DELAWARE STATE BAR ASSOCIATION

CONTINUING LEGAL EDUCATION

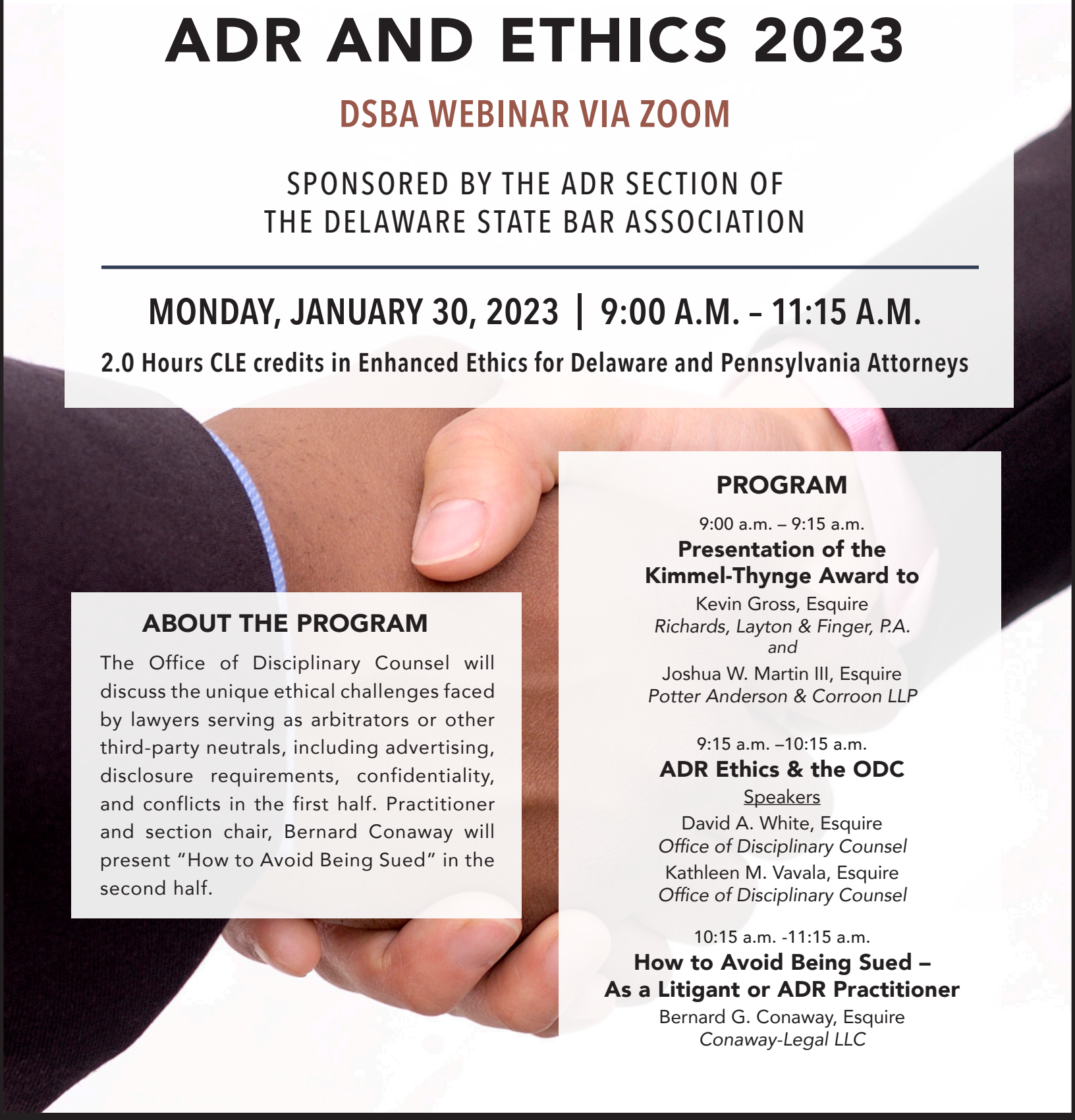
ADR AND ETHICS 2023

DSBA WEBINAR VIA ZOOM

SPONSORED BY THE ADR SECTION OF
THE DELAWARE STATE BAR ASSOCIATION

MONDAY, JANUARY 30, 2023 | 9:00 A.M. – 11:15 A.M.

2.0 Hours CLE credits in Enhanced Ethics for Delaware and Pennsylvania Attorneys



ABOUT THE PROGRAM

The Office of Disciplinary Counsel will discuss the unique ethical challenges faced by lawyers serving as arbitrators or other third-party neutrals, including advertising, disclosure requirements, confidentiality, and conflicts in the first half. Practitioner and section chair, Bernard Conaway will present "How to Avoid Being Sued" in the second half.

PROGRAM

9:00 a.m. – 9:15 a.m.

Presentation of the Kimmel-Thynge Award to

Kevin Gross, Esquire
Richards, Layton & Finger, P.A.
and
Joshua W. Martin III, Esquire
Potter Anderson & Corroon LLP

9:15 a.m. –10:15 a.m.

ADR Ethics & the ODC

Speakers

David A. White, Esquire
Office of Disciplinary Counsel
Kathleen M. Vavala, Esquire
Office of Disciplinary Counsel

10:15 a.m. -11:15 a.m.

How to Avoid Being Sued – As a Litigant or ADR Practitioner

Bernard G. Conaway, Esquire
Conaway-Legal LLC

Visit https://www.dsba.org/event/adr-and-ethics-2023/ for all the DSBA CLE seminar policies.

Please note that the attached materials are supplied by the speakers and presenters and are current as of the date of this posting.

Presentation of Kimmel-Thynge Award to

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Office of Disciplinary Counsel

David A. White
Chief Disciplinary Counsel, Office of Disciplinary Counsel,
Delaware Supreme Court

Mr. White is a frequent speaker/moderator in the areas of legal ethics and Alternative Dispute Resolution. In March 2021, the Delaware Supreme Court appointed Mr. White Chief Disciplinary Counsel of the Office of Disciplinary Counsel ("ODC"), and Arm of the Court.

The ODC, which functions as an educational and professional resource for members of the Delaware bar, receives, evaluates, investigates, and when necessary, prosecutes complaints of lawyer misconduct and the unauthorized practice of law. The Office also recommends sanctions for attorney misconduct to the Board on Professional Responsibility and the Court.

Previously, Mr. White was in private practice and was the office managing partner in the Wilmington, Delaware office of McCarter & English, LLP. There, he was a member of the firm's business litigation, products liability, and bankruptcy practice groups. A substantial portion of his practice was devoted to ADR and representing lenders in the areas of commercial loan workouts, commercial litigation, commercial real estate, and related bankruptcy issues.

Mr. White was a Superior Court Commissioner from 2001-2008 and for several years he taught a civil litigation course for the University of Delaware, Division of Professional and Continuing Studies, where he was awarded Excellence in Teaching awards in 2007 and 2008.

Mr. White has served on the Executive Committee of the Delaware State Bar Association for many years and he is also an Honorary/Volunteer member of the Professional Guidance Committee.

Education:
Widener University School of Law, J.D 1986
University of Delaware, B.A. 1982

KATHLEEN M. VAVALA

Kathy Vavala has been a member of the Delaware, Pennsylvania, and New Jersey state bars, as well as the federal bar for the U.S. District Court of Delaware, for twenty-six years. She is currently Disciplinary Counsel for the Supreme Court of the State of Delaware. Prior to that appointment, Ms. Vavala was a Deputy Attorney General for the Delaware Department of Justice, where she headed the Domestic Violence, Child Abuse and Elder Abuse Unit, the Criminal Division Felony Screening Unit, and served as a senior litigator and mentor in the Criminal, Family, and Fraud Divisions. Ms. Vavala is a graduate of Franklin & Marshall College and Delaware Law School. Previously, she was a judicial law clerk to the Honorable Vincent A. Bifferato, Resident Judge of the Delaware Superior Court and associated with the law firm of Tybout, Redfearn & Pell. Ms. Vavala is an adjunct professor for Delaware Law School and Saint Joseph's University, where she teaches health care law and finance, biomedical ethics, and advanced legal writing. Ms. Vavala is also a frequent presenter on professionalism, civility, and ethical standards applicable to the legal profession at both the local and national level.

Ethical Issues in Arbitration

Attorney Serving as Arbitrator or Third Party Neutral

DLRPC 2.4(a) What's a third-party neutral?

- A lawyer serves as a third-party neutral when they assist 2 or more clients who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between them.
- Arbitrator, mediator or lawyer serving in such capacity as will enable the parties to resolve the matter
- Selected by the parties or mandated by the Court

Who can serve as a Third-Party Neutral? It depends…

- Who can serve is driven by Court Rule.
- DLRPC 2.4, Cmt. 2 says "The role of a third-party neutral is *not unique to lawyers*, although, in some court-ordered contexts, only lawyers are allowed to serve in this role to handle certain types of cases."

What Rules govern the professional conduct of Lawyers serving as Third-Party Neutrals?

- There are specific DLRPC that apply to third-party neutrals: Rules 1.12 and 2.4.
- In addition, Rule 2.4, Cmt. [2] states:" [a] lawyer *may be subject to court rules or other law that apply either to third-party neutrals generally or to lawyers serving as third party neutrals*.
- Lawyer-neutrals may also be subject to various codes of ethics, such as the code of Ethics for Arbitration in Commercial Disputes prepared by a joint committee of the American Bar Association and the American Arbitration Association.

Other Codes and Rules that may be applicable…

- Federal Arbitration Act (FAA, 9 USC §§ 1-14)
- Uniform Arbitration Act (UAA)
- ABA/AAA Code of Ethics for Arbitrators in Commercial Disputes
- Delaware Rapid Arbitration Act
- Individual Court Rules

Select Ethical Issues for Arbitrators

- Advertising
- Disclosure Requirements
- Duty to inform unrepresented parties of role as arbitrator
- Confidentiality
- Competence
- Future representation after serving as arbitrator

Advertising: ABA/AAA Canon VIII

- Advertising or promotion of an individual's willingness or availability to serve as an arbitrator *must be accurate and unlikely to mislead*. Any statements about the quality of the arbitrator's work or the success of the arbitrator's practice *must be truthful*.

- This does not preclude an arbitrator from printing, publishing, or disseminating advertisements conforming to these standards in any electronic or print medium, from making personal presentations to prospective users of arbitral services conforming to such standards or from responding to inquiries concerning the arbitrator's availability, qualifications, experience, or fee arrangements.

Fairness & Impartiality: ABA/AAA Code, Canon I

- One should accept appointment as an arbitrator only if fully satisfied:
  - (1) that he or she can serve impartially;
  - (2) that he or she can serve independently from the parties, potential witnesses, and the other arbitrators;
  - (3) that he or she is competent to serve; and
  - (4) that he or she can be available to commence the arbitration in accordance with the requirements of the proceeding and thereafter to devote the time and attention to its completion that the parties are reasonably entitled to expect.

Fairness & Impartiality: Federal Arbitration Act

- Throughout all stages of the proceeding, arbitrators should conduct themselves in a manner that is fair to all parties and should not be swayed or influenced by outside pressure, buy fear of criticism, or by self-interest.

Disclosure Requirements: ABA/AAA Code, Canon II:

Attorneys who are requested to serve as arbitrators ***must disclose***:

- Direct or indirect financial/personal interest in the arbitration's outcome;
- Past and existing financial, business, professional, family or social relationships with any of the parties, their lawyers, or co-arbitrators; and
- Any prior knowledge of the dispute to be arbitrated.
  - Consider familiarity with parties and their products, patents or specific technology involved, and industry news.

The duty to disclose is ongoing for the duration of arbitration.

Delhanty, John M., "The Attorney as Third-Party Neutral: Navigating Ethical Obligations" Presentation, (Apr. 20, 2012).

Disclosure Requirements: Federal Arbitration Act

- 3.01 An arbitrator is responsible for disclosing any existing or potential conflict of interest or relationship that could reasonably be perceived by a party as affecting the arbitrator's or mediator's impartiality.
  - Direct or indirect financial or personal interest in the outcome of the arbitration or mediation, or the existence of financial, business, familial or personal relationships with a party, its representative, or a witness, must be disclosed. Requirement extends to members of the arbitrator's or mediator's family, a domestic partner or household member, and his/her current employees, partners, and business associates.
  - An arbitrator or mediator should make a reasonable effort to inform himself or herself of any such interests or relationships.

Federal Arbitration Act Continued…

- Disclosure should be made to all parties and other arbitrators.
- 3.02 An arbitrator or mediator should not proceed unless all parties have acknowledged and waived any actual or potential conflict of interest. If the conflict of interest casts serious doubt on the integrity of the process, an arbitrator or mediator should withdraw, notwithstanding receipt of a waiver by all parties.
- 3.03 An arbitrator or mediator's disclosure obligations continue throughout the course of the arbitration

Imputation of the Neutral's Firm's Conflicts of Interest to the Neutral

- **ABA/AAA Code Canon II** requires arbitrators, mediators, and other neutrals to disclose the conflicts of their partners and associates prior to an ADR proceeding.
- In all cases, the neutral may participate in the arbitration, mediation, or other ADR proceeding after full disclosure of imputed conflicts and with the consent of all parties.

Delhanty, John M., "The Attorney as Third-Party Neutral: Navigating Ethical Obligations" Presentation, (Apr. 20, 2012).

Duty to Disclose Practice Tips & Ramifications for Failure to Disclose

- Make disclosures at the earliest time practicable.
- Construe the duty to disclose broadly so that the parties can realistically assess the neutral's ability to remain impartial.
- When in doubt, disclose.
- Avoid creating conflicts of interest during the course of ADR.
- If you become aware of a conflict during ADR, disclose it immediately.
- Withdraw from service as a neutral if you find that you cannot remain impartial (notwithstanding the fact that the parties have consented).

Delhanty, John M., "The Attorney as Third-Party Neutral: Navigating Ethical Obligations" Presentation, (Apr. 20, 2012).

DLRPC 2.4(b) Lawyer's duty to explain their neutral role in ADR process

- A lawyer … shall inform unrepresented parties that the lawyer is not representing them.

Duty to explain, Cmts. R. 2.4

- Parties come into process with varying levels of knowledge and sophistication
- The extent of disclosure required will depend on the particular parties involved and the subject matter of the proceeding, as well as the particular features of the dispute-resolution process selected.
- The potential for confusion is significant when the parties are unrepresented in the process.

What do you have to tell them?

- When the lawyer knows *or reasonably should know* that a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client, including the inapplicability of the attorney-client privilege

Confidentiality: DLRPC

- Rule 1.12, Cmt. [3] : Although lawyers who serve as third-party neutrals do not have information concerning the parties that is protected under Rule 1.6, *they typically owe the parties an obligation of confidentiality under law or codes of ethics governing third-party neutrals*.

Confidentiality: ABA/AAA Code, Canon VI

- An arbitrator is in a relationship of trust to the parties and *should not*, at any time, use confidential information acquired during the arbitration proceeding to gain personal advantage or advantage for others, or to affect adversely the interest of another.
- The arbitrator should *keep confidential all matters relating to the arbitration proceedings and decision*.

Confidentiality: ABA/AAA Code, Canon VI

- It is not proper at any time for an arbitrator to inform anyone of any decision in advance of the time it is given to all parties.
- In a proceeding in which there is more than one arbitrator, it is not proper at any time for an arbitrator to inform anyone about the substance of the deliberations of the arbitrators.
- *After an arbitration award has been made, it is not proper for an arbitrator to assist in proceedings to enforce or challenge the award*.

Confidentiality: Federal Arbitration Act

- 2.01 Unless otherwise agreed by the parties, or required by applicable rules, rulings, or law*, an arbitrator or mediator shall maintain the confidentiality of all matters relating to arbitration proceedings*, including the decisions rendered or reached.

- 2.02 An arbitrator or mediator should not use confidential information acquired during the arbitration or mediation proceeding to gain personal advantage or advantage for others, or to affect adversely the interest of another.

Confidentiality: Federal Arbitration Act

- 2.03 *Unless otherwise provided by written agreement of the parties, an arbitrator should not discuss a case with any party or its representatives in the absence of any other part*y.
- All deliberations and discussions of the merits of an arbitration should take place only in the presence of the entire panel.
- An arbitrator or mediator should not discuss a case with persons not involved directly in the arbitration or mediation unless advance consent of all parties is obtained or the identity of the parties and details of the case are sufficiently obscured to eliminate any realistic probability of identification.
- 2.04 An arbitrator shall not inform anyone of any decision in a matter in advance of informing all parties.

Competence

Competence: ABA/AAA Code, Canon I

- Arbitrators should accept appointment only if fully satisfied that they are competent to serve. In making this determination, potential arbitrators should consider:
  - Previous experience as an arbitrator;
  - Familiarity with the type of dispute to be arbitrated (e.g., patent infringement or theft of trade secrets); and
  - The level of sophistication of the arbitrator's understanding of the subject in dispute.
    - Must the arbitrator be an expert on the particular technology involved to resolve the dispute?

Delhanty, John M., "The Attorney as Third-Party Neutral: Navigating Ethical Obligations" Presentation, (Apr. 20, 2012).

Competence: ABA/AAA Code, Canon VI

- Arbitrators may obtain help from their associates in reaching decisions so long as the associates follow proper conflict check procedures and agree to maintain the confidentiality of the arbitration.

Delhanty, John M., "The Attorney as Third-Party Neutral: Navigating Ethical Obligations" Presentation, (Apr. 20, 2012).

Future Employment: Conflicts of Interest

When a lawyer who serves as a third-party neutral is *subsequently asked to serve as a lawyer* representing a client in the same matter, *conflicts of interest may arise for both the individual lawyer and the lawyer's law firm*.

DLRPC 1.12(a)

- Except as stated in paragraph (d), a lawyer *shall not* represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer or law clerk to such a person or as an arbitrator, mediator or other third-party neutral, unless all parties to the proceeding give informed consent, confirmed in writing.

DLRPC 1.12(b)

- (b) A lawyer shall not negotiate for employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially as a judge or other adjudicative officer or as an arbitrator, mediator or other third-party neutral.

Rule 1.12, Cmt. [2]

- Other law or codes of ethics governing third-party neutrals may impose more stringent standards of personal or imputed disqualification. *See* Rule 2.4.

ABA/AAA Code, Canon I

- *Arbitrators should avoid* entering into business, professional, or personal relationships with the parties, or acquiring financial or personal interests in the parties, for a reasonable period of time after arbitration has concluded.

- This protects the integrity of the arbitration process by avoiding the creation of any appearance of partiality on the arbitrator's behalf.

Delhanty, John M., "The Attorney as Third-Party Neutral: Navigating Ethical Obligations" Presentation, (Apr. 20, 2012).

Imputed Conflicts, Screening and Notice: DLRPC 1.12(c)

- (c) If a lawyer is disqualified by paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in the matter unless:
  - (1) the disqualified lawyer is timely *screened* from any participation in the matter and is apportioned no part of the fee therefrom; and
  - (2) *written notice* is promptly given to the parties and any appropriate tribunal to enable them to ascertain compliance with the provisions of this rule.

Applicability of Rule 1.6

- Rule 1.12, Cmt. [3] : Paragraph (c) provides that *conflicts of the personally disqualified lawyer will be imputed to other lawyers in a law firm unless the conditions of this paragraph are met*.

Screening

- Requirements for screening procedures are stated in Rule 1.0(k).
  - "Screened" denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law.

Screening

- Paragraph (c)(1) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.
- Notice, including a description of the screened lawyer's prior representation and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.

Exception for multimember arbitration panel

- (d) An arbitrator selected as a partisan of a party in a multimember arbitration panel is not prohibited from subsequently representing that party.
  - Cmt [1] explains: the term "personally and substantially" signifies that a judge who was a member of a multi-member court, and thereafter left judicial office to practice law, is not prohibited from representing a client in a matter pending in the court, but in which the former judge did not participate. So also the fact that a former judge exercised administrative responsibility in a court does not prevent the former judge from acting as a lawyer in a matter where the judge had previously exercised remote or incidental administrative responsibility that did not affect the merits

Questions?

"Lately I've been feeling ethical.
Can you prescribe something for that"

How to Avoid Being Sued – As a Litigant or ADR Practitioner

Bernard G. Conaway, Esquire
Conaway-Legal LLC

Delaware State Bar Association

PRESENTED BY THE

Alternative Dispute Resolution Section

January 30, 2023

ADR Ethics and How to Avoid Being Sued
~ As a Litigant or ADR Practitioner ~

~ Presented By ~

Bernard G. Conaway, Esquire
Conaway-Legal LLC
1007 North Orange Street, Suite 400
Wilmington, DE 19801
bgconaway@conaway-legal.com
www.conaway-legal.com
(302) 428-9350
(844) 364-0137 (f)

PART ONE: In the Soup - As a Mediator

Complaints about mediators for mediation services face consequences from four basic sources.

1. **Civil Liability** – Like every profession, a mediator can engage in conduct that gives rise to personal, civil liability., i.e., paying damages to a mediating party for tort or contract injuries caused by mediator misconduct. Examples of such conduct follow.

    a. *Fraudulent misrepresentations*
    b. *Duress*
    c. *Blown confidentiality*
    d. *Conflicts of interest*

2. **Criminal Liability** – Mediators are not immune from criminal liability. Criminal liability for mediators is rarely reported. Those criminal acts are generally known to most people. The Mediator can, however, find themselves in unfamiliar territory. For example, most states have imposed an affirmative obligation to report child sexual abuse and neglect. Be aware that mediation agreements often recite applicable law. Serving as a mediator applying/using law that you are unfamiliar with can impose unappreciated risk, including criminal liability.

    a. *Criminally fraudulent conduct*
    b. *Failure to report certain conduct*
    c. *Murder*

3. **Association Imposed Conduct Standards** – It is common for mediators to belong to voluntary associations. Many of those associations impose principles or conduct standards. Moreover, those associations respond, in varying ways, to complaints made by third parties. Those responses can range from seriously consequential to otherwise consequential. Think about breaches of the *Delaware Lawyer's Rule of Professional Conduct*, or ADR/mediation-centric associations such as JAMS.

    a. *Removal from association*
    b. *Required to make a public apology*
    c. *Defending against formal ethics investigations/charges.*

A violation of voluntary association conduct standards, generally, does not result in civil or criminal liability. Caution, however, if the mediation agreement or the mediator's advertising references an association's conduct standards, then those conduct standards may be imputed/implied into the mediation agreement and consequently creating a basis for legal action.

4. **Referral Source Conduct Standards** – A prime example here being court-annexed mediation programs. While court related programs, such as Delaware's, provide quasi-judicial or qualified immunity, that immunity has limits.

A mediator who fails to uphold the standards of most referral programs risks sanctions that could range from reprimands to disqualification from future service in the program to the imposition of the costs of the proceeding in which the misconduct took place.

Ironically, most circumstances giving rise to mediator liability are, frankly, well within the mediator's control. For example, the failure to disclose a conflict of interest is the most common problem faced by mediators. The remedy for this problem, even accounting for incomplete information provided by the parties, is to over disclose. For example:

> Subject to the general disclosure that, over the course of my career, I have litigated, arbitrated and/or mediated cases with all counsel and/or with other members of their respective firms, and, just as likely socialized professionally with the same, **the conflict check revealed no issues**.
>
> I do not believe that these prior interactions constitute a prohibited conflict of interest but will, of course, defer to counsel.

In Delaware, this type of broad-based - I know everyone - disclosure is almost essential. This disclosure coupled with offer inviting the parties to assert a conflict puts the onus on the parties to conflicts of interest are considered.

Finally, some mediation agreements declare that the mediation will be conducted according to the law of a specific jurisdiction or set of rules. If you find yourself in such a situation, inform yourself or suffer the consequences. Notable example, in most states communications with a mediator are deemed confidential. As of 2016, in New York there is no statutory privilege in New York mediations. Moreover, New York courts do not automatically mediation made statements as confidential as a matter of public policy. Parties that fail to account for the lack of confidentiality may find those statements used as evidence against them in a subsequent proceeding. *See Hauzinger v. Hauzinger,* 43 A.D.3d 1289, 842 N.Y.S.2d 646 (4th Dep't 2007), *aff'd,* 10 N.Y.3d 923, 862 N.Y.S.2d 456, 892 N.E.2d 849 (2008).

PART TWO: In the Soup – As the Lawyer Mediating a Claim

In Delaware, complaints against mediators that give rise to liability - of any type - are uncommon. Conversely, client complaints against lawyers for mediation-related

conduct are more common. One fundamental reason for this is lawyer-client relationship.[1] This relationship, set out in the *Delaware Lawyer's Rule of Professional Conduct*, underlies every interaction between the client and lawyer. In addition, even without a client complaint, the DRPC rules are enforced.

1. **Settlement Authority:** This comes up in several ADR contexts. (1) some retention agreements include a provision that allows a lawyer to settle a case if the client fails to maintain contact with the lawyer; (2) the client cannot, or will not, attend a mediation; or (3) the client voluntarily relinquishes settlement authority to the lawyer.

2. **Limits on Settlement**: Mediating, or even proposing, a settlement that precludes you from representing clients in future litigation against another party. Any agreement not to represent other clients denies members of the public access to the lawyer whose experience and background render him/her best suited to represent them and creates a conflict for the lawyer who is asked to give up future representation in the interest of the current client. These public policy considerations and RULE 5.6 require attorneys neither to suggest nor to enter into such an agreement. *See* RESTATEMENT (*Third*) OF THE LAW GOVERNING LAWYERS (2000) §13(2)

3. **Limiting Information or Work Product**: Mediating a settlement that limits an attorney's use of information gathered in the matter, or limit dissemination of related work-product likewise violates RULE 5.6. Like limitations on an attorney's ability to represent subsequent clients, settlement terms that limit the use of work-product have been deemed a violation of RULE 5.6. See *Maryland State Bar Association, Committee on Ethics, Docket No. 2021-03*.

4. **Protecting Client Confidentiality**: Covid changed the legal profession. One of the most consequential changes involved a growing reliance upon video technology for fact finding, general communications, court proceedings, and confidential communications. Prior to covid, video teleconferencing was a rarely used. The DRPC rules have evolved to keep pace with technology. Review Comment 8 to RULE 1.1 regarding competency:

> To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and

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[1] *See Delaware Lawyer's Rule of Professional Conduct, Preamble, Comment [3],* stating:

> In addition to these representational functions, a lawyer may serve as a third-party neutral, a nonrepresentational role helping the parties to resolve a dispute or other matter. Some of these Rules apply directly to lawyers who are or have served as third-party neutrals. *See, e.g.,* Rules 1.12 and 2.4.

An acknowledgement that the DRPC do not apply, in some circumstances, to those serving in non-representational roles as third-party neutrals.

education, and comply with all continuing legal education requirements to which the lawyer is subject.

The takeaway here is that your competency as a lawyer is, among other things, measured by your understanding of technology that you use, and, more importantly, the competency to balance the risks of that technology against your obligations to maintain client confidences or protect against unauthorized access. How much do you really know about Zoom/Go to Meeting/ Microsoft Teams? Is the communication encrypted end-to-end? Is the videoconference being recorded? Who else is participating off-camera? *See, e.g.*, ZOOM SECURITY ISSUES: WHAT'S GONE WRONG AND WHAT'S BEEN FIXED, TOM'S GUIDE, *https://www.tomsguide.com/news/zoom-security-privacy-woes* (last checked 1/27/2023).

PART THREE – How to Avoid Being Sued Mediating

I. Failure to Disclose a Conflict of Interest/Witnesses

This is the most common failure of mediators/arbitrators and lawyers is a disclosure failure. The problem has many causes but the most common occurs at the very outset of engaging an ADR professional. When an ADR professional is engaged, that engagement typically starts off with a conflict check. That check is based upon information provided by the lawyers. That conflict check is only as good as the information provided. With respect to arbitration know that *the Federal Arbitration Act*, 9 USC § 10, and *Delaware Uniform Arbitration Act*, 10 Del. C. § 5714 both permit an award to be set aside based upon an arbitrator's conflict of interest. Problem areas: corporate conglomerates, foreign corporate structures, trust/estate matters – any place where the identity of related entities is obscured.

II. Breach a Specific Contractual Promise Regarding Structure or Outcome

Both the lawyer promising their client a specific litigation result and a mediator promising a resolution end up in the same trouble.

III. Breach of Confidentiality

Generally, three ways to breach confidentiality:

(1) externally by communicating with third parties about the mediation.

(2) internally by revealing confidential information to party not entitled to that information.

(3) maintaining confidentiality when obligated by law or rule to report. Child sexual abuse, imminent threats of

IV. Commit Fraud

Misrepresenting facts or party positions, or misrepresenting the law, or overstating

PART FOUR – Avoiding Suit and Being a Successful Arbitrator

* ***A Deep Abiding Appreciation of Due Process and what it Means, i.e.,Being Fair, Balanced, Knowledgeable, Informed, and Impartial.*** Can't over emphasize enough the need to be independent/impartial and perceived that way. Every step you take will be evaluated, at a minimum, in retrospect. Be self-aware of how your actions could be viewed.

Independence and impartiality are generally considered to be two different concepts: independence is the objective absence of any substantial link to any of the parties as that may alter the freedom of judgment of the arbitrator; impartiality is the subjective will not to favor any of the parties.

Due process contemplates more than independence and impartiality. Understanding how to conduct yourself in a manner conveys both qualities. Running an arb iteration. Understanding how to handle a hearing. How to establish pre-hearing process.

* ***Always ask for the Arbitration Agreement if one exists.*** Distinguish this from high/low or other types of agreements. Some terms of an arbitration agreement the parties may not want you to know. Some agreements are very basic. Some very complicated. For example, you should understand what your final decision should look like – a reasoned decision of nothing more than a conclusory award.

A reasoned decision is professionally and personally rewarding but it also the serves as the perfect foundation for overturning the award. Be very careful when writing a decision. Flip remarks, bad math, an overhyped critical focus on a single fact/circumstance set the foundation for a reversal argument. A powerful reasoned decision precisely identifies those facts, that testimony, and credibility that reinforce the outcome.

* ***When in Doubt, Confirm Your Authority to Act***. If you are unsure that you have certain authority as an arbitrator, then ask the parties to confirm that you do. Literally, a simple question can add immeasurable clarity.

* ***Respond Promptly and Completely***. Remember that arbitration is selected because it is quicker and less expensive. Taking too long to respond undermines that objective. Additionally, some arbitration agreements impose a time frame for completion. Exceeding or ignoring that time frame may result in a loss of authority.

* ***Understand the Allegations – Ask as Many Questions as it takes***. The single best way to lose credibility is to fail to grasp the issues. It's far better to make the "wrong decision" because you disagreed with a party's position, then to make the wrong decision because you didn't understand the facts, legal issues, or arguments.

* ***Be Overly Inclusive Regarding Your Conflict Check***. Likewise, your disclosure to the parties should be broad. Example: indicating that you've served as an arbitrator involving an insurance carrier or a specific attorney, or that others in your firm may have/had some relationship with one of the litigants.

* ***Understand that Everyone is Trying to Manipulate You***. Thus, it is vitally important to know yourself. For example, are you conceptual, open-minded, equity-oriented person or a rule-oriented, no-nonsense, by-the-numbers strict constructionist. To be successful you need to understand your own psychology and understand how your mindset might be influenced by counsel. Know that the lawyers selected you and already have their own insight into your psychology. Example: strict construction of the contract and related documents, while the other argues the parties' intent and the equities of the case.

* ***Humiliate No One Especially the Referring Attorneys***. This ought to be obvious.

* ***Know the Rules and Law for Which You Are Accountable***. Ask the parties especially if there is no written arbitration agreement. An important corollary to this rule is knowing the *Federal Arbitration Act* and*the Delaware Arbitration Act,* especially the provisions relating to vacating and modifying awards. For example, the *Delaware Rapid Arbitration Act*, 10 DEL. C. § 5801, *et seq*., imposes other time and process obligations upon the arbitration. The failure to know the controlling statutes or rules is a recipe for disaster.

Federal Arbitration Act	**Delaware Uniform Arbitration Act**

9 U.S.C.A. § 10 *Award of arbitrators; confirmation; jurisdiction; procedure]; vacation; grounds; rehearing.* (a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application ofany party to the arbitration— (1) where the award was procured bycorruption, fraud, or undue means; (2) where there was evident partialityor corruption in the arbitrators, or either of them; (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.	**10 Del C. § 5714** *Vacating an award.* (a) Upon complaint or application of a party in anexisting case, the Court shall vacate an award where: (1) The award was procured by corruption, fraud or other undue means; (2) There was evident partiality by an arbitrator appointed as a neutral except where the award was by confession, or corruption in any of the arbitrators or misconduct prejudicing the rights of any party; (3) The arbitrator(s) exceeded their powers, or so imperfectly executed them that a final and definite award upon the subject matter submitted was not made; (4) The arbitrators refused to postpone the hearing upon sufficient cause being shown therefor, or refused to hear evidence material to the controversy, or otherwise so conducted the hearing, contrary to the provisions of § 5706 of this title, or failed to follow the procedures set forth in this chapter, so as to prejudice substantially the rights of a party, unless the party applying to vacate the award continued with the arbitration with notice of the defect and without objection; or (5) There was no valid arbitration agreement, or the agreement to arbitrate had not been complied with, or the arbitrated claim was barred by limitation and the party applying to vacate the award did not participate in the arbitration hearing without raising the objection; but the fact that the relief was such that it could not or would not be granted by a court of law or equity is not ground for vacating or refusing to confirm the award. (b) An application under this section shall be made within 90 days after delivery of a copy of the award to the applicant, except that, if predicated upon corruption, fraud or other undue means, it shall be made within 90 days after such grounds are known or should have been known.

	(c) In vacating the award on grounds other than stated in paragraph (a)(5) of this section, the Court may order a rehearing and determination of all or any of the issues, before new arbitrators chosen as provided in the agreement, or in the absence thereof, by the Court in accordance with § 5704 of this title, or, if the award is vacated on grounds set forth in paragraphs (a)(3) and (4) of this section, the Court may order a rehearing before the arbitrators who made the award or their successors appointed in accordance with § 5704 of this title. The time within which the agreement requires the award to be made is applicable to the rehearing and commences from the date of the order. (d) If the application to vacate is denied and no motion to modify or correct the award is pending, the Court shall confirm the award.
9 U.S.C.A. § 11 *Same; modification or correction; grounds; order* In either of the following cases the United States court in and for the district wherein the award was made may make an order modifying orcorrecting the award upon the application of any party to the arbitration— (a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in theaward. (b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is amatter not affecting the merits ofthe decision upon the matter submitted. (c) Where the award is imperfect inmatter of form not affecting the merits of the controversy. The order may modify and correct theaward, so as to effect the intent thereof and promote justice between the parties.	**10 Del C. §** 5715 *Modification or correction of award by Court.* (a) Upon complaint or on application in an existingcase made within 90 days after delivery of a copy of the award to the applicant, the Court shall modify or correct the award where: (1) There was an evident miscalculation of figuresor an evident mistake in the description of any person, thing or property referred to in the award; (2) The arbitrators have awarded upon a matternot submitted to them and the award may be corrected without affecting the merits of the decision upon the issues submitted; or, (3) The award is imperfect in a matter of form, notaffecting the merits of the controversy. (b) If the application is granted, the Court shall modify and correct the award so as to effect its intent and shall confirm the award as so modified and corrected. Otherwise, the Court shall confirm the award as made. An application to modify or correct an award may be joined in the alternative with an applicationto vacate the award.