

## Mediation of Technology and Business-Related Disputes in the Delaware Court of Chancery

The Delaware Court of Chancery is widely recognized as the nation's preeminent forum for the determination of disputes involving the internal affairs of Delaware corporations and other business entities. Since the passage of the Delaware General Corporation Law in 1899, the Court of Chancery has handled some of the preeminent corporate law cases in the country. In addition to corporate law cases, the Court of Chancery has traditional equity jurisdiction, and also has specific statutory jurisdiction conferred upon it by the Delaware General Assembly. The Court of Chancery hears disputes in which there is no adequate remedy at law, such as cases for injunctive and declaratory relief, specific performance, and rescission. As a court of equity, the Court of Chancery has been an important court for trade secret actions, which typically seek injunctive relief. Due to its limited equitable and statutory jurisdiction, the Court of Chancery hears no criminal cases or tort actions seeking only money damages, and does not entertain claims for punitive damages. There also are no jury trials in the Court of Chancery, and cases are assigned to one of the Court's five judges.

The Court of Chancery's mediation program allows the Court of Chancery to remain preeminent in its ability to meet the needs of the business community. The mediation program involves mediation of disputes in ongoing cases pending in the Court of Chancery, as well as technology-related disputes and several other business-related disputes (which need not be subject to a case pending in the Court of Chancery).

### Why mediate in the Court of Chancery?

#### **Sophisticated court and mediators**

For the sixth straight year, Delaware was ranked as the nation's best legal environment in a survey of in-house counsel commissioned by the U.S. Chamber of Commerce. Delaware was ranked 1st overall, 1st in 9 out of 12 individual categories, including judicial impartiality and judicial competence, and ranked 8th or better in all 12 individual categories.

Two of the Court of Chancery's five judges were also named to Lawdragon's list of top judges in the country, including Chancellor William B. Chandler III ("One of the 100 most influential people in finance" – *Treasury & Risk Magazine*) and Vice-Chancellor Leo B. Strine, Jr. ("Corporate law's most prolific, brilliant and passionate judge" – Lawdragon).

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Vice Chancellor Parsons is a member of the Panel of Mediators of the United States Court of Appeals for the Federal Circuit Mediation Program. He has successfully mediated patent cases from that program and from the U.S. District Court for the District of Delaware. Vice Chancellor Parsons is also a member of the patent bar and has a B.S. in Electrical Engineering. While in private practice, Vice Chancellor Parsons specialized in intellectual property litigation, participated in numerous jury and nonjury patent trials, wrote several papers relating to intellectual property law, and participated in several dozens of patent mediations.

### **Efficient**

Mediation in the Court of Chancery is designed to provide companies with quick, reliable, and knowledgeable decisions.

### **Avoid risks involved with formal litigation**

Mediation in the Court of Chancery allows both sides to the dispute to avoid the substantial risks associated with formal litigation, including the unpredictability associated with jury trials (e.g., punitive damages or hung juries), as the Court of Chancery is known for its ability to generate well-grounded decisions in complex civil matters in a short period of time.

### **Preserve business relationships**

Many legal disputes center on important commercial relationships, many of which continue after the disputes are resolved. Mediation in the Court of Chancery allows both sides of the dispute to present their case without the hostility associated with formal litigation.

### **Cost effective**

Mediation in the Court of Chancery allows both sides to resolve a dispute in a less expensive way as compared to formal litigation.

### **Confidential**

Any communications made in or in connection with the mediation that relates to the controversy being mediated, whether made to the mediator or to a party or to any other person if made at the mediation conference, is confidential. These communications are not part of public record.

### **Flesh out the parties' positions with a judicial perspective**

In the event that an agreement is not reached and the mediation conference is terminated without prejudice to any party, the parties to the mediation still have the benefit of fleshing out their respective position prior to formal litigation with perspective provided by a well-respected judicial officer from the premier business court in the country.

## **What disputes may be mediated in the Court of Chancery?**

The Court of Chancery has the authority to mediate disputes in ongoing cases pending in the Court of Chancery (Court of Chancery Rule 174), technology disputes (10 *Del. C.* § 346), and other business disputes (10 *Del. C.* § 347).

- The Court of Chancery has the power to mediate and has jurisdiction to hear and determine technology disputes when the following five prerequisites are satisfied:
  - The parties have consented to the jurisdiction of or mediation by the Court of Chancery by agreement or by stipulation;
  - At least one party is a business entity;
  - At least one party is a business entity formed or organized under the laws of Delaware or having its principle place of business in Delaware;
  - No party is a "consumer," as defined in 6 *Del. C.* § 2731, with respect to the technology dispute; and
  - In technology disputes involving solely a claim for monetary damages, the amount in controversy is no less than \$1,000,000.
  
- A "**technology dispute**" means a dispute arising out of an agreement and relating primarily to: **[a]** the purchase or lease of computer hardware; the development, use, licensing or transfer of computer software; **[b]** information, biological, pharmaceutical, agricultural or other technology of a complex or scientific nature that has commercial value, or the intellectual property rights pertaining thereto; **[c]** the creation or operation of Internet web sites; **[d]** rights or electronic access to electronic, digital or similar information; or **[e]** support or maintenance of the above.
  
- The term "technology dispute" shall be interpreted **liberally** to provide "an **expeditious** and **expert** forum for the handling of technology disputes involving parties who have agreed to resolve their disputes in the Court of Chancery."
  
- Parties who have agreed to resolve their technology disputes in the Court of Chancery, may seek to have the Court of Chancery mediate the dispute only; mediate the dispute initially, and if that fails, adjudicate the dispute; or adjudicate the dispute.
  
- With respect to mediation of "other business disputes," the **same five prerequisites** for mediation of technology disputes apply (i.e., agreement of the parties, one of which is a Delaware entity, damages greater than \$1 million, and there is not a "consumer" dispute).
  
- Mediation of "other business disputes" intended to encourage the Court of Chancery to include complex corporate and commercial disputes, including technology disputes, within the ambit of the business dispute mediation rules. The Court of Chancery will **interpret a business dispute broadly** to effectuate that intention.

## How to obtain a mediation in the Court of Chancery?

There are essentially two ways to obtain mediation in the Court of Chancery: the first situation involves a dispute where both parties agree to mediation; and the second situation involves proactively including a forum selection provision in the relevant transactional documents providing for mediation in the Court of Chancery when one of the parties is a Delaware corporation or has a principle place of business in Delaware.

### Required documents

- **First**, the parties must enter into a written consent and order of mediation that identifies the issues to be mediated.
- **Second**, a petition for mediation identifying the issues to be mediated and amount in controversy (if damages are sought).
- **Third**, a mediation statement, not to exceed 15 pages, may be required. This should describe the parties, provide an overview of the facts and law, and describe prior settlement discussions, if any. The mediator may request opening and reply statements totaling 15 pages instead.
- Every document is confidential. No documents are publicly filed, but rather are hand delivered to the mediator.
- Delaware counsel is required on the documents and at mediation.

### Fees

- A \$5,000 mediation fee must be submitted with the petition for mediation.
- A \$2,500 fee is payable for each day the Chancellor, a Vice Chancellor or the Master in Chancery is engaged in mediation.
- These fees are divided equally among the parties.