



Mala Malhotra-Ortiz, left, is the director of the Court of Special Appeals' Alternative Dispute Resolution Division, started by Court of Special Appeals' Chief Judge Peter B. Krauser, right. (The Daily Record/Maximilian Franz)

## Appellate mediation does more than resolve one case

### It also stops future litigation and appeals

By: Steve Lash Daily Record Legal Affairs Writer October 27, 2014

The family dispute was ugly, with a mother suing her daughters over a bequest from their paternal uncle.

Pretrial settlement negotiations went nowhere, fueling the animosity. A trial judge's dismissal of the case did not end the matter: the mother filed an appeal.

But no appellate court ever heard the case.

Instead, both sides were ordered to attend appellate mediation through the Court of Special Appeals' Alternative Dispute Resolution Division.

The daughters' attorney, who recounted the story, said he was initially skeptical about being able to get the parties into the same room, let alone reach an agreement. But even though he had won the case below, attorney Mark A. Binstock said that without a mediated solution the litigation would have been endless.

Binstock called the appellate mediation an unqualified success, due in large part to the skill of the division's director, attorney-mediator Mala Malhotra-Ortiz, and retired Montgomery County Circuit Judge Ann S. Harrington, who served as co-mediator.

Malhotra-Ortiz "was very good at getting people to understand what fights were worth fighting and what they stood to gain by being reasonable versus being stubborn," said Binstock, of the Law Firm of Paley Rothman in Bethesda.

Harrington and Malhotra-Ortiz understood "where each party was coming from" and "pointed out the strengths and weaknesses" of each side's case," he added.

An agreement that had seemed impossible at the outset was reached in a day, Binstock said — though he declined to disclose its contents.

#### Seventy-percent success rate

Appellate-level settlements have been reached in 70 percent of the cases that Court of Special Appeals Chief Judge Peter B. Krauser has ordered to mediation since the program's start in February 2010, said Malhotra-Ortiz. An additional 3 percent of the ordered cases have resulted in "partial settlement," in which the issues or parties are narrowed before consideration by the appellate court.

On average, 156 civil appeals are ordered to mediation annually, or about 10 to 15 percent of the appellate court's civil docket, according to Judiciary statistics. The mediation is free for the litigants.

The ADR Division screens about 1,100 civil appeals per year for potential order to appellate mediation and makes its recommendations to Krauser, who issues the orders.

The chief judge will not order a case for mediation if it is "inappropriate" or if one of the parties is strongly opposed to it, he said, adding that the process is doomed to fail in such instances.

Reluctance, however, is often overcome, he said.

Malhotra-Ortiz acknowledged that at first blush, appellate mediation might sound like an oxymoron.

After failing to reach agreement before or during trial, why would the parties be amenable to settlement on appeal? The winner below, presumably, would have little to gain; while the losing side — the one who filed the appeal — might view the Court of Special Appeals as a venue for vindication, not compromise.

"On appeal, some of the parties are a lot more entrenched," Malhotra-Ortiz said. "It's ratcheted up to another degree of animosity," she added.

And therein lies the challenge for the mediators: To convey to the winning side that a victory below does not guarantee appellate success and to explain to the losing side that a mediated resolution is in their long-term interest.

Mediation provides "an opportunity to stop the train for just a moment" and permit the parties to talk, Malhotra-Ortiz said.

### **Key differences**

An appellate mediation involves two mediators: a staff attorney-mediator in the ADR Division and a retired judge.

The pair work as a team, Malhotra-Ortiz said. In a typical case, the retired judge might talk to the parties' attorneys about the procedural posture of the case, including what would likely happen if the case is sent back to circuit court. The attorney-mediator, meanwhile, will convey to the litigants — so certain they are in the right — that the outcome in court is not so clear cut.

"The judicial system isn't all about being heard," Malhotra-Ortiz said she tells the litigants. "It's about hearing admissible evidence."

In mediation, unlike in the courtroom, the parties are expected to tell the mediators information they would never divulge to a judge, such as the amount of money for which they are truly willing to settle. The figure is kept confidential but can assist the mediators in reaching an agreement, she added.

Retired Howard County Circuit Judge Diane O. Leasure, who has served as a mediator, called appellate mediation "amazing" in that it can resolve not only the issues on appeal but matters yet unlitigated, such as a brewing child custody dispute.

Without mediation, a family-law appeal "could get into that vicious cycle of never getting finality," Leasure said.

A subset of family-law appeals — those involving Children in Need of Assistance, termination of parental rights or guardianship of minors — are ineligible for appellate mediation, Krauser said.

Even so, family law appeals are the kind most frequently ordered to appellate mediation, making up 31 percent of the total so far, according to Judiciary data. Seventy percent of those cases resulted in full settlement and an additional 4 percent in partial settlement. (Contracts, at 20 percent of the total, and personal injury, at 17 percent, round out the top three.)

Attorney Sally B. Gold said she has recently resolved two family-law cases through appellate mediation due in large part to the mediators' desire to resolve all conceivable issues in the divorce, child custody and support litigation.

"They weren't limiting themselves to the issues on appeal," said Gold, of The Law Offices of Sally B. Gold in Baltimore. "The tone was set so that we were going to resolve it along the terms that we discussed, the comprehensive solution that was put on the table. That would not have happened without the third-party [mediators] present."

Family law cases are "particularly intractable, but the people at the Court of Special Appeals are particularly skilled," Gold added.

Krauser, who brought appellate mediation to Maryland as a pilot project in 2010 after reviewing its success in Arizona, said he's satisfied that the program is meeting the goal of taking work away from the appellate court.

A successful mediation not only eliminates the appeal in question, but ensures the case will not return after a remand to the circuit court, Krauser said.

"We prevent cases from bouncing back and forth," he added. "We don't see the case again on appeal. We prevent bounce-back."

Occasionally, attorneys will seek mediation after arguing their cases before the Court of Special Appeals but before the judges have handed down a decision.

"Sometimes after oral argument the parties have no longer any illusions about the outcome," Krauser said. "They have a better grasp of what is really at stake and what is likely to be the outcome."

Appellate mediation:		
Types of cases referred	% total	% fully settled
Family law:	31	70
Contracts:	20	77
Pers. injury:	17	64
Real property:	13	53
Foreclosure:	6	67
Workers' comp:	4	77
Estates & trusts:	4	70
Employment:	3	80
Administrative:	2	67

Source: Maryland Judiciary