

INSIDE: Principles of Professionalism ♦ Mediation and Arbitration ♦ The Delaware Way in Corporate Litigation

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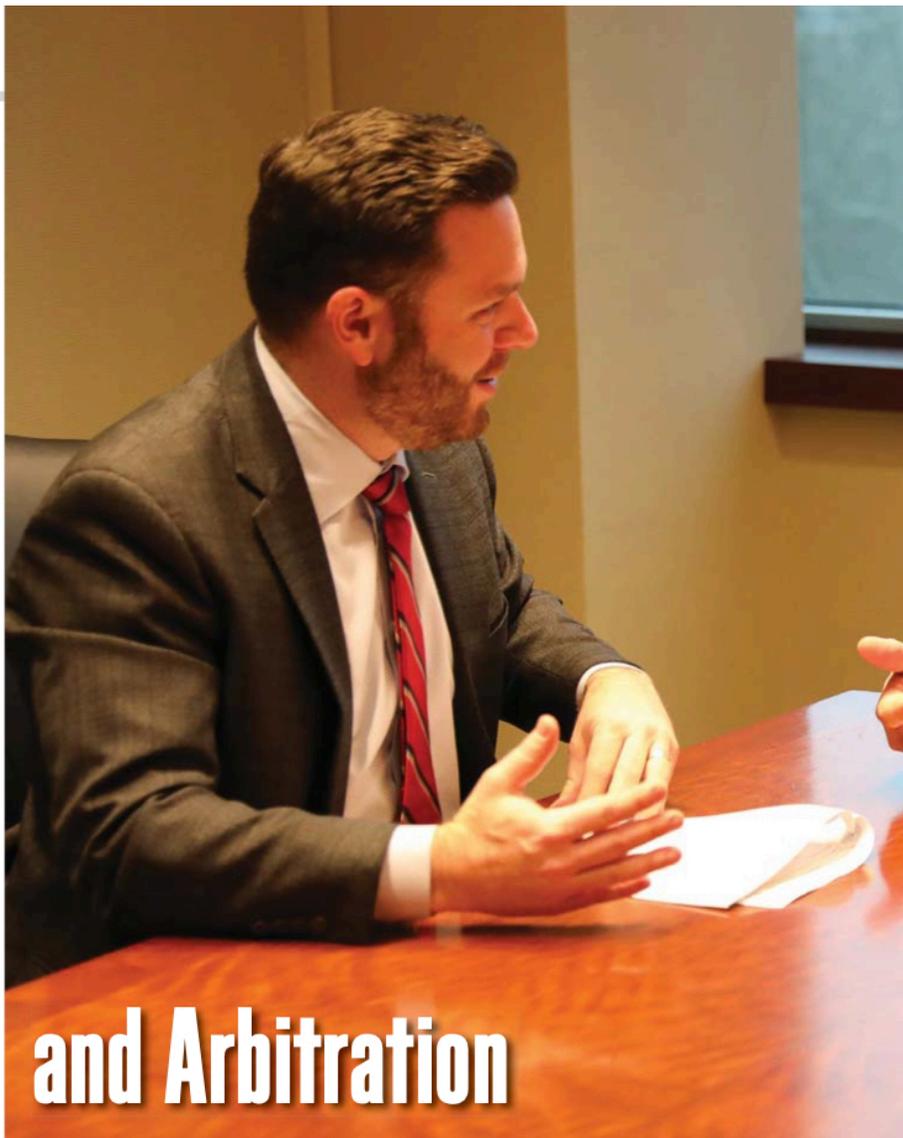
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FEATURE

Hon. Mary M. Johnston (Ret.)
and William D. Johnston



Mediation and Arbitration

Showcasing 'The Delaware Way' at Its Finest

"Delawareans expect people with no business being together to be together, and they expect it to happen without incident. ... Delaware is not just a state but a way of life." Celia Cohen, *Only in Delaware.*¹

Much has been said of "The Delaware Way." At its best, the reference celebrates Delawareans and others collaborating to efficiently and expeditiously achieve a mutually beneficial result. Detractors (or perhaps secret admirers) of the Delaware Way, however, may suggest backroom deals not subject to the light of day. Or, at its worst, "cronyism and ultimately corruption."²

The good news is that alternative dispute resolution (ADR) in Delaware — principally mediation and arbitration — manifests the very best of the Delaware Way.

Delaware's ADR History

Delaware Lawyer previously has addressed the Delaware Way in connection with resolution of broken-deal commercial disputes, in an article that focused on the role of Delaware counsel and non-Delaware counsel — whether disputes are resolved through litigation or ADR.³

This article builds on the previous focus to briefly survey the history of ADR in Delaware, and to suggest how the Delaware Way may have helped influence the development of ADR along the way and continues to do so.



BUD KEEGAN

Concepts of ADR likely have been an important part of life — in one form or another — since the dawn of civilization. In more recent history, particularly in extrajudicial constructs, ADR typically has taken the form of mediation or arbitration.

To state the obvious, concepts of ADR likely have been an important part of life — in one form or another — since the dawn of civilization. In more recent history, particularly in extrajudicial constructs, ADR typically has taken the form of mediation or arbitration. And Delaware has been no exception.

Delaware Supreme Court Chief Justice Daniel L. Herrmann encouraged consideration of ADR in the early 1980s, including urging the teaching of ADR in law schools.

The Delaware Bar in the Twentieth Century, in 1994, recounted arbitration and mediation initiatives in the Delaware Superior Court, reporting that “the results have been overwhelmingly

favorable.”⁴ The chapter concluded:

Although relatively new in the history of the Delaware Bar, alternative dispute resolution has gained an important role in the Delaware judicial system and Delaware has taken a leading role in the country in ADR, first in its devotion of resources to court-mandated arbitration and, more recently, mediation. Delaware is thus taking its place on the tide of the movement toward “multi-door courthouses” in which potential litigants have multiple options for resolution of their dispute.⁵

As of 2011, the *History of the Delaware Bar From 1995 Through 2010* recounted the Delaware Superior

Court’s continued ADR initiatives.⁶ And, importantly, the book went on to recognize the ground-breaking efforts (and success) of Chief Magistrate Judge Mary Pat Thyng in serving as a mediator in the United States District Court for the District of Delaware.⁷

In addition, mediation initiatives have been pursued successfully in the Bankruptcy Court for the District of Delaware, the Court of Chancery, the Court of Common Pleas, the Family Court, the Justice of the Peace Courts, and certain State administrative agencies. Likewise, the Third Circuit Court of Appeals has had success with mediation of matters on appeal.⁸

Of note, the book celebrating

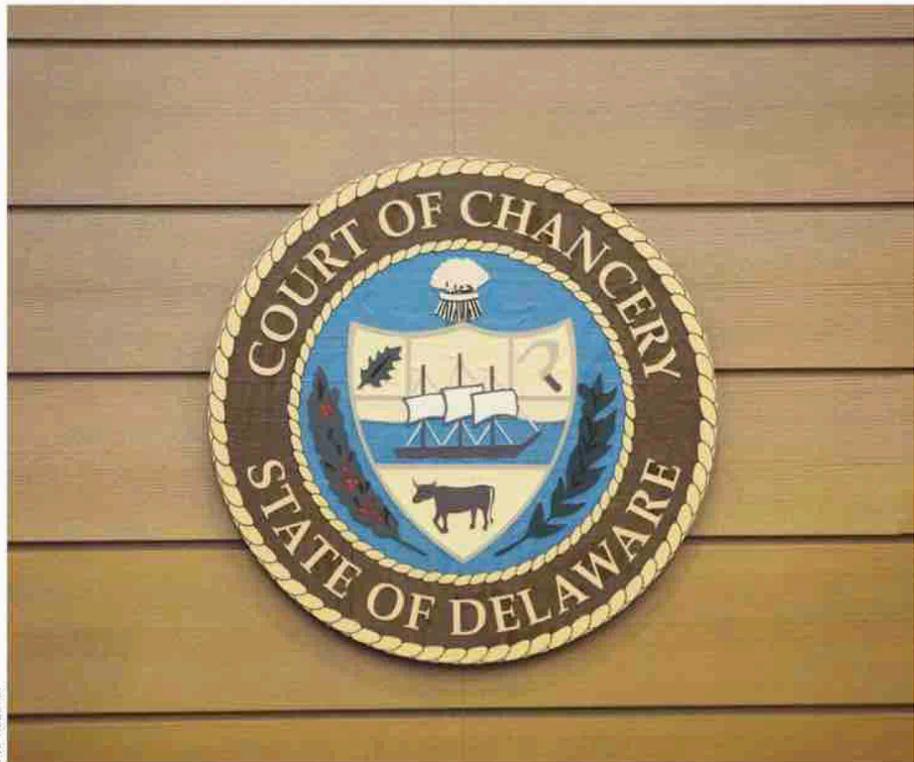
FEATURE | MEDIATION AND ARBITRATION

the Golden Anniversary of the Delaware Family Court in 2021 recounted the implementation of mandatory mediation of custody and visitation cases (1981) and child support cases (1992).⁹ The Family Court also offers a popular mediation training program.

With the approval of the Executive Committee of the Delaware State Bar Association, the Alternative Dispute Resolution Section of the DSBA established the Kimmel-Thynge Award, recognizing the contributions of ADR professionals in Delaware (following in the footsteps of the award's namesakes, the late Morton Richard Kimmel and Chief Magistrate Judge Thynge).

What Is Happening Now

Mediation and arbitration continue to be viable and valuable alternatives to litigation in Delaware state and federal courts and in courts throughout the



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Insurance Services for Delaware Attorneys



Many judges in the Superior Court and the District of Delaware require parties to at least explore mediation as a potential means for resolution of cases.

country (or, for that matter, the world). Some matters are mediated before they “ripen” into arbitration or litigation. Other matters proceed directly to arbitration, pursuant to contractual provisions agreed to by counter-parties. And still other matters find their way to mediation as pending litigation matters — pre-discovery, in the midst of discovery, before or after dispositive motion practice, or on the eve of trial.

Delaware courts have also continued their embrace of ADR to help parties resolve their disputes extra-judicially. Many judges in the Superior Court and the District of Delaware require parties to at least explore mediation as a potential means for resolution of cases, and the Court of Chancery has established substantive mediation programs for both cases pending before the Court,¹⁰ and for disputes that have not yet given rise to a judicial action.¹¹ These efforts

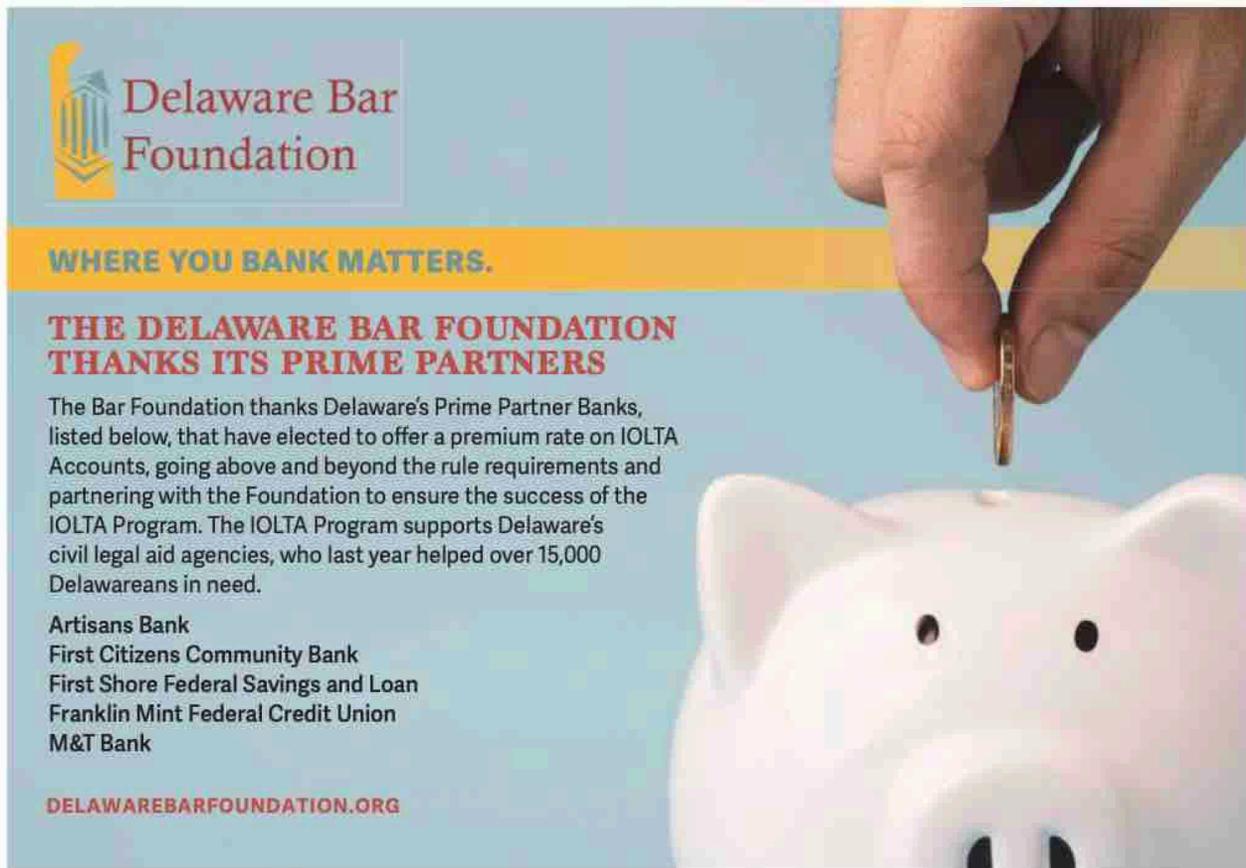
have led to the resolution of countless matters that would otherwise have required judicial intervention, while promoting efficiency for both the parties and the courts.

The Delaware Way

So, what difference has the Delaware Way made in the development of ADR in Delaware, and in what currently is occurring in Delaware with regard to ADR?

As has been emphasized previously, the role of Delaware counsel in mediation or arbitration proceedings is critically important, as it is in litigation pending in Delaware state or federal courts.¹²

At the same time, while there is certainly no shortage of excellent non-Delaware mediators and arbitrators, there can be substantial value associated with engaging a Delaware-based



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mediator or arbitrator. The obvious advantage is familiarity with Delaware substantive law and with the decisions/inclinations of members of the Delaware state and federal judiciary. By virtue of their long experience and practice with the Delaware Way, Delaware lawyers and judges generally are skilled in collegial and collaborative practices to achieve either a win-win mediation resolution, or an arbitration outcome where all parties feel that they have received full and fair consideration.

In theory, mediation can proceed without the presence of Delaware counsel. In practice, Delaware attorneys are crucial to efficient and meaningful mediation. It can be difficult for skilled and experienced litigators to put aside their normal advocacy roles and encourage clients to focus on the cost-benefit analysis necessary to resolve the matter before trial (or arbitration). Non-Delaware counsel, who may be accustomed to more rough-and-tumble litigation and negotiation tactics, need to be educated by Delaware counsel that a hardball approach rarely will lead to a win-win resolution.

The Delaware Way is neither about concession nor meeting halfway for the sole purpose of maintaining collegial relationships. Far from it. Delaware lawyers advocate as strongly for their clients as counsel in any other venue. However, good Delaware lawyers recognize the line between strong and effective advocacy and pointless strategies designed to delay and inflict pain on the opponent. Puffery and chest-pounding always are counterproductive — particularly so in ADR.

The presence and active participation of Delaware counsel informs and encourages clients and non-Delaware counsel that it is in everyone's best interests to conduct themselves professionally and with civility. Two positions

can only converge when the trajectory is toward a meeting of the minds — not continuing to move in opposite directions.

A hallmark of the Delaware Way is respect for the judiciary. The corollary in arbitration and mediation is due regard for the arbitrator or mediator. There is no question that Delaware counsel enhance these proceedings by affirmatively validating the ADR professional's evaluation and predictions as to how litigation and a trial will proceed (assuming counsel agree with the analysis, of course).

While the judiciary strives for consistency, it is human nature that each judicial officer will have certain preferences and practices. Delaware is known for its small Bench and Bar, and Delaware practitioners are great students of judicial preferences. It is not an exaggeration to say that Delaware lawyers have a long-established cottage industry of ensuring that they have Delaware precedent at their fingertips. When both the ADR professional and Delaware counsel concur as to anticipated litigation progression and possible trial outcomes, clients and non-Delaware counsel are more likely to be brought onboard to achieve a mutually beneficial resolution.

A word of caution: the Delaware Way must not be confused with collusive chumminess. It is easy for outsiders to misinterpret long-standing professional and personal relationships as a predilection to reach a resolution at any cost to the clients. Nothing could be farther from the truth.

While it is a fact of life in Delaware that the Bench and Bar regularly interact outside the courtroom and conference room — at children's schools, sporting events, religious institutions and social events — Delaware lawyers, judges and ADR practitioners are

constantly mindful to check those relationships at the door where necessary. Particular care must be taken to avoid overly personal *ex parte* exchanges with the ADR professional, leading to the counterproductive impression that such conversations might well be taking place with the other parties.

The Delaware Way is the precious coin of the realm. It cannot be forgotten that this valuable coin may be perceived as having two sides.

The Crystal Ball

Looking ahead, our hope and expectation is that the Delaware Way will continue to be a guiding light for those who serve as ADR professionals and/or serve as Delaware and non-Delaware counsel in mediations or arbitrations. If we can successfully look to that light — bringing people together “without incident” — we should stand a good chance of achieving the best of alternative dispute resolution in Delaware and beyond. ♦

NOTES

1. Celia Cohen, *Only in Delaware*, at 2 (Grapevine Publishing, LLC 2002).
2. *Id.* at 4.
3. A. Rocanelli and K. Swoyer, *Broken-Deal Resolution: The Delaware forums and the importance of Delaware counsel's role*, Delaware Lawyer, Vol. 41, No. 3 (Delaware Bar Foundation Summer 2023) (hereinafter “Broken-Deal Resolution”).
4. *The Delaware Bar in the Twentieth Century* (Delaware State Bar Association 1994), at 423; *see also id.* at 425 (“Another form of ADR that has recently become increasingly prevalent in Delaware is mediation.”).
5. *Id.* at 426-27.
6. *History of the Delaware Bar From 1995 Through 2010* (Delaware State Bar Association 2011).
7. *Id.* at 433.
8. *See* Joseph A. Torregrossa, *Appellate Mediation in the Third Circuit – Program Operations: Nuts, Bolts and Practice Tips*, 47 Vill. L. Rev. 1059 (2002).
9. *Family Court of the State of Delaware Golden Anniversary 1971-2021*, at 6 (Family Court of the State of Delaware 2021).
10. Ch. Ct. R. 174.
11. Ch. Ct. R. 93-95; 10 Del. C. § 347.
12. Broken-Deal Resolution.