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## Delaware Private Arbitration: Its Practicality, Constitutionality, and Potential Influence on Other States

Christopher Martin

Hon. Clifford Meacham

Gregory Varallo

John Mark Zeberkiewicz

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## **Delaware Private Arbitration: Its Practicality, Constitutionality, and Potential Influence on Other States**

*Christopher Martin, Hon. Clifford Meacham, and Gregory Varallo,  
with John Mark Zeberkiewicz as Moderator*

SAM FAYE: Keeping with the same subject of the Delaware private arbitration program and what has been discussed, I'm going to invite Mr. Chris Martin back up, who is going to get involved in this discussion, and also the Honorable Clifford Meacham, who is a retired Cook County judge and currently acts as a neutral for JAMS. And I think these guys are just going to get into a discussion based on the previous presentation, and Judge Meacham and Mr. Martin will give their insight on the Delaware program based on practicing in Illinois. So all yours, gentlemen.

CHRISTOPHER MARTIN: Do you think it would be good to start with just a little background very briefly on the constitutionality issue and what's being raised and how perhaps?

HON. CLIFFORD MEACHAM: Can we do something before we get to that point?

CHRISTOPHER MARTIN: Sure.

HON. CLIFFORD MEACHAM: I used to teach law, and I always had some mantras that I would share with my students, the first of which is good lawyers are good plumbers. No matter how smart you are, what your client wants is a result. And if you can solve the problem instead of fight the problem, you are much, much better off.

And this is a pretty sophisticated topic here. And what I would like to do is just ensure that everybody has an appreciation of what it really means to participate in alternative dispute resolution. So in Cook County, it's a little bit of a different animal than it is in Delaware obviously. In Cook County, there is the Chancery Division. It's separate and apart from the Law Division and the First Municipal Division and the like. The Chancery Division has a mediation rule, which gives the chancellors the authority to order a mediation.<sup>1</sup> There is actually a Law Division mediation rule as well.<sup>2</sup>

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1. COOK. CNTY. CIR. CT. R. 21.01–21.11.

2. COOK. CNTY. CIR. CT. R. 20.01–20.11.

And there are people who have been approved for mediations under both the Law Division mediation rule and the Chancery Division rule, and there's also a provision if the parties can't agree—well, first of all, let me back up and say if the parties select someone that is not on the approved listing, the court will go along with it. And if the parties can't agree, the court will order a mediation and select somebody.

So there is a very active alternative dispute resolution process in the State of Illinois, as there are in several other states. And one of the other things that I just wanted to mention briefly is that the Delaware law is really interesting from my perspective. There is another area of the country that has an interesting alternative dispute resolution process, and that's California where they have both constitutional and statutory authority for private judges under the auspices of the circuit court, the various and sundry circuit courts of California, and they use many retired judges to adjudicate their disputes.

The advantages, of course, being time, money, and experience. You can select your judge. So there are a lot of different ways to go about this. From my perspective, good lawyers, again, can do a lot of things to frame issues to make life easier for judges and their clients. For example, in Illinois, we would—oftentimes where we have a pure legal issue that you talked about, if it's ninety days, we would invite cross-motions for summary judgment.

If the issue was one purely of law, it's nice to identify it. And I completely agree, the best service you can do for your client is to really focus in on what does the adjudicator have to decide. Is it a question of law? Is it a question of fact? Is it a mixed question of law and fact?

Oftentimes, there are stipulated bench trials. So if you have a stipulated set of facts, the judge is in a position to make a determination. Courts here in Illinois engage in a tremendous number of pretrials, and you kind of get two shots at the apple as well. Because you can ask your judge, the assigned chancery judge, if he will conduct a pretrial. Most will. Some are reluctant to do so. But within the division, there's the opportunity to ask your judge if he will send it to somebody else to conduct the pretrial. Sometimes it's a good thing.

The Cook County experience in terms of agreeing to a particular judge did not work out very well, and there was the Greylord scandals, as I'm sure something that you're not aware of, but some years ago, a number of Cook County judges wound up going to federal prison. And it's Cook County, what can you do?

They give you a test here and you have to finish high on the test in order to serve as a judge in Cook County. It's not like you just win an election or anything like that. Please. Appreciate the fact that half of this is tongue in cheek.

GREGORY VARALLO: Which half, Judge?

HON. CLIFFORD MEACHAM: Both halves. No fair making the judge blush. What these gentlemen are saying is really extremely valuable because you have to work with your client to put together what you need in order to be able to effectively represent your client.

And sooner is always better than later insofar as I'm concerned. Again, just to go back briefly, if you can identify whether it's a pure question of law, a question of fact, a mixed question of law and fact and if you can agree with your opponent on what it is, that can really shorten the process.

Whether it's a trial, a pretrial, or an arbitration under this system, the Delaware system, you can really tailor your case to the particular needs. And identifying the right person to make the adjudication is critical. Some people are wonderful mediators. Some people are great arbitrators.

Recognize, too, that there are different styles. There are facilitative mediators. There are evaluative mediators, and the best kind of mediator is facilitative until he can't stand it anymore, and then says, "Does anybody want to know what I think?" And when the answer is, "Okay," that's the Dracula moment where the mediator stabs both sides in the heart and says, "This is what you ought to do, and the answer to why, because I say so."

Edward Bennett Williams, the famous Washington attorney, once was given a long letter and it said, "What should I do?" And Edward Bennett Williams wrote him back and said, "Do nothing," with a bill for \$20,000. And the lawyer wrote back and said, "I don't really appreciate your thoughts. It's really valuable, but my client would really like to know the basis for your reasoning." And Edward Bennett Williams wrote him back and said, "Because I say so," with a bill for \$10,000.

I don't subscribe to that, and I really am a big believer in clients having the opportunity to participate, and judges and/or mediators and/or arbitrators have the absolute obligation to say who wins and why. I don't like judges that just say judgment for defendant, judgment for plaintiff.

One of the best things you can do, I think, to help lawyers and their clients is to give them the basis for your opinion. Sometimes (and, again, you haven't been in a courtroom setting yet, I presume, but in

federal court I practiced for many years. I was a member of the Department of Justice) we would put together proposed findings of fact and conclusions of law, and we would submit them to the judge and produce the evidence premarked, and the judge would have our proposed findings of fact and our exhibits, and he would have the other side's proposed findings of fact and conclusions of law and their exhibits.

So by the time we got to trial, if we were able to stipulate to Exhibits 1-900, then we didn't have to lay a foundation for all those exhibits. They were in the record already. And instead of laying the foundation for each one of them, you just hand them up and everybody follows along.

By the way, use real-time if you have a complicated case. That's where the court reporter takes your—and she can read back the question and life is so much easier and everybody gets their own disk, and it's a much better way to try cases.

In any event, if you understand what the issues are and if you can tailor the case—most cases, when they're filed in chancery, for example, I would get cases with three, four or five, ten, fifteen, twenty counts, and many times there would be counterclaims, cross-claims, third-party claims. But usually cases could be distilled into four or five key issues. And if you understood what those issues were and you could frame those issues accurately—and again, that's the value of having somebody as an arbitrator or a mediator who has a good deal of experience—then you can focus on those issues, get a result, and call the next case.

So again, the way to practice law is to make it easy for the judge and/or the adjudicator, and the way to do that is to do a bang-up job to understand that there is an evidentiary universe. And before you sit down to draft your complaint, it's always a good idea to think about what do I have to prove eventually to get to the point of putting my dog and pony show on.

And you will find that sometimes your legal theory will change depending upon the facts because litigation is a moving target. I think it's going to be here, take a couple of depositions. I thought your comment about amendments was valuable. Don't get stuck identifying a narrower range of issues than might eventually exist. The issue may be different after you've gone through some discovery. So, you know, that's my two cents, and now we can talk about the majesty of the constitutional issues that are raised here.

CHRISTOPHER MARTIN: One thing I wanted to add to that. As law students, what I found is you might have somewhat of a miscon-

ception that the judge is going to do a lot of this stuff for you in terms of defining the litigation, and it's really your case, right?

The judge and/or the arbitrator is relying on you to bring forth what the issues are and to define the scope of them. So don't think that this is going to be done for you, that the judge is up there making all these decisions. They do make decisions, but they make the decisions based on what you bring them.

So it's on you to define the scope of the litigation or the arbitration. And that's a very important point that I think, as students, you want to understand because, going back to my cost talk, that's going to have a big impact on what the final bill is on how this all comes out. As Judge Meacham just said, if you come forward with fifteen or sixteen counts and most of them are going to do nothing but create noise and noise costs money, that's a big part of the ultimate length of the trial or arbitration and the amount that your client's going to end up paying.

GREGORY VARALLO: Let me add to that, if I can, and underline it. What we do as advocates is communicate, and we communicate hopefully in a way that helps the judge do his or her job more effectively.

And what you don't see until you've been around for a while is just how busy the judges you appear before really are and, honestly, just how little time they have to devote to any one matter. You live with the matter for days or weeks prior to coming in for an argument, and because you know it inside and out, you expect that the judge does.

Well, I've never been a judge, but I suspect your Honor could tell us that in any one matter, you might have two or three hours at most to think about the matter before you take the bench. And so it's your job to narrow it and communicate it in a way that anybody can understand it, so that an accomplished jurist takes it and runs with it.

Also, I have to say that I received an opinion from Vice Chancellor Glasscock last week on a complicated matter that was made unduly complicated by the other side. And the vice chancellor, in describing the plaintiff's multifaceted complaint, said that they took advice from the Vice President of the United States and then he dropped a footnote in. He said, "Buy a shotgun, buy a shotgun."

HON. CLIFFORD MEACHAM: That's extremely true. I will often tell people in a mediation context I am the person who knows least about the conflict in the room. The lawyers have to live with it for a very, very long time. I have a mediation on Monday, and I don't even have the submissions as I sit here. So my weekend will be spent looking at submissions. And again, what I do is I analyze what we

need to do in order to get to an adjudication, a point where we can adjudicate and/or mediate effectively.

And in this case, it's a four-party mediation. Everybody's got an opinion, subrogation, indemnification. Don't make it harder than it has to be. I get to have breakfast almost every morning with a number of appellate court justices and meet up old trial court judges, and it is a very common refrain that lawyers tend to make things too complicated.

I will tell my students to practice your argument in front of your bartender, your wife, your significant other, and if they start dazing off, you know you will have lost them. So when you're in a position to make that argument, never, ever say, "I'll get back to that." Listen to the question, answer the question. If you don't know the answer, you can vamp a little and say, "Well, what we need is this," but answer the question and keep it, distill it down so that your argument is clear and consistent.

If you get caught up in one of the backwaters of esoteric argument, that isn't going to help the court, yourself or your client.

GREGORY VARALLO: I have to add, Judge, that I don't get an opportunity to try jury cases very often because I practice in a court that doesn't have juries. But every time I'm privileged enough to be before a jury, I have a simple rule. And my wife's a very intelligent, very educated woman, but if she doesn't understand me the first time through, I work on that argument until she understands precisely what I'm saying and gets me to the point where I want to get.

I don't prejudice her in advance. I say, "Will you listen to my argument?" And if she's got questions, guaranteed that the jury's going to have questions because she's really smart and she picks it up right away.

If you can't talk to a non-lawyer and you're going to go talk to eleven, twelve, or six of them depending upon your jurisdiction, you're not going to do very well, so make sure you can explain it to a non-lawyer quickly and concisely before you get in front of that jury. So now back to arbitration.

CHRISTOPHER MARTIN: I think it would be beneficial maybe just to get a little summary from our Delaware colleagues about the constitutionality of the issue and where it stands and what the arguments are.

JOHN MARK ZEBERKIEWICZ: Speaking of distilling things down, we'll take it in three very small steps. We provided in the

materials a copy of the memorandum opinion from the district court that found this whole regime unconstitutional.<sup>3</sup>

We didn't provide Greg's dissent or his hand-marked copy of the opinion because we wanted you to just read it without prejudice. Essentially, if you go to that opinion, you'll notice that it starts off with the plaintiffs—the plaintiffs here being the Delaware Coalition for Open Government and the defendants being the chancellors and the vice chancellors of the Court of Chancery of the State of Delaware—arguing that the First Amendment's qualified right of access prevents the defendants from concealing these arbitration proceedings from the public and the press.<sup>4</sup> The court, after a lengthy discourse about all of the salubrious benefits of open court proceedings, et cetera, et cetera, found that the arbitration regime, because of the confidential aspect of it, violated the First Amendment of the United States Constitution as applied to the states through the Fourteenth Amendment of the Constitution.<sup>5</sup> In the court's opinion, the confidentiality component was found to be violative of the First Amendment.<sup>6</sup>

But, when you turn to the order, the court enjoins the entire regime.<sup>7</sup> Not just the confidentiality piece—the piece that was, in fact, subject to the challenge. The entire regime, baby and bathwater.

With that very brief summary, I think we can maybe argue the merits of the opinion. When you cut through it all, the court was essentially saying that, without open access to the courts, in some aspects, we can't trust our justice system. This arbitration regime, which is administered by the State of Delaware under the auspices of state funding and state power, even though it's called arbitration and used by private parties through mutual consent, was, for all intents and purposes, a civil proceeding.

The court looked back to aspects of how proceedings have been treated historically, whether they have been open to the public or not open to the public. The court looked at a few cases on point. The ones that the court focused on primarily and described and explained were in the context of criminal proceedings.

The court spends a few pages going through a detailed analysis of those particular cases arising in the criminal proceeding context and says, for all of these various sundry reasons, it is incredibly important

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3. Del. Coal. for Open Gov't v. Strine, 894 F. Supp. 2d 493 (D. Del. 2012).

4. *Id.* at 497–500.

5. *Id.* at 504.

6. *Id.*

7. Order, Del. Coal. for Open Gov't, Inc. v. Strine, 894 F. Supp. 2d 493 (D. Del. 2012) (No. 1:11-1015).



to our society—to our democracy, no less—that criminal proceedings remain open.<sup>8</sup> Candidly, I understand some of the reasons for that analysis.

With criminal proceedings closed to the public, there's always a risk of abuse, a risk that people will be unfairly or unjustly prosecuted. Keeping those proceedings open obviously helps to ensure that people won't get unfairly prosecuted—and to ensure that the people who do abuse their powers will be called out for that.

The court then provides a string cite, without much explanation, that includes the cases that stand for the proposition that civil proceedings should also be open.<sup>9</sup> The court then basically says, without much analysis, “Many of the same rationales supporting openness in criminal trials apply equally to civil trials.”<sup>10</sup>

The case is on appeal in the Third Circuit right now. All of the findings at the district court level will be rehashed at the Third Circuit. For now, though, they're going to be rehashed on this panel.

A couple of things that I do want to raise to frame this discussion. One is the court almost assumes that these arbitration proceedings are civil proceedings and, therefore, should be treated the same as you would treat a civil proceeding. So let's just accept as true that civil proceedings have to be open. The court jumps right to the conclusion that these are basically civil proceedings. Greg, I want to see if you'll take the “they're not” stance.

GREGORY VARALLO: I'm so glad you gave me that stance because I would have a really hard time with the other stance. They're not. Look, because I say so, and that will cost you \$30,000.

We went through the form earlier, and one of the provisions of the form is taking out of the chancellor's hands the right to act in his capacity as an arbitrator to limit discovery. I would respectfully suggest to you that if you walked into court tomorrow and said, “Judge, this is a civil action in Cook County or anywhere else, and we're telling you because we agree, the parties agree, you're not going to have this power and that power and the other power,” that wouldn't work very well because you don't have the right to tell the judge in a civil action what power he or she has. It's simply not available to you.

Arbitration is a creature of contract and is fundamentally different. In addition, the court just assumed that all arbitrations chartered

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8. *Strine*, 894 F. Supp. 2d at 497–99.

9. *Id.* at 498.

10. *Id.*

under this regime had been conducted exactly as though they were civil trials. Well, that's not at all true.

Unfortunately, the state decided to present its case on cross-motions for summary judgment without any record development—in other words, serving it up as a pure issue of law—and the court, relying on the complaint, determined it must be just like a trial.

The record, if it were developed, would show—and I know this because I did them—that at least the first of these had no discovery, no appellate rights, no motion practice, and presented purely an issue of law very much unlike any civil trial I've ever conducted or been involved with.

So not only is the court wrong as a matter of fact—and to be fair to the court, she didn't have a factual record because of the way the parties presented it—but her assumptions of fact are incorrect. And honestly, I would even challenge John Mark's given, that is, that all civil proceedings are open.

Her Honor, in her opinion describing the United States Court of Appeals for the Third Circuit's opinion in *First Amendment Coalition v. Judicial Inquiry & Review Board*,<sup>11</sup> explained that at least in the Third Circuit, there is historically no right of access to administrative proceedings that is recognized. And I would suggest to you that certainly there is a right of access to criminal proceedings. Nobody disputes that including myself. And by the way, I'm uncharacteristically on the far left of this table. It's just not a position I'm very often in.

But even I would agree that there is an enormous public benefit in having open criminal proceedings at all levels at all times. But that is not necessarily the public policy, and the rationale behind that doesn't necessarily port in all its glory to every civil proceeding.

And her Honor recognized that administrative civil proceedings in the Third Circuit and deportation hearings, for example, which are also hearings that involve people's liberty, at least at one level, need not be open to the public notwithstanding the United States Constitution.

**JOHN MARK ZEBERKIEWICZ:** Did the court indicate which administrative proceedings that she is referring to?

**GREGORY VARALLO:** No. So the court says at page 498 of the decision, this is describing the Third Circuit, "The Court of Appeals found no historically recognized right of access to administrative pro-

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11. *First Amendment Coal. v. Judicial Inquiry & Review Bd.*, 784 F.2d 467 (3d Cir. 1986) (en banc).

ceedings, which use fundamentally different procedures than the judiciary . . . .”<sup>12</sup>

Well, if you’ve concluded that administrative proceedings are different under the First Amendment because they use fundamentally different procedures and you conclude that civil trials and arbitrations are otherwise substantively identical, I would suggest that you have some flawed reasoning in your *ratio decidendi*, but that’s just me.

HON. CLIFFORD MEACHAM: Administrative proceedings in Illinois are appealed to the Chancery Court, and they do not—every administrative hearing is not open to the public. You’re exactly right. So the court’s reasoning is flawed in that respect.

In addition, here in Illinois, certain matters can be filed under seal and/or you can ask the court to have a seal, and oftentimes there is good reason to do so. The Tribune Company will invariably come in and say, “We want this information to be released,” and they routinely win in criminal matters, but they do not routinely win in the Circuit Court of Cook County Chancery Division.

So it’s not as if every single case and every single pleading is a matter of public record. So I completely concur with the analysis. I think that that was very flawed. Although the worst thing is from my perspective I need to ask—Was there a motion to reconsider here?

GREGORY VARALLO: I think they skipped the motion for reconsideration as a tactical matter because they wanted to bring the scope . . .

HON. CLIFFORD MEACHAM: They wanted to have a record?

GREGORY VARALLO: Yeah, exactly.

HON. CLIFFORD MEACHAM: Pay attention. Sometimes, if you know the judge is wrong, you don’t want to give him a chance to correct himself. You want to take it right up. I will bet you that this case will be reversed, and one of the easiest grounds for reversal is who asked for an injunction. I mean, this is a judge who is taking a very extraordinary step in entering relief that is not even sought. Wow.

Usually to get an injunction, you need to put on the grounds for an injunction, particularly a permanent injunction. And for a judge to, on his or her own motion, essentially say, “I’m enjoining this in total,” it’s mind-boggling to me.

GREGORY VARALLO: I have to tell you, Judge, I was embarrassed—I’m not often embarrassed, but I was embarrassed by this one. When the decision came out, the order—the decision came out

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12. *Srine*, 894 F. Supp. 2d at 498.

about two hours before the order was issued. And I read the decision immediately.

My friend was counseling the court and sent me a copy of it. And I occasionally will go on to my LinkedIn page and put out little blogs for those who care. Believe it or not, other than my wife and kids, there are a few who do. I don't understand why, but they do.

And I had been following this, and I sort of blogged into the ether that, well, don't worry because she's going to allow public arbitrations to go forward, and some general counsel may find that worthwhile. And then the order came down, and I was shocked because when you read the decision right up to the end, she's talking about access and her reasoning is that it's a closed proceeding and it needs to be opened.

One would assume, if given the choice between enjoining or stopping closed proceedings or enjoining or stopping all proceedings and thus striking down a state statute, which federal courts are supposed to do with only great reluctance, the answer would have been, "I'm simply ordering going forward that all these proceedings are open." I then had to un-blog or re-blog or however one corrects oneself in the blogosphere.

**JOHN MARK ZEBERKIEWICZ:** If I could defend my partner, the court's opinion concludes with a statement, "[T]he right of access applies to the Delaware proceeding created by section 349 of the Delaware Code. The portions of that law and Chancery Court Rules 96, 97, and 98, which make the proceeding confidential, violate that right. An appropriate order shall issue."<sup>13</sup> That order then said this whole thing's unconstitutional and no further proceedings pursuant to the state under those rules shall be permitted. So that was the appropriate order, getting rid of the portions of the law and the rules.

**CHRISTOPHER MARTIN:** If I might, the whole idea of confidentiality or openness in civil trials, I would say in my practice, a full 20% of my cases probably ended like this.

Judge Meacham would say, "Plaintiff, come back to my chambers" and you would go back and meet with the judge. And now you go out and send the defendant back, and then both of you come in. And if you were interested in our case and you were sitting out in the courtroom and we went back in Judge Meacham's chambers and he got us to a point where we could agree to settle it and we walked out there and you asked, "What just happened back there?" "I'm not telling you that."

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13. *Id.* at 504.

A lot of civil cases end in that way with no public record, no public access. And not only is it efficient, it usually comes out with a much better result than you would have gotten if it proceeded to trial.

HON. CLIFFORD MEACHAM: There's no question about it, final order, stipulation, and dismissal. For those of you—I have to make an analogy to criminal law. In Illinois, you can ask for what's known as a 402 conference. If the state's attorney and the public defender can't agree on a sentence, but they know that the defendant is going to be found guilty, they'll ask for a 402 conference.

The court goes back in the chambers. The public defender makes a speech: "A long-standing citizen of Cook County, he's got X and Y in the way of background." And so we're praying, please God, for a probation.

And the state's attorney says, "Oh, this guy is the biggest slug in the world, here are the facts," and the public defender will say, "Oh, probation." The state's attorney will say, "Six months." And the judge can then say, "Well, this is what I think. I've been sitting here for twenty years, and this is exactly like a lot of other cases I've had and, you know, so far as I'm concerned, if there is a plea agreement, this would be my sentence."

And then the public defender can go back and talk with his client, and the state's attorney can go back and attempt to justify why it is to his supervisor—and sometimes the judge will call up and say, "You know, your assistant state's attorney argued crazy, but I'm the judge and this is the sentence," and then they'll go out and essentially if the state's attorney doesn't want the deal, the judge will look at him and say, "Well, I appreciate your time, thanks very much," and he'll look at the defense attorney and say, "Do I hear a plea?" And that's a cue to the defense attorney, the public defender, "I'm going to give this guy what I said I was going to give in chambers."

And you don't have that trial. You don't have the full exposition of all the facts. You don't have the exchange back and forth between the parties and the judge, and the judge will typically admonish the defendant, "You know, you're waiving all of your rights to trial and jury trial and all of this." And they'll sit there and the judge will say, "This is the sentence and the case is over." That's the way it works.

GREGORY VARALLO: I would also say there's an elephant in the room. It's sort of in the court's opinion. And that is that there are courts across the country including federal courts that have mandatory arbitration proceedings if the case is under a certain dollar amount; certain classes of cases are, by definition, required under the rules of various district court jurisdictions to go to mandatory arbitration.

And it hits me that it's a little bit strange to say to the state you can't have consensual private arbitration. Remember, nobody's required these companies to come into chancery to arbitrate. They have agreed among themselves that they want the judge in a circumstance where, in many cases, there is not an appeal by agreement. They want the judge to call it because they have confidence and faith in this particular judge. They want him to do it.

That's not a circumstance that you have to worry about openness in the same way you'd have to worry about openness for other kinds of circumstances. And if that logic holds, then what are you going to do to the entire system of state and federal court mandatory arbitration as it exists currently in the United States? I honestly don't get it.

HON. CLIFFORD MEACHAM: I don't get it either, and I will tell you in the First District Appellate Court and even at the Seventh Circuit level, they can force people to come off the call and go before a judge. And it's always a judge, it's not a member of the panel, in order to attempt to not arbitrate but to mediate their disputes.

So there is this tremendous backlog of cases everywhere, and that's one of the things that prompted the law to change—when the law changed in California. And it's also one of the things that prompted the Chancery and the Law Division mediation rules here.

If it takes you three years to get to trial, your case—in a commercial case, it's like a diminishing ice cube. The longer it takes, the more it costs. By the time you finally get your judgment, the next step for many defendants is Chapter 11 bankruptcy because people will think about some prebankruptcy planning. Sorry to disillusion you, by the way. If you're a senior law student, my strong advice is take bankruptcy. You need to know it. It couldn't be more important.

But in any event, time is your enemy. Your case will not get better. And somebody asked a question—What does that do to my fees? Well, what does it do to your fees? You're going to work harder for a shorter period of time, but you will come to closure, which is what your client wants.

Your client needs certainty. He needs closure. He needs an endpoint. Because no matter what the result is, whether it's good or bad, even if it's bad, it's like getting a tooth pulled. Once you know it's bad, on to the next. Go back and make some more money and do something else. But don't string it out. It's not in anybody's best interests to do that absent rare circumstances. I'm just giving you my general philosophy.

CHRISTOPHER MARTIN: If I could chime in really quick on that. I thought that fee question was an interesting one because you

kind of condense your work, and so perhaps from a business standpoint of the firm, you don't stretch out your ability to make money over a year, two years, three years.

I would say if you do a very good job and this is viewed as a valuable thing to do, you'll finish in ninety days and you will have someone knocking on your door saying, "Can you take me the next ninety days?" And so it can actually be a very good thing for your business model because you will be loaded with work constantly because it's a valuable service.

JOHN MARK ZEBERKIEWICZ: I want to move to an ancillary point that the court made, and I want to use a hypothetical that I came up with as a result of an opinion that was in a public civil proceeding.

But let's assume that it has been done in an arbitration. And so the court does make the point that, among the benefits of open civil proceedings, everybody has access to the law. Everybody can watch what the court's doing, monitor and figure out how to apply the law going forward. This is one of the great benefits of having precedent. Last week, the Delaware Court of Chancery issued its opinion in *Meso Scale Diagnostics, LLC v. Roche Diagnostics GmbH*.<sup>14</sup>

About nine months ago, there was a situation where Roche acquired a company called BioVeris through a reverse triangular merger. In the reverse triangular merger, Roche, as acquirer, dropped a subsidiary, which it merged with and into. BioVeris survived the merger. All of the stockholders of BioVeris immediately prior to the merger got cashed out, and BioVeris ended up as a wholly-owned subsidiary of Roche. So BioVeris was the same company before and after the merger. It just had a completely different owner.

Meso Scale had a contract with BioVeris that said, in sum, that if a transfer with respect to the ownership of certain IP licenses is to occur, Meso Scale would have the opportunity to block it. The narrow question before the court was whether this reverse triangular merger resulted in a transfer by operation of law, not a change of control, but rather a transfer by operation of law of BioVeris's IP rights.

So remember before the merger, BioVeris and its stockholders had these IP licenses, and then after the merger, BioVeris still had the IP licenses. It just had a completely different owner. Were those licenses transferred by operation of law, giving rise to Meso Scale's consent right? That was the question before the court.

On a motion to dismiss, the court said it was an open issue of Delaware law. As a practitioner, I thought and have always thought it was

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14. *Meso Scale Diagnostics, LLC v. Roche Diagnostics GmbH*, 62 A.3d 62 (Del. Ch. 2013).

clear cut: same company before and after the merger and, thus, no transfer. And I think most practitioners had the same view. But then the case came out on a motion to dismiss, and all of a sudden this is a real concern. Nine months go by. Then, on summary judgment, the court releases its opinion. As we had always thought, the reverse triangular merger doesn't result in a transfer by operation of law.

This would have been the perfect case for arbitration in some respects. It's a very narrow contractual provision. It would have been pretty easy for the parties to just go in and get this issue resolved within ninety days. The downside to that is that nobody knows the answer unless there's a public opinion that a reverse triangular merger is not, in fact, a transfer by operation of law. Does anybody want to take either side of that now that I've teed it up?

GREGORY VARALLO: The question is, John Mark, that it's somehow unconstitutional to have proceedings that you can't rely on?

JOHN MARK ZEBERKIEWICZ: Well, the question is—Is the benefit of having the law out there so important and fundamental to our society that it would be unconstitutional to prevent this precedent from being created and available to everyone?

HON. CLIFFORD MEACHAM: Answer, no. There's always another case. I mean, you want to pick your spots, and it seems to me the fact is that they got their precedent. But does that mean they shouldn't have considered at least the option of applying to an arbitrator in the same kind of fashion as is contemplated by the statute?

They have that right. You can make a determination on behalf of your client how you want to proceed. And as long as they're in a position to make an informed judgment, the courts need, I think, to stay out of it.

That doesn't mean that the courts stay out of everything. I mean, there can be—I used the example earlier of a 402 conference. Sometimes a defendant and the state's attorney will come up with a sentence and it's wrong, and the judge has the inherent authority to say, "No, I am not going to consider that sentence." And sometimes a judge can, if there are public policy considerations, throw a monkey wrench into the gears of lawyering. There are times when a judge can say, "No, I'm not going to consider that," or "I'm not going to consider that at this point in time."

In your case, it was before the judge early, and the judge got a little shaky. But then after the motions for summary judgment, I assume cross-motions for summary judgment were fully briefed, now the court has a record. And judges are loath to enter summary judgment



because that's the most often reversed order. Sorry, Judge, but no material issue of fact.

Well, creative lawyers can damn near always find some sort of an issue of fact. It's the way it is. Cross-motions for summary judgment. Now you have two people, both of whom are saying there's no material issue of fact. Now you can decide.

But to decide a motion for summary judgment where you're not really satisfied with it, if it's a close case, you're going to say that's what we're here for. Let's put on your witnesses. Call your first witness. We'll go to trial. We'll give you a chance to make your record. And even though I may know the way it's going to come out, not that judges ever feel that way, even though you know the way it's going to come out, let them put on their evidence and let's see how the record develops.

GREGORY VARALLO: I agree, John Mark. I thought you were going to ask me whether it was inherently unfair that those of us who do these arbitrations would know how a judge was leaning on a particular issue. And the answer is, yes, it's unfair, but it's certainly not unconstitutional in my view.

JOHN MARK ZEBERKIEWICZ: It's nothing that prevents anybody from hiring us.

HON. CLIFFORD MEACHAM: Always, always, always look into the background of your arbitrator, your mediator, your judge—always, particularly in Cook County. I was on a panel—I shouldn't tell you this story, but I will.

I was at the University of Chicago. This is an august spot, and everybody was tweedy and bearded, and I'm just a complete Cook County guy. And so I made this point about you need to know where this guy comes from. Was he an assistant state's attorney, was he a public defender, was he a do-gooder? You got to know this stuff.

And I kind of went off on a rant and used my usual colorful language. And I said, "Any questions?" One of the professors looked at me and said, "Well, I wouldn't think that this is the way a circuit court judge should approach these kinds of serious issues." And I said, "Ever hear the story about the dog that could play the accordion?" And he says, "No, what's that?" "There was a dog that was playing an accordion and he was playing *Lady of Spain*, and there were two law professors who were watching. And one of the law professors looked at the other one and said, 'You know, that dog, I mean, what a selection, what a selection.' The other law professor said, 'Not only that, he missed several notes in the first bar,' to which a real live person

who was sitting next to him says, 'You know, you guys kind of missed the point. First of all, it's a dog.'

So that made me real popular. Although one of the students appreciated it afterwards and I said, "You're the one who's going to go far in this entire class." You got to be a practical human being. You need to know what the territory is like.

In Delaware, they have wonderful, competent chancellors, unlike the Circuit Court of Cook County where they're sort of kind of elected. But talk to people. Develop your network. Talk to your partners. These guys do it all the time.

It's assigned to such and such a judge. What are his predilections? Some judges make you stand up when you object. Some judges are very formal. Some judges are much less formal. You need to know where you're operating, what the territory is like.

CHRISTOPHER MARTIN: I would absolutely agree with that. Especially if you're going to be practicing here in Cook County; you have to know the judges. I would go farther than that. Know the judges, know the clerks, know everyone that you can in the courtrooms because they can all help you. If you're a good person and nice to them, it will help.

HON. CLIFFORD MEACHAM: Always, always, always. The clerks, you have no idea. The court staff is a family. You have the judge. You have the deputy. You have the law clerks. And if you go in there and give the clerk a hard time, you can rest assured that that clerk will tell everybody else what a jerk you are.

And you need to know that in Chicago, if you look at Sullivan's, there are a million lawyers, right? But judges talk. And if you get caught going in the wrong direction, everybody in that judge's division will know about it and soon.

Your word as a lawyer is the most important tool you have. It doesn't matter how smart you are. Your word as a lawyer—if you say you're going to do something, you do it. And the law is always practiced in the gray. If it's black or white, you're going to win or you're going to lose. So don't go in there and argue bad precedent. Don't go in there and act like a nitwit. Don't be hyperaggressive. If you're going to be real arrogant, you better be real smart. Because the worst thing you can do is make the judge your enemy.

The judge always has the last word, and he can sit there and listen to it, and the judge will still follow the law and get it right. But again, you want to be a right guy. It's always easier when they like you.

JOHN MARK ZEBERKIEWICZ: I want to stay on the topic of integrity and continue that thread. Among the other benefits that the district court identified, and I'll just quote directly from the opinion, "Public scrutiny discourages witness perjury and promotes confidence in the integrity of the courts."<sup>15</sup> Is there a real concern that if we have these closed proceedings, some of the witnesses, maybe even the lawyers, would be less forthright?

GREGORY VARALLO: No lawyer I know would be more or less forthcoming because the matter was open or not. I think at a certain level of practice, if you're going to be representing clients before the Court of Chancery, you better assume a certain level of integrity or you're in trouble, as the judge said, very quickly.

And as far as perjury goes, I practiced for a long time. I've only seen one case, one clear case of perjury in a trial, and the fellow was referred to the prosecutorial services and convicted in absentia to five years in jail for fabricating a document in a business case.

CHRISTOPHER MARTIN: I would also say that people are—people are under oath outside of the public view all the time. We take depositions, and those are not in the public view. Ask former President Clinton whether being under oath in a deposition saves you from telling the truth. It doesn't.

Clients sign affidavits under oath all the time as part of settlement. Instead of producing records, they might say, "These are our sales, and I'm telling you this under oath." And no one ever sees that. It doesn't affect the veracity of the document or the statements. So I would disagree with that.

Also, just going back to the whole idea of whether this will harm the development of the law because they are in private. You know, we've had private arbitrations for a long time now, and I would say the law has muddled along just fine in its development, and I don't think the courts are lacking for litigation.

HON. CLIFFORD MEACHAM: You should look forward to soon practicing law, and it is, I will tell you from my perspective, the great profession. I mean, it is wonderful. It is fun. I mean, it can be deadly serious. You will meet wonderful people. You will learn an enormous amount about a lot of different things.

You will see wonderful—you'll see humanity at its absolute best and its absolute worst. It's above, I mean, it is just—you have no idea what your future holds for you. Look forward to it, embrace it.

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15. *Strine*, 894 F. Supp. 2d at 504.

And there's one other thing—if you're going to practice in Cook County, there's an outfit called Chicago Volunteer Legal Services (CVLS). Sign up with CVLS. There are a lot of people out there that need lawyers.

You'll get a case from CVLS every once in a while. They have a tremendous staff and a tremendous number of people who volunteer to serve clients. You will be a do-gooder. You will help people who need it. You will exponentially expand your networking ability.

You'll meet people from giant firms, medium firms, small firms, and you will get cases from them and be able to send cases to them. Make a contribution to make this profession even better. It's easy to sit back and make a lot of money and all this and that sort of stuff, but demand more of yourself. It's a service-oriented occupation. Serve some.

CHRISTOPHER MARTIN: I absolutely agree with that. I keep a couple of—I've got a couple of old pro bono clients, some poor South Side churches that always get themselves in trouble. And I still represent them just because (a) I like to be in the courtroom just to keep myself fresh. I think if you sit in a classroom all the time and don't practice, you get stale. And (b) just because they're great people who just can't afford representation, and they constantly get themselves in trouble. They need it.

HON. CLIFFORD MEACHAM: You get those clients year after year after year.

CHRISTOPHER MARTIN: Yes.

HON. CLIFFORD MEACHAM: I have to tell you one final story. I probably shouldn't. But when you talk about South Side churches when I was sitting in the mechanics' lien section, I had a construction case. A poor South Side church general contractor comes in. They make the mistake of giving them all the money, terrible, he evaporates. In the meantime, a material supplier has delivered a bunch of stuff to the site, and the plaintiff is represented pro bono by Chester Blair, former president of the Chicago Bar Association, wonderful guy. And the defendant is represented by a lawyer, a local lawyer by the name of Burton Brown, great guy. He does all kinds of volunteer work.

And every time the case was up, the courtroom is filled with the elders. There are about seventeen elders. And it wasn't a tremendous amount of money, but it was more than the church had. So one day the case is up again, and we're all kind of doing this. Burton Brown says, "Well, you know, my guy, he doesn't want to make anything and he's going to lose something, but here's what he's willing to do. If

these people can come up with this much money, we'll go away, and the lien comes off the church and they can go forward."

And so we were pretty much in the ballpark and had everybody take a step closer so the elders couldn't hear, and I said, "What about it, Mr. Blair?" And he said, "Okay, I'll write them a check, too." "What about it, Mr. Brown?" "Okay, I'll write them a check, too." And I looked at both of them and said, "On Sunday, there are going to be three checks in the basket, one from Mr. Blair, one from Mr. Brown, and one from an anonymous person who will never, ever admit to it." And I swear to God, my law clerk said, "There's going to be four checks in the basket," and it happened so, you know.

GREGORY VARALLO: We're totally convinced this opinion is unconstitutional, and it's going to be reversed by the Third Circuit. I will say that the law firm of Mayer Brown is representing the judges on this appeal. The State of Delaware and the court had the good sense to go outside the state to find an excellent appellate advocate. Apparently it's a lawyer from Chicago.

HON. CLIFFORD MEACHAM: Ty Fahner?

GREGORY VARALLO: I think so.

HON. CLIFFORD MEACHAM: My former boss, former Attorney General of the State of Illinois, one of the great lawyers of the world.

GREGORY VARALLO: And the question is whether we wind up in the United States Supreme Court one day or not. In the meantime, we are doing our best to muddle along arbitrating cases with retired judges, and we're blessed with a number of them in Delaware that are very fine judges and neutrals.

And I guess the question is—Having exhausted the subject of constitutionality, what else can we productively talk about? You guys are every day thinking about these things actively as you're going through your classes. You've got a panel up here that ranges the gamut in terms of our experience and what we do. You've heard a lot of different things from us. What's on your minds?

AUDIENCE MEMBER: I had a question. I guess this goes to constitutionality, but having just skimmed the memo, I know we discussed sort of a judicial obligation to set precedent. But in the qualified First Amendment right of access for the public, I saw more of a right to notice to understand how companies are performing business and to potentially amend your consumer behavior or just to have an awareness perhaps as a deterrent for companies to act in certain ways. And I think that in some senses, like, that's how I read the First Amendment, that right to know.

JOHN MARK ZEBERKIEWICZ: I think that's part and parcel with the whole idea of witnesses not perjuring themselves and the whole idea of proceedings being open for the integrity of the law and the process and companies being monitored. I think the whole thing is kind of throughout this opinion. All of those issues are blended together and really merge.

GREGORY VARALLO: I would also say, though, that the law imposes on companies the obligation to disclose material things about their business, either by 10-Ks or proxy statements or quarterly reports when they're public. And to the extent that you're positing or the judge is positing a duty that goes beyond the federal scheme of disclosure regulation, I don't think that you can find a principled basis for that in the First Amendment.

You've got to disclose what you've got to disclose. To the extent what her Honor is saying is, and you need to go beyond that because there's integrity in having knowledge out there, the problem quickly becomes how much knowledge needs to be out there. If you're already beyond the statutory scheme, do you need to disclose a little bit more or do you need to disclose a lot more, or how does that work?

And as we've indicated earlier, there are lots of times companies in this situation are in court-ordered mediation or arbitration or other ADR that's not public, and that just doesn't seem to match up with a principled analysis under the First Amendment.

HON. CLIFFORD MEACHAM: There's another point, too, in addition to the disclosure requirements, for example, under the SEC. You mentioned consumers. There are consumer fraud and deceptive trade practices acts in virtually every state in this nation in addition to the little SEC actions.

So there are attorneys general all over the place that if they find an unfair act or practice in trade or commerce, they're going to jump into it. A good example is the litigation with respect to the mortgage foreclosure robo-signings and the like. There are a lot of different ways to get a result.

What we're talking about, I think, is much narrower private litigation as opposed to litigation that really does have an impact upon the public at large.

GREGORY VARALLO: And I would also say that the way this is set up, by definition, you've got to certify that it's not a consumer matter. So that whole sort of area gets excised out of the scheme to begin with.

AUDIENCE MEMBER: But making it public could still illuminate that they had no—even if it's between two corporations, if one corpo-

ration is shown to have acted in negligence or willful and wanton behavior, access to scientific information that a certain product is deadly to its own employees, for instance, and one is suing the other.

**JOHN MARK ZEBERKIEWICZ:** The same argument would apply to a private arbitration that doesn't involve the state, right?

**CHRISTOPHER MARTIN:** That's what I'm wondering. I feel like I'm missing something, but I don't think I am. Because it's not as if enforcing this judgment is going to make all this public now. They'll just go find a retired judge and do the exact same thing.

You'll lose the advantages that have been established by using these chancery judges, which provide a great benefit at no greater cost to the public. So I guess I'm missing something because it seems like . . .

**JOHN MARK ZEBERKIEWICZ:** It's somehow using the instrumentality of the state, it is argued, that pulls that out. I just don't know what it is because you take your example. I hear you. You think maybe it is beneficial to have some knowledge about these things and to have that all be open. But all of this can be done through private arbitration that doesn't involve the state in any way. It's just that now you've got this instrument of the State of Delaware coming in, you're able to make this argument that closing it down to the public is a terrible thing, even though we know that you can do that anyway. It's just you don't have Chancellor Strine. You have a neutral.

**CHRISTOPHER MARTIN:** And I can tell you from practicing here that the chancery judges in Illinois are excellent judges. I find them some of the most knowledgeable, and if I was picking someone to do an arbitration, I would—You don't agree?

**HON. CLIFFORD MEACHAM:** One of the first things I ask every time I do an arbitration or mediation is, "Tell me the judge you hate most in the Circuit Court of Cook County," and sometimes they'll tell me. Again, I'm being silly. He's absolutely right. Chancery judges are from top to bottom . . .

**CHRISTOPHER MARTIN:** So if we could do that here, and it would be a tremendous source of revenue for the courts, which they need badly, and by barring it, barring this, all you're doing is pushing them into private arbitration; it makes no sense. I guess I understand the First Amendment argument, but the common-sense practical outcome of this is horrible. It just doesn't make sense. It's bad all the way around.

**GREGORY VARALLO:** You know, your point about pushing it to private arbitration—for large corporations, more and more and more, you're seeing cross-border deals. So we've got Brazil, we've got Chile.

We've got various Latin American countries that are strong and growing, and many large U.S. companies are forming joint ventures or other business relationships with them.

So you've got radically different legal systems half a world away, and what do you see? You see ICC arbitration or arbitration before the Singapore Tribunal, these established arbitrable tribunals. Well, as a nation—and I don't want to get too pompous about this. But as a nation, if you are effectively pushing cross-border work to the foreign arbitral bodies, there's nothing wrong with that, but we're losing the opportunity to do that work here. And why not? If we've got a U.S. company, why not give them access to that kind of service here?

SAM FAYE: You all seem to agree on the constitutionality of the program and that the order will be reversed. And obviously we've discussed that much of it is very particular to Delaware and the way Delaware functions. But do you see benefits from the program that could be kind of extracted from it, assuming this is overturned and goes forward, that could be taken out and used as a framework in other states? Obviously, the abortion issue attached as a rider to an arbitration proposition would kill a similar program almost anywhere. But if this is reversed and does go forward being successful in Delaware, do you see other states potentially looking at this as a potential revenue maker, especially states that are strapped for cash and can in a way adapt their own state-run version of the same thing that AAA or JAMS does to try and generate revenue for the state rather than private forums?

HON. CLIFFORD MEACHAM: I would be amazed if it wasn't considered by other states. Other states don't have the panache of Delaware, but they also don't have the—there is a pretty steep entry fee in Delaware to take advantage of this system, and not everybody is in a position to come up with that kind of money in order to get access to the program.

So I would predict that other states that might do it may do so on a more limited scale with perhaps a reduction in the amount, both the amount in controversy, a million or less, and the amount to really implement it. That would be my prediction. But I wouldn't be at all surprised to see this really be replicated in a lot of different places.

CHRISTOPHER MARTIN: In the break, I was telling them that we steal ideas from Delaware all the time. We have a series LLC in Illinois now that we took from Delaware. And given the fact that we do have the Chancery Division here, which most states do not—most states do not divide out their equity and law into separate courts—it



would be something that I think could be replicated here pretty easily to be honest.

GREGORY VARALLO: You'll be surprised to find I don't disagree with you. I think that individual local politics will play a role in how easy it is to adopt. One of the things we've seen in the last twenty years anyway has been a movement towards business divisions and business courts across the country, and it's been very successful. Many of those divisions or courts have been modeled on the Delaware Court of Chancery.

I know that when North Carolina started its own chancery court, Ben Tenille was the first chancellor. And he was a smart fellow, and the first thing he did was he came up to Delaware and spent several months effectively sitting on the bench with the Delaware chancellors learning how they did it, then brought it back to North Carolina. And they've now grown that court to two or three judges.

I know Philadelphia, for example, has a commercial division. New York is pushing very hard to breathe life into its commercial division. And given how that movement has taken hold over the years, I see very little reason why other courts, to the extent this is doable, wouldn't pick up with it.

And you know, look, Delaware is where it is by having stolen New Jersey's corporation law. We did it because there was a fellow called Woodrow Wilson who was governor of New Jersey and decided he was going to start messing with their large corporations, and we said, "Come on over," and it worked.

Nevada took our law in the 1970s. It didn't work because they didn't have the bar and the judiciary and the legislature working together. But if you look at the Nevada corporation law, it looks a lot like the Delaware corporation law. So imitation is a sincere form of flattery, and there ought to be experimentation with this, and it ought to be tailored to the individual circumstances of each court.

Because ultimately, if this means that the hardworking judges of those courts wind up having fewer public trials to do and can wash a lot of these cases out in arbitration or in mediation or in some other form of ADR, the public in general is better off.

HON. CLIFFORD MEACHAM: Questions?

SAM FAYE: Do you guys have any last final words to add?

GREGORY VARALLO: I got one for you. You had an Edward Bennett Williams story. I just have to share one of mine. I happen to be working with that firm currently. I don't know if Williams is alive. But it's an apocryphal story. A number of years ago, apparently Mr.

Williams was in a conference room with his clients and a young associate, a very young associate came bursting in and said, "Mr. Williams, justice has prevailed. What should we do?" And Williams without missing a beat looked up and said, "Well, gosh darn it, take an appeal."

SAM FAYE: On that note, I want to thank everyone for coming. It's been a great day. Thank you to our speakers especially; I really appreciate your time. Thank you both for taking the time to travel here and participate with us, and I hope everyone enjoys the rest of his or her afternoon and evening. Let me know if anyone has any questions in regards to today's program.

