

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

# Delaware Lawyer

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DELAWARE BAR FOUNDATION



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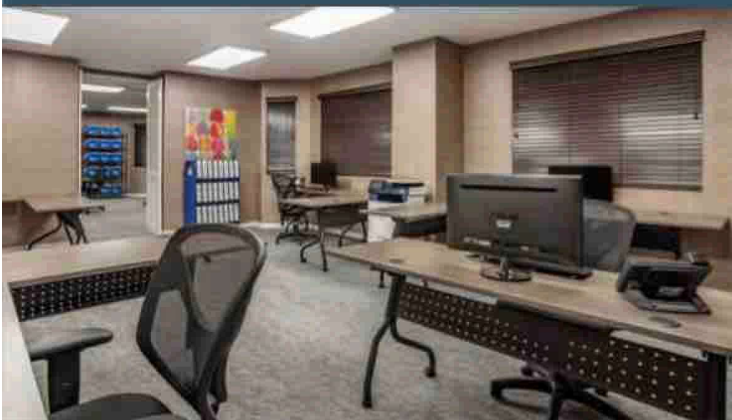


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# Delaware Lawyer

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The Delaware Bar has always been small in size but mighty in its approach to the law, much like the state itself.

One of the things that sets Delaware lawyers apart is how we approach our interactions with our fellow members of the Bar, as well as with members of the Delaware judiciary. Collegiality, courtesy and professionalism are hallmarks of what characterizes Delaware lawyers. As a small Bar, we know that in most things, cooperation yields better results than confrontation. Collaboration is more valuable than combativeness. While another lawyer may be your opposing counsel in one case, they may be your co-counsel in the next. Making enemies in a Bar the size of Delaware's is a one-way ticket to the doghouse.

We call our approach to practicing law "The Delaware Way," and it is a tradition that has not only survived but thrived for hundreds of years. The Delaware Way instructs us to treat other lawyers with the courtesy that we would expect in return, and to make the practice of law not merely a profession, but a pleasant one. Delaware lawyers extend scheduling courtesies and other considerations to accommodate vacations and family activities, and because our judges expect us to reach agreement wherever possible without involving the court, especially on the little things.

The Delaware Way does not preclude zealous advocacy. Far from it. Delaware lawyers pursue their clients' interests as aggressively as lawyers in other jurisdictions. But it instructs us to keep our interactions with other Delaware lawyers civil, and even enjoyable. And that matters more in Delaware because our fellow

Delaware lawyers are not just opposing counsel. They are our neighbors. Our friends. They coach our kids' sports teams. In a small state and Bar, building and maintaining strong relationships is paramount. And generations of Delaware lawyers paved the way and set the expectations for us to follow in their footsteps.

Our first article highlights an embodiment of the values that the Delaware Way represents: the Principles of Professionalism for Delaware Lawyers. Adopted by the Delaware Supreme Court and the Delaware State Bar Association, these Principles inform lawyers and the public of the standard to which Delaware lawyers hold themselves, and what to expect when they hire or interact with a Delaware lawyer.

In our second article, Pete Walsh reflects on the Delaware Way in a modern litigation practice. Litigation often gets intense, and when tempers flare it often falls to the Delaware lawyers to break the tension and try to collaborate with their contemporaries on the other side to reach agreement where possible. The Delaware Way reminds us of the importance of that role, and to involve the court only as a last resort.

Finally, retired Superior Court Judge Mary Johnston and long-time practitioner Bill Johnston discuss the Delaware Way in alternative dispute resolution. Mediation and arbitration continue to proliferate as alternatives to litigation, and the role of Delaware lawyers — and adherence to the Delaware Way — in those fora is no less important than in more traditional litigation environments.

Experienced Delaware lawyers understand that practicing in our state is a privilege compared to other

legal communities that don't place as heavy of an emphasis on courtesy and professionalism. But the Delaware Way isn't self-perpetuating. Rather, it requires us all to continue embracing the principles that set Delaware lawyers apart, to distinguish Delaware as a national and global leader in legal practice professionalism.

With this issue, we also recognize the efforts of several of our longstanding Board of Editors members, as they conclude their service to *Delaware Lawyer*. Consistent with the Delaware Way, David McBride, Bob Whetzel, Commissioner Loretta Young, Gerry Grant and Commissioner Candace Holmes gave considerably of themselves and strove to make *Delaware Lawyer* the best magazine it can be. We are in a stronger position because of their efforts, and we thank them for their years of dedicated service.



James H. S. Levine

# Delaware Lawyer

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BUD KEEGAN



**The Honorable Mary M. Johnston (Ret.)** is a retired judge of the Delaware Superior Court, where she presided over hundreds of jury and bench trials during her more than 20-year tenure, including more than a decade on the Superior Court's preeminent Complex Commercial Litigation Division.

Judge Johnston was often cross-designated as a Vice Chancellor of the Court of Chancery, and was regularly appointed to complete panels of the Delaware Supreme Court for appeals from the Court of Chancery. As a jurist, Judge Johnston successfully mediated complex corporate and commercial disputes, and she now practices as a full-time professional neutral with Delaware ADR, LLC.



**William D. Johnston** is a partner with Young Conaway Stargatt & Taylor, LLP. He brings more than 40 years of practice experience as an advocate on behalf of clients in corporate and other business counseling and litigation to assist parties and their counsel as a mediator, arbitrator, court-appointed

neutral (Special Magistrate) and expert witness. His record of service includes President of the Delaware State Bar Association, President of the American Judicature Society, Chair of the ABA Business Law Section, State Delegate to the ABA House of Delegates, and President of the American Counsel Association. He is certified by the Delaware Superior Court as a mediator and a commercial arbitrator, is a Distinguished Neutral with CPR: International Institute for Conflict Prevention and Resolution, is a Commercial Arbitrator and Consumer Arbitrator with the American Arbitration Association, and is a Fellow of the Academy of Court-Appointed Neutrals.



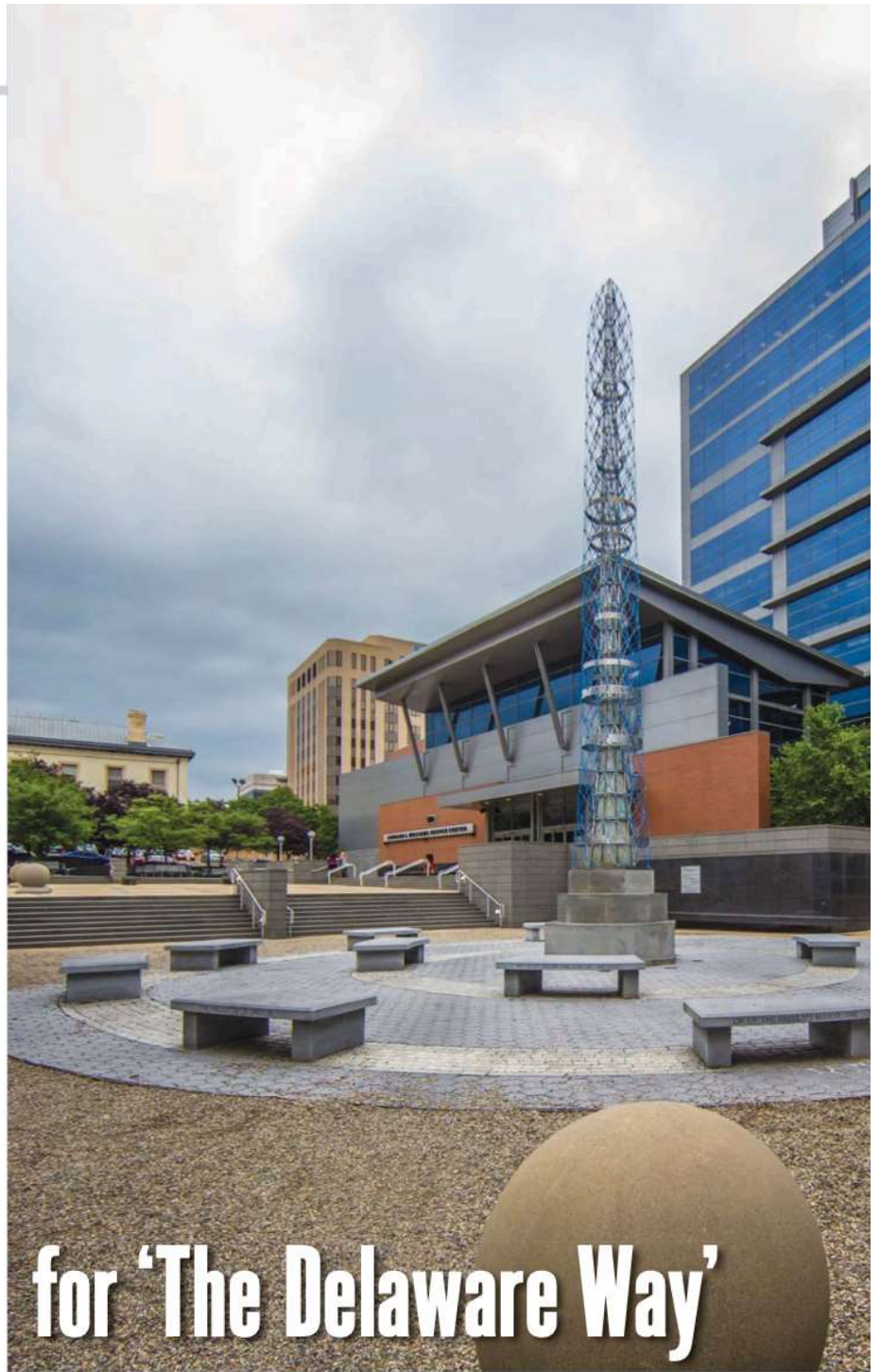
**James H. S. Levine** is a partner with Troutman Pepper Hamilton Sanders LLP, where he regularly represents clients in complex corporate and commercial disputes, including breach of contract, fiduciary duty and bet-the-company litigation. He has extensive experience in the Court of Chancery, as well as

in the Superior Court Complex Commercial Litigation Division and the District of Delaware. In addition to his litigation and counseling practice, Levine has served by judicial appointment as a special master, and has also served as a mediator in corporate and alternative entity disputes, and in breach-of-contract actions. Levine is the co-Editor-in-Chief of *Delaware Lawyer*, a member of the Delaware Board of Bar Examiners, and has held leadership positions in multiple sections of the Delaware State Bar Association.



**Peter J. Walsh, Jr.** chairs Potter Anderson & Corroon LLP's Executive Committee and is a partner in the Corporate Litigation Group. He joined the firm following a clerkship in the Delaware Court of Chancery and handles complex corporate and commercial cases in the Delaware courts. Walsh has

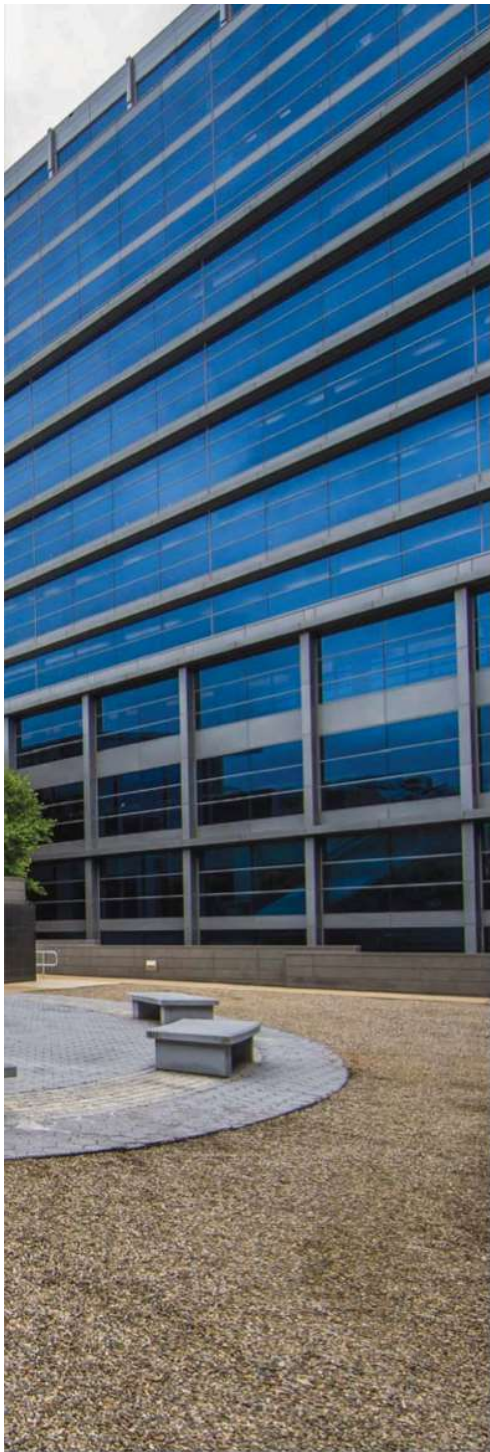
first-chaired many trials in the Delaware courts and has successfully argued numerous appeals before the Supreme Court of Delaware, as well as several in the United States Court of Appeals for the Third Circuit. He regularly handles Court of Chancery proceedings, including stockholder class and derivative actions, summary proceedings pursuant to the General Corporation Law, and disputes involving alternative entities. He also frequently counsels officers, directors and board committees in matters of Delaware corporate law, primarily in the context of ongoing or anticipated litigation.



# Guideposts for 'The Delaware Way'

## Principles of Professionalism for Delaware Lawyers

“The Delaware Way” can be challenging to describe to outsiders. It is an approach to practicing law; an attitude and a perspective that can be difficult to reduce to mere words or examples. But documenting the expectations of Delaware lawyers (and those who are admitted to practice in Delaware *pro hac vice*) is important so those who are subject to those expectations understand what is asked of them. Delaware’s efforts to describe the Delaware Way have resulted in the adoption of a characterization of those principles called “Principles of Professionalism for Delaware Lawyers.”



BOB CRAIG

All states have formal rules governing attorney ethics. The American Bar Association has published rules and guidelines concerning ethics since the early 20th century.<sup>1</sup> But Delaware's Principles go beyond the bare-minimum expectation of most ethics rules. They prescribe how lawyers *should* act, beyond merely what they are prohibited from doing.



## PRINCIPLES OF PROFESSIONALISM FOR DELAWARE LAWYERS

The Delaware State Bar Association and the Delaware Supreme Court have jointly adopted the Principles of Professionalism for Delaware Lawyers for the guidance of Delaware lawyers, effective November 1, 2003. These Principles replace and supercede the Statement of Principles of Lawyer Conduct adopted by the Delaware State Bar Association on November 15, 1991. They are not intended, nor should they be construed, as establishing any minimum standards of professional care or competence, or as altering a lawyer's responsibilities under the Delaware Lawyers' Rules of Professional Conduct. These Principles shall not be used as a basis for litigation, lawyer discipline or sanctions. The purpose of adopting the Principles is to promote and foster the ideals of professional courtesy, conduct and cooperation. These Principles are fundamental to the functioning of our system of justice and public confidence in that system.

### PRINCIPLES.

**A.** IN GENERAL. A lawyer should develop and maintain the qualities of integrity, compassion, learning, civility, diligence and public service that mark the most admired members of our profession. A lawyer should provide an example to the community in these qualities and should not be satisfied with minimal compliance with the mandatory rules governing professional conduct. These qualities apply both to office practice and to litigation. A lawyer should be mindful of the need to protect the standing of the legal profession in the view of the public and should bring these Principles to the attention of other lawyers when appropriate.

**1. INTEGRITY.** Personal integrity is the most important quality in a lawyer. A lawyer's integrity requires personal conduct that does not impair the rendering of professional service of the highest skill and ability; acting with candor; preserving confidences; treating others with respect; and acting with conviction and courage in advocating a lawful cause. Candor requires both the expression of the truth and the refusal to mislead others in speech and demeanor.

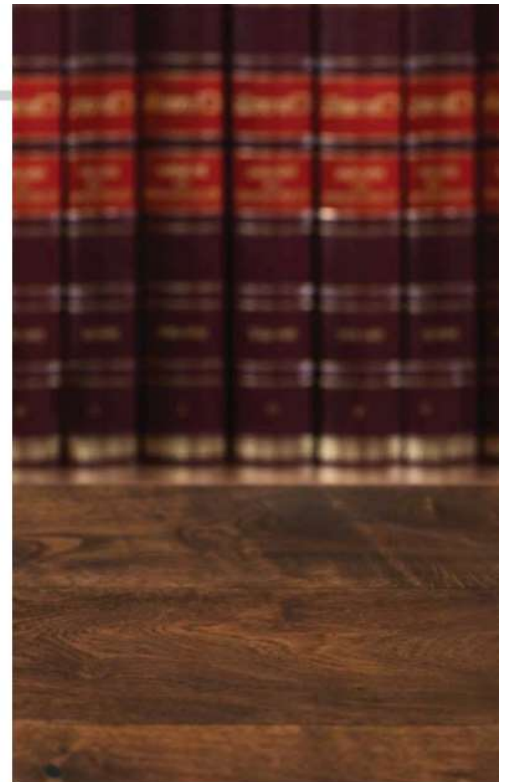
*Continued on the bottom of the next page*

Although professionalism and collegiality are the defining characteristics of the Delaware Way, Delaware certainly did not invent them out of whole cloth. Nor were we the first to develop a code of professionalism; indeed, many states have adopted similar codes.<sup>2</sup> But Delaware's Principles feel somehow different. More than just words on a page, they are an outline of what to expect from a Delaware lawyer: integrity, compassion, learning, civility, diligence and public service. These are the standards to which we hold ourselves as Delaware lawyers.

The Principles also encourage Delaware lawyers to provide a copy of the Principles to out-of-state lawyers who will be admitted *pro hac vice* in a Delaware proceeding — because the Delaware Way

is broad enough to extend to those who will practice among our ranks even for a limited time and in a limited capacity. We welcome them into our community but want them to understand that we expect them to rise to the same high standards to which we hold ourselves.

Most of all, the Principles provide guideposts to recall and reaffirm the Delaware Way. They inform newer lawyers of what the Bar expects of them and refresh the recollections of more seasoned lawyers who may have forgotten how special membership in our Bar is. So while the Delaware Way may be difficult to explain to those who have not experienced it firsthand, understanding and embracing the Principles is a good jumping-off point. ♦



**2. COMPASSION.** Compassion requires respect for the personal dignity of all persons. In that connection, a lawyer should treat all persons, including adverse lawyers and parties, fairly and equitably and refrain from acting upon or manifesting racial, gender or other bias or prejudice toward any participant in the legal process.

**3. LEARNING.** A lawyer's commitment to learning involves academic study in the law followed by continual individual research and investigation in those fields in which the lawyer offers legal services to the public.

**4. CIVILITY.** Professional civility is conduct that shows respect not only for the courts and colleagues, but also for all people encountered in practice. Respect requires promptness in meeting appointments, consideration of the schedules and commitments of others, adherence to commitments whether made orally or in writing, promptness in returning telephone calls and responding to communi-

cations, and avoidance of verbal intemperance and personal attacks. A lawyer should not communicate with a Court\* concerning pending or prospective litigation without reasonable notice whenever possible to all affected parties. Respect for the Court requires careful preparation of matters to be presented; clear, succinct, and candid oral and written communications; acceptance of rulings of the Court, subject to appropriate review; emotional self-control; the absence of scorn and superiority in words or demeanor; observance of local practice and custom as to the manner of addressing the Court; and appropriate dress in all Court proceedings. A lawyer should represent a client with vigor, dedication and commitment. Such representation, however, does not justify conduct that unnecessarily delays matters, or is abusive, rude or disrespectful. A lawyer should recognize that such conduct may be detrimental to a client's interests and contrary to

the administration of justice.

**5. DILIGENCE.** A lawyer should expend the time, effort, and energy required to master the facts and law presented by each professional task.

**6. PUBLIC SERVICE.** A lawyer should assist and substantially participate in civic, educational and charitable organizations. A lawyer should render substantial professional services on a charitable, or *pro bono publico*, basis on behalf of those persons who cannot afford adequate legal assistance.

**B. CONDUCT OF LITIGATION.** In dealing with opposing counsel, adverse parties, judges, court personnel and other participants in the legal process, a lawyer should strive to make our system of justice work fairly and efficiently. A lawyer should avoid conduct that undermines the judicial system or the public's confidence in it, as a truth seeking process for resolving disputes in a rational, amicable and efficient way.

\*As used in these Principles, "Court" includes not only state and federal courts, but also other tribunals performing an adjudicatory function including administrative hearing panels and boards as well as arbitration tribunals.



## NOTES

1. American Bar Association Model Rules of Professional Conduct, *available at* [https://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/?login](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/?login).
2. *See, e.g.*, Connecticut Bar Association, Lawyers' Principles of Professionalism, *available at* [https://www.ctbar.org/docs/default-source/resources/2014\\_0520\\_lawyers\\_principles.pdf?sfvrsn=a63f1713\\_2](https://www.ctbar.org/docs/default-source/resources/2014_0520_lawyers_principles.pdf?sfvrsn=a63f1713_2); New Jersey Commission on Professionalism in the Law, Principles of Professionalism for Lawyers and Judges, *available at* <https://www.njd.uscourts.gov/sites/njd/files/PrinciplesOfProfessionalism.PDF>; Virginia Bar Association, Principles of Professionalism for Virginia Lawyers, *available at* [https://www.vba.org/page/principles\\_professionalism](https://www.vba.org/page/principles_professionalism); Washington State Courts, Fundamental Principles of Professional Conduct, *available at* [https://www.courts.wa.gov/court\\_rules/pdf/RPC/GA\\_RPC\\_FUNDAMENTAL%20PRINCIPLES.pdf](https://www.courts.wa.gov/court_rules/pdf/RPC/GA_RPC_FUNDAMENTAL%20PRINCIPLES.pdf).

### 1. RESPONSIBLE CHOICE OF FORUM.

Before choosing a forum, a lawyer should review with the client all alternatives, including alternate methods of dispute resolution. A lawyer should not file or defend a suit or an administrative proceeding without as thorough a review of the facts and the law as is required to form a conviction that the complaint or response has merit.

### 2. PRE-TRIAL PROCEEDINGS.

A lawyer should use pre-trial procedures, including discovery, solely to develop a case for settlement or trial and not to harass an opponent or delay a case. Whenever possible, stipulations and agreements should be made between counsel to reduce both the cost and the use of judicial time. Interrogatories and requests for documents should be carefully crafted to demand only relevant matter, and responses should be timely, candid and not evasive. Good faith efforts should be made to resolve by agreement objections to matters contained in pleadings, discovery re-

quests and objections.

A lawyer should endeavor to schedule pre-trial procedures so as to accommodate the schedules of all parties and attorneys involved. Agreements for reasonable extensions of time should not be withheld arbitrarily.

Only those depositions necessary to develop or preserve the facts should be taken. Questions and objections at deposition should be restricted to conduct appropriate in the presence of a judge.

### 3. COMMUNICATIONS WITH THE COURT OR TRIBUNAL.

A lawyer should speak and write respectfully in all communications with the Court. All papers filed in a proceeding should be as succinct as the complexity of the matter will allow. A lawyer should avoid *ex parte* communications with the Court on pending matters, except when permitted by law. Unless specifically authorized by law, a lawyer should not submit papers to the Court without serving copies of all papers upon opposing counsel in such a manner that opposing counsel

will receive them before or contemporaneously with the submission to the Court.

**4. SETTLEMENT.** A lawyer should constantly evaluate the strength of a client's legal position and keep the client advised. A lawyer should seek to settle any matter at any time that such course of action is determined to be consistent with the client's best interest after considering the anticipated cost of continuing the proceeding and the lawyer's good faith evaluation of the likely result.

**5. APPEAL.** A lawyer should take an appeal only if the lawyer believes in good faith that the Court has committed error, or an appeal is otherwise required.

**C. OUT OF STATE ASSOCIATE COUNSEL.** Before moving the admission of a lawyer from another jurisdiction, a Delaware lawyer should make such inquiry as required to determine that the lawyer to be admitted is reputable and competent and should furnish the candidate for admission with a copy of these Principles.

## FEATURE

Peter J. Walsh, Jr.



# A Matter of Mutual Respect

## Practicing 'The Delaware Way' in Corporate and Commercial Litigation

It's been about 20 years since I ventured outside Delaware to handle a matter. We had been poised to begin a trial in the Court of Chancery. It was a corporate case involving an individual who had a checkered past and who appeared to have used Delaware entities in furtherance of an illegal transaction that my clients were seeking to unwind. I felt good about the case and my clients.

**B**ut two days before trial was to set to begin, a federal court in a midwestern city (which will go unnamed) enjoined my clients from proceeding in Delaware. The federal court agreed to schedule a trial for several weeks hence.

Suddenly, my clients were forced into a last-minute "away game."

Given our work in preparing the matter for trial in Chancery, my clients asked me to continue as lead counsel in the out-of-state federal court proceeding.



BOB CRAIG

I agreed, thinking it might be fun and interesting to see how law was practiced in a different jurisdiction. Soon after being admitted *pro hac* and temporarily relocating for the trial, I came to the stark realization it wasn't much fun at all — the professionalism, courtesies and norms that I had become so used to in Delaware were missing. The lawyers on the other side were pleasant enough, but one had the feeling this case was personal for them. There was no mutual trust; collaboration of any sort was out of the question; and all pre-trial disputes had to be taken up with the

already busy judge, who clearly had more weighty matters to handle.

In short, I was totally stressed out and could hardly sleep at night. Fortunately, the case settled before trial, albeit with a less satisfying result than I had hoped for. In looking back on the episode, I am reminded that whatever “The Delaware Way” may mean, *this* decidedly was not it. I vowed to never again take a case outside Delaware, and to this day I haven't.

So, what is the Delaware Way, and why does it matter? I don't purport to be an authority on the subject; however,

having been a corporate and commercial litigator in Delaware for many years now, I can — perhaps — point you in the right direction and provide a few exemplars.

### The Delaware Courts

I'll start with our courts. We are blessed to have, from the top down, judges who set the tone at every opportunity. Our merits-based appointment system has produced exceptionally hard-working and gifted jurists who accommodate the parties' scheduling needs (whenever possible) to ensure that all matters are given due consideration.

Many of the filings and motions made in the Court of Chancery and the Superior Court Complex Commercial Litigation Division require counsel for the parties to agree upon briefing and other scheduling orders. We've all been subject to the haggling that sometimes accompanies scheduling orders and the like. But I have never seen a motion or case decided in Delaware on the basis of which side got the better of a schedule. And that is because our judges invariably “dig in” and give each matter due consideration. Secure in the knowledge that litigants will always get a fair shake in Delaware, we don't need to dwell on every little scheduling nuance and can work towards a fair and mutually acceptable schedule. This is the Delaware Way of scheduling, thanks to a superb bench.

Recent years have seen an increase in public criticisms by litigants of certain rulings. As for the critics, my personal view is that there will always be the few malcontents. And if they don't believe they received a fair shake in Delaware, unlike the vast majority of litigants whose disputes are resolved here every year, they should take their football and go home (wherever that may be). Our judiciary has demonstrated incredible professionalism in the wake of these

recent high-profile (and unfair) attacks. The restraint shown and commitment to carrying on with the business of the courts is indicative of the Delaware Way.

The Bar must do its part in response to such attacks. We must protect the integrity of our judiciary and stand up to those who unfairly criticize the courts. I applaud the DSBA for defending our judges when they are unable to do so themselves. In this highly charged political year, it is all the more important that, in keeping with the Delaware Way, each of us speak out if necessary in support of the Delaware judiciary.

The courts' workload is another issue in which the Bar needs to be vigilant and to do its part. I am sure that many of you, like me, have had clients or corresponding counsel that insist that their case is the "unique" one which deserves to be heard quickly, and that is why they have come to Delaware. Similarly, litigants want their motions to be scheduled for argument promptly and always have plenty to say in (sometimes unnecessary) filings. Thankfully, our judges are remarkably adept at sniffing out when a case should be expedited, and the extent to which it should be accelerated, if at all. And it must be remembered that expedition comes at a cost. Limited judicial resources are expended and the personal lives of our judges are often upended by expedited matters. Fortunately for all of us, the judges make these sacrifices in pursuit of the Delaware Way. It is our responsibility, however, to be judicious about the demands we place on the courts. This is becoming increasingly true as the courts' dockets increase year after year and scheduling becomes more difficult.

And although litigation is inherently an adversarial process, the Delaware Way requires litigators to focus on the merits of their clients' disputes, and work together to present the substance of those disputes to the courts in an efficient manner. We are allowed to

disagree, but should strive to avoid being disagreeable. It serves litigators best to explain the weakness of the other side's positions, not to attack the advocates themselves. Our judges can tell the difference.

The point is, if we want to continue to attract stellar candidates to serve on our courts, we need to do our part in making their lives tolerable. That means resisting efforts to secure expedited treatment of matters that don't need to be expedited and, similarly, avoiding unnecessary or borderline unnecessary filings as well as aggressive, personal attacks on counsel. Remember, at some point, you are going to have a case that truly requires the court's prompt attention and time. It may not be available to you if we don't all do our part to protect and respect our scarce judicial resources.

It is not only the professionalism flowing from the hard work and dedication of the judges, but also the day-to-day interaction and pleasantries as well that set the tone for the Delaware Way. Our judges are accessible, never fail to thank visiting attorneys for their submitted work-product or travel to Delaware, and they devote countless hours to promoting the Delaware courts. In my many years of practice, I have never seen any member of our judiciary disrespect a litigant, and, following hearings, I am constantly told by out-of-town counsel how impressed they were with the presiding judge. All part of our courts' embrace of the Delaware Way, I would suggest.

### **My Colleagues in the Delaware Bar**

I am going to date myself here. I was a young partner when, in April 1997, a fire engulfed the 13th floor of the (then named) Delaware Trust Building, home to Potter Anderson's newly renovated offices on the third and fourth floor. For weeks, we had no access to our



computers and, back then, largely paper files. But within days, the Delaware Way was on full display. The Supreme Court promptly suspended deadlines for matters involving our firm and the firm now known as Bayard, P.A., also then located in the building. Adversaries reached out to me and other firm members, unsolicited, and offered extensions and copies of their own files to enable us to continue handling client matters until normalcy was restored.

Since then, not a week goes by that I am not reminded of the Delaware Way by my colleagues in the Bar.



BOB CRAIG

And, typically, the more seasoned the Delaware lawyer, the more likely they are to exhibit the hallmarks of professionalism and collegiality. My practice primarily involves defense side work in the Court of Chancery, meaning I am often opposite what we refer to as the “Plaintiffs Bar.” But they are often among the most accommodating when it comes to scheduling, and, more importantly, those last-minute requests for “more time” when health, family or other pressing matters intervene. While I will admit to instinctively taking the “defense” side more often than not, no

side of the “v” has a monopoly on the Delaware Way.

The same is true for the firms that are in some sense our “competitors,” whether we work together or face off in complex, hard-fought litigation. I am reminded of an incident where we arguably missed a court deadline, resulting in the inability to raise an issue on appeal. A senior member of a “competitor” firm who had no involvement in the matter called me (unsolicited) to offer assistance in suggesting an alternative interpretation of the applicable rule. Fortunately, the perceived error proved

inconsequential, but the thoughtful and gracious outreach meant everything. I would venture to guess that most attorneys in the country look for opportunities to help out their firm colleagues, but only in Delaware are there folks who look out for fellow members of the Bar in such a manner. This was an example of the Delaware Way at its best.

### Advice from Mentors

The Delaware Way is a learned approach, and I was fortunate to become associated with a firm that had great mentors — some retired and others who unfortunately are no longer with us. From each of them, I learned through daily trials and tribulations what it meant to be a Delaware lawyer. I will give you a few examples, but first a confession: 98% of the time I am cool and composed; however, I have “lost it” on a few occasions with clients or opposing counsel. And, invariably, I regretted it within hours. At least with respect to opposing counsel, I apologized in due course. I do not recall ever seeing any of my mentors lose their cool, so this tip comes from me: as upset or frustrated as you may be at your opponent, take a deep breath and maintain your composure — you will be glad you did.

### Extend Courtesies in Scheduling and Extensions

As for what I learned from my mentors, something touched upon previously: scheduling and extensions. Be courteous and fair when negotiating scheduling orders, and grant extensions absent prejudice or unusual circumstances. Sure, sometimes scheduling disputes cannot be avoided, but avoid them whenever possible.

The same goes for discovery disputes; work them out if possible. It is your responsibility to push back against the difficult co-counsel or client. We’ve all had clients or co-counsel who push the envelope, refuse to accept the court’s ruling(s) or claim bias. As a



Delaware lawyer, it is our job to persuade these folks that it is in their interest to respect the courts, the process and the Delaware Way. If a client insists upon taking a position that is unethical or arguably in violation of a court order, then it is time to sever the relationship, as unpleasant as that may be. I have found that experienced, reputable co-counsel — especially ones who regularly appear in Delaware — can be great allies in helping to steer a difficult client in the right direction.

### **Exemplify the Delaware Presence in All Manner of Proceedings**

The expectations for Delaware lawyers (and those admitted *pro hac*) for handling depositions and other formal proceedings are generally well known. Since the infamous addendum in *Paramount Communications v. QVC Network, Inc.*, 637 A.2d 34 (Del. 1984), Delaware lawyers and those appearing in Delaware proceedings have been on notice that the Delaware courts will not tolerate a lack of civility or professionalism in such proceedings. Our judges

read deposition transcripts, but that is the least of many reasons why you should never fail to comport yourself as a Delaware lawyer in any proceeding.

As for informal proceedings — those outside the presence of a court reporter or judge — no less is expected. Meet and confers are a good example. The meet and confer has become a staple of the corporate and commercial litigation practice. Unfortunately, lawyers sometimes see these calls or conferences as an opportunity to attack opposing positions, or worse, their opponents, which usually results in a completely unproductive exercise. My advice, handed down by mentors, is that these occasions offer Delaware lawyers myriad opportunities to influence the proceeding in a positive manner that reflects the Delaware Way.

In such a situation, whether it be a meet and confer, scheduling call or the like, don't be afraid to inject yourself into the conversation as the voice of reason. Not only that, it is your responsibility to maintain a productive and professional decorum. Focus the

participants on the issues at hand, avoid and discourage the personal attacks, and politely and respectfully disagree when compromise is unattainable. Your corresponding counsel is not likely to fault you for trying to steer matters in the right direction, especially when considering that your client is paying you to guide them through the proceeding as efficiently as possible. And, for our firm, it is not uncommon that our opponents in these circumstances may be our co-counsel in another proceeding. Hence, all the more reason to put your best foot forward and show our out-of-town colleagues the Delaware Way.

### **Treat More Junior Lawyers and Court Staff with Utmost Respect**

This should go without saying. Respect and civility are not reserved only for your contemporaries in the Bar. If we truly want the Delaware Way to continue, there is no better way than to treat the newest members of the Bar and court staff with appreciation and respect. Be the mentor that you may have had, and pass along the good will. The Delaware Bar remains comparatively

small, but it is growing and, increasingly, we have fewer interactions with our colleagues. That makes it all the more important that we make a good first impression on the newest members of the Bar and, whenever possible, reinforce the importance to them of maintaining a collegial and respectful atmosphere in all aspects of the practice. Although litigation is inherently an adversarial process, the Delaware Way requires litigators to focus on the merits of their clients' disputes, and work together to present the substance of those disputes to the court in an efficient manner. We are allowed to disagree, but expected not to be disagreeable. Once again, the Delaware lawyer exposes the weakness of the other side's positions, not the shortcomings of the advocates themselves.

### Bring Your 'A Game' at All Times and Spread the Word by Example

As I have alluded to, much of my practice, and the Delaware corporate and commercial practice in general, involve working with out-of-town lawyers whose clients have been sued, or have initiated a suit, in Delaware. It never ceases to amaze me that so many of these lawyers are already familiar with the Delaware Way and embrace our way of practicing law. Why? I think it is because they realize the many benefits our system. They see the virtues of sophisticated and experienced judges who deliver prompt, well-reasoned opinions, and they appreciate the professionalism and decorum exhibited by the members of our Bar. Those things make

their work lives more fulfilling, as they do ours.

How do we keep it going? First, bring your "A game" to every matter you handle. The more respect you garner as Delaware counsel, the more likely it is that our out-of-town friends will respect and replicate the way we practice law. Second, lead by example, and don't be afraid to speak up if your gut tells you that something does not seem in accord with the Delaware Way. And, finally, be the mentor that you likely had — set the right tone for the next generation.

We have a really great thing going here — let's all do our part to keep it that way. ♦

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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*.<sup>1</sup>

**M**uch 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."<sup>2</sup>

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.<sup>3</sup>

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

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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.

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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.”<sup>4</sup> 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.<sup>5</sup>

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

Court’s continued ADR initiatives.<sup>6</sup> 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.<sup>7</sup>

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.<sup>8</sup>

Of note, the book celebrating

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).<sup>9</sup> 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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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,<sup>10</sup> and for disputes that have not yet given rise to a judicial action.<sup>11</sup> 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.<sup>12</sup>

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, Vo. 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.

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