (4 percent), estates and trusts (3.5 percent), administrative (3.5 percent), and corporations (1.4 percent).

### Program Evaluation

While mediation has been provided for more than a decade in Maryland's trial courts, there were initial questions about the value of mediation at the appellate stage. The program's settlement rates and participant evaluations are indicating, however, that mediation is an appropriate and useful service in many appellate cases.

Information on state appellate programs gathered around the country in 2009 suggests that COSA's settlement rates are well above average. Our settlement rates compare favorably with the mediation programs that

have been operating for over 15 years in other states. We are currently in the process of conducting a national survey to determine whether these statistics are comparing "apples to apples" in terms of the other state appellate mediation program guidelines, screening methods, mediation models, and other relevant factors. The results of this study will be presented at the American Bar Association's Dispute Resolution Section Annual Conference in Washington, D.C., this April. Our hope is that the information will help our program, and other similar programs, evaluate and improve our services.

For more information on COSA's mediation program, go to the program's website at [www.mdcourts.gov/cosappeals/mediation](http://www.mdcourts.gov/cosappeals/mediation) or call the Office of Mediation at 410-260-3717.

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