Court of Chancery of the State of Delaware

Mediation Guideline Pamphlet

Rev: 7/2023

VOLUNTARY MEDIATION
IN THE DELAWARE COURT OF CHANCERY[1]

Preface

The State of Delaware wishes to remain preeminent in its ability to meet the needs of its business community, including the needs of all business entities domiciled in Delaware. The mediation program available in Delaware's Court of Chancery is one way the State is attempting to meet these needs. Mediation is intended to provide the participants convenient access to dispute resolution proceedings that are fair, confidential, effective, inexpensive and expeditious.

There are now two types of non-mandatory mediation[2] available in the Court of Chancery: (i) mediation pursuant to Court of Chancery Rule 174, which provides for mediation in an ongoing case pending in the Court of Chancery ("Rule 174 Mediations"), and (ii) mediation pursuant to 10 *Del. C.* § 347 and Rules 93 to 95, which now provide for "mediation only" dispute resolution for certain types of business disputes where there is no pre-existing pending action (the "Mediation Only Program"). Mediation in both cases is voluntary and can only proceed with consent of the parties.

Who May Participate In The Mediation Program?

First, parties to an ongoing case pending in the Court of Chancery may agree to mediation pursuant to Court of Chancery Rule 174.

Second, under the Mediation Only Program, parties who consent by agreement to mediation may have a business dispute mediated, so long as at least one party is a business entity (as defined in 10 *Del. C.* § 346), at least one party is a business entity formed or organized under Delaware law or having its principal place of business in Delaware and a consumer is not a party to the dispute.

Who Will Serve As The Mediator?

In Rule 174 Mediations, the Chancellor or Vice Chancellor presiding in a case, with the consent of the parties, may refer any case or issue in a case to any other judge

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[1] *This pamphlet is intended to provide a general summary of the mediation process in the Delaware Court of Chancery. The Court's official rules should be consulted and govern in the case of any inconsistencies between statements contained herein and the rules.*

[2] *Mandatory mediation is required in certain guardianship and estate cases under Court of Chancery Rule 174.1. This pamphlet is intended to describe only the two types of non-mandatory mediation procedures in the Court of Chancery; it has no application to the mandatory mediation required by Rule 174.1.*

or magistrate sitting permanently in the Court of Chancery who has had no involvement in the case or to another person agreed upon by the parties for voluntary mediation. In the Mediation Only Program, a member of the Court of Chancery (or the Magistrate in Chancery) will act as the mediator and the parties may request a particular member of the Court to act as mediator.

What Types of Business Disputes Qualify for the Mediation Only Program?

Only "business disputes" where one of the parties is a business entity formed in Delaware or having its principal place of business in Delaware, and no party to the dispute is a consumer eligible for the Mediation Only Program. In the case of business disputes involving solely a claim for money damages, the amount in controversy must exceed $1 million.

By rule, the Court of Chancery has defined business disputes that are eligible for submission as any complex corporate commercial or alternative entity dispute, including technology disputes, as that term is defined in *10 Del. C. § 346(c).* A "technology dispute" means a dispute arising out of an agreement and relating primarily to: the purchase or lease of computer hardware; the development, use, licensing or transfer of computer software; information, biological, pharmaceutical, agricultural or other technology of a complex or scientific nature that has commercial value, or the intellectual property rights pertaining thereto; the creation or operation of Internet web sites; rights or electronic access to electronic, digital or similar information; or support or maintenance of the above. The term does not include a dispute arising out of an agreement (i) that is primarily a financing transaction, or (ii) merely because the parties' agreement is formed by, or contemplates that communications about the transaction will be by, the transmission of electronic, digital or similar information.

Will I Need Local Counsel?

Yes, local counsel must be present and prepared to participate in a meaningful way.

Is There A Filing Or Other Fee?

Yes, for Rule *174* Mediations, if the mediator appointed is the Chancellor, one of the Vice Chancellors or Magistrate in Chancery, the mediator shall not be compensated. Instead, a filing fee shall be assessed against the parties as court costs in the amount of *$5,000* for the first day of mediation and *$5,000* for every additional day required. *See* Ch. Ct. Rule *174(c)(2).* These fees shall be deposited into a separate account maintained by the Court of Chancery, which shall be used from time to time in the discretion of the Court for mediation training and/or refunds or any other purpose designated by the Chancellor. This mediation filing fee and the fee for each additional day of mediation shall be divided between the parties and may be waived or modified in the discretion of the presiding Chancellor, Vice Chancellor or Magistrate in Chancery. For the Mediation Only Program, there is an initial filing fee of $10,000. For each day after the first day that the Chancellor, a Vice Chancellor or a Magistrate in Chancery is engaged, a fee of $5,000 per day shall be assessed. The fee shall be divided equally among the parties.

Are Mediation Proceedings Confidential?

Yes. The strict confidentiality provisions set forth in Rule 174(3)(c) apply with respect to both types of mediation. *See* Ch. Ct. Rules 94(a)(4), 95(b). Any communication made in or in connection with the mediation that relates to a controversy being mediated, whether made to the mediator or a party or to any person if made at a mediation conference is confidential. In Rule 174 Mediations, the mediator shall not discuss the substance of any mediation with the trial judge and shall treat all aspects of the mediation as confidential, unless otherwise agreed by the parties. A mediation agreement, however, shall not be confidential unless the parties otherwise agree in writing.

Information disclosed to the Mediator by a party or counsel during the mediation session, including in any written submissions, is not disclosed to the other party without consent. All mediation proceedings are confidential, are not admissible as evidence in any other proceedings, and may not be recorded without prior consent of the parties and the Mediator.

Who Must Attend?

Rule 174(3)(b) governs participation in all mediation conferences. It provides that at least one representative with an interest in the issue or issues to be mediated and with authority to resolve the matter should participate in the mediation conference. Delaware counsel, as defined in Rule 170(a), must also attend the mediation conference on behalf of each party. This rule also applies in the Mediation Only Program. *See* Rule 95(a). In the Mediation Only Program the initial mediation conference will generally be scheduled between 15 and 60 days after the filing of the petition. Rule 94(c).

If a person with authority to resolve the matter is unable to participate, that must be disclosed at the commencement of the mediation and must be set forth in the mediation order and approved by the mediator. Also, the method by which authority will be obtained must be set forth.

What Documents Must the Parties Prepare?

First, before the mediation commences, the parties must enter into a written consent and order of mediation that identifies the issues to be mediated and specifies the methods by which the parties shall attempt to resolve the issues. *See* Ch. Ct. Rules 93(d)(4), 94(a)(3) and 174(3)(c). The parties should attempt to identify clearly the matters to be resolved.

Second, a petition for mediation must be submitted to the Register in Chancery. It must identify the issues to be mediated, the amount in controversy and a statement that all parties consent and that the jurisdictional requirements have been met. *See* Ch. Ct. Rule 94(a)(3).

Third, a mediation statement will normally be required, which statement may not exceed 15 pages. Chancery Court Rule 171 (d) should be followed regarding form. The mediation statement is not to be shared with the other parties. The mediation statement should provide the following:

- A description of who the parties are, their relationship, if any, to each other and by whom each party is represented, **including the identity of all individuals participating on behalf of a party during the mediation conference.**

- A brief factual background, clearly indicating those facts not in dispute.

- A brief summary of the law, including applicable statutes, cases and standards. Any unreported decisions, including decisions from this jurisdiction, are to be included as exhibits.

- An **honest** discussion of the party's claims and/or defenses, including the strengths and weaknesses of the party's position.

- A brief description or history of prior settlement negotiations and discussions, including the party's assessment as to why settlement has not been reached, the party's proposed term(s) for a resolution and a description of how the party believes the Court may be able to assist in reaching an agreement.

- The amount of attorneys' fees and costs **listed separately** that have been incurred by the party to date, with a fair estimate of such additional fees and expenses, including expert witness fees, if this matter is not settled. In the case of a contingency fee or non-hourly rate fee arrangement, the percentage of that fee, if applicable, the number of hours and costs incurred by the party to date, with a fair estimate of additional expenses, including expert witness fees, and the amount of hours if this matter is not settled.

The original and a copy of the Statement shall be submitted to the Mediator at least 10 days before the Mediation Conference, shall not be filed with the Register in Chancery, shall not be exchanged with other parties, shall not be provided to the trial judge and shall not become part of the court record.

Third, if the parties reach agreement with regard to the issues set forth in their mediation agreement, their agreement shall be reduced to writing and signed by the parties and the mediator. *See* Ch. Ct. R. 95(d) and 174(3)(c). The agreement will be binding on all parties to it and, upon filing by the mediator, will become part of the Court record. If, however, the parties choose to keep the terms of the agreement confidential, a stipulation of dismissal may be filed instead. *See* Rule 95(b) (A mediation agreement, however, shall not be confidential unless the parties otherwise agree in writing.)

Parties are expected to prepare in advance for the mediation so that the mediator's time can be used most efficiently.

What Happens If No Agreement Is Reached?

The mediator shall officially terminate the mediation conference. The termination shall be without prejudice to any party in any other proceeding. No party shall be bound by anything said or done at the conference unless an agreement is reached. *See* Rule 95(e). (The mediation in a mediation only matter is not eligible to adjudicate any matter

arising from the issues identified.)