
No. 12-3859

**IN THE UNITED STATES COURT OF APPEALS
FOR THE
THIRD CIRCUIT**

DELAWARE COALITION FOR OPEN GOVERNMENT, INC.

Plaintiff-Appellee,

v.

THE HON. LEO E. STRINE, JR.; THE HON. JOHN W. NOBLE; THE HON.
DONALD F. PARSONS, JR.; THE HON. J. TRAVIS LASTER; THE HON. SAM
GLASSCOCK, III; IN THEIR OFFICIAL CAPACITIES,

Defendants-Appellants

On Appeal from the United States District Court for the District of Delaware
Honorable Mary A. McLaughlin, U.S. District Judge
Case No. 1:11-cv-01015

**BRIEF OF *AMICUS CURIAE* THE CORPORATION LAW SECTION
OF THE DELAWARE STATE BAR ASSOCIATION
IN SUPPORT OF DEFENDANTS-APPELLANTS**

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CORPORATE DISCLOSURE STATEMENT

The Section of Corporation Law is a section of the Delaware State Bar Association, a Delaware corporation with its headquarters in Wilmington, Delaware. The Delaware State Bar Association is a non-stock, member corporation, accordingly, no person or corporation owns ten percent or more of the stock of the Delaware State Bar Association, nor is the organization publicly held.

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STATEMENT OF INTEREST

The Corporation Law Section of the Delaware State Bar Association (“Section”) submits this brief as *amicus curiae* in support of Appellants and to urge this Court to reverse the District Court’s erroneous holding that the First Amendment of the Constitution of the United States grants the public a right of access to confidential arbitrations authorized under Del. Code Ann. tit. 10, § 349 (2012).¹

The Section, which counts nearly 500 Delaware attorneys, judges and academics as its members, supports Delaware’s reasoned decision to offer confidential arbitrations as an alternative to other ADR services available in the market. The Section annually reviews Delaware’s laws governing corporations and alternative entities to ensure that Delaware’s legal regime remains optimal for its business citizens.² The benefits of that well-developed legal regime are significantly enhanced by businesses having access to the knowledge and expertise

¹ Pursuant to Fed. R. App. P. 29(c), no counsel for any party authored this brief in whole or in part. No counsel, party or person other than *amicus* and its members made a monetary contribution intended to fund the preparation or submission of the brief. This brief was authorized by the Council for the Corporation Law Section, the governing body for the Section. The Section’s website (<http://dsba.org/index.php/sections-of-the-bar/corporation-law.html>) contains additional information about the Section, and identifies the Section’s officers and members of the Council.

² Delaware is the state of incorporation for 63% of Fortune 500 companies and more than 945,000 active businesses. See Delaware Division of Corporations, *2011 Annual Report*, available at <http://corp.delaware.gov/2011CorpAR.pdf>.

of Delaware judges, who are renowned for their consistent and prompt resolution of business disputes.³ Because of Delaware's well-developed business law and expert judiciary, parties frequently select Delaware law to govern their commercial and business relationships, including selecting Delaware as the forum to resolve their disputes.⁴ Delaware's decision to offer businesses a forum for confidential arbitrations promotes the twin goals of addressing businesses' increasing demand for alternatives to civil litigation as a means of resolving commercial disputes and making the state's expert judiciary available to satisfy that demand with well-reasoned results and savings of time and expense.⁵ Accordingly, the Section supports Delaware's decision to offer businesses confidential arbitrations and urges reversal of the District Court's decision.

³ *Ranking the States Lawsuit Climate 2010*, U.S. Chamber Institute for Legal Reform (2010), available at <http://www.uschamber.com/reports/ranking-states-lawsuit-climate-2010> (showing results of eight surveys from 2002 to 2010 of "in-house general counsel, senior litigators or attorneys, and other senior executives" with each survey identifying Delaware as the best litigation environment among all states); William H. Rehnquist, *The Prominence of the Delaware Court of Chancery in the State-Federal Joint Venture of Providing Justice*, 48 Bus. Law 351, 354 (1992) ("The Delaware state court system has established its national preeminence in the field of corporation law due in large measure to its Court of Chancery.").

⁴ See Matthew D. Cain & Steven M. Davidoff, *Delaware's Competitive Reach*, Journal of Empirical Legal Studies, Mar. 2012, at 105 (study of 1,020 public company merger agreements shows that from 2004-2008, approximately 66.4% of agreements select Delaware for their governing law and 60% of agreements select Delaware as their choice of forum).

⁵ Private arbitration has been increasingly utilized in this country as a means of resolving sophisticated business disputes. See Br. for Appellants at 4-9 (noting that the American Arbitration Association has witnessed its "caseload increase by almost 330 percent between 1994 and 2004").

SUMMARY OF THE ARGUMENT

The District Court erroneously held that the public's right of access to civil trials that springs from the First Amendment to the Constitution of the United States, and this Court's holding in *Publicker Industries, Inc. v. Philadelphia Newspapers, Inc.*, 733 F.2d 1059, 1071 (3d Cir. 1984), applies to confidential arbitrations administered under Del. Code Ann. tit. 10, § 349 (2012) ("Delaware's Arbitration Statute"). *See* JA30. In so holding, the court below concluded that those portions of the "law and Chancery Court Rules 96, 97, and 98, which make the proceeding confidential, violate that right [to public access]." JA33. That conclusion rested upon two erroneous conclusions: (1) that arbitrations administered under Delaware's Arbitration Statute are no different than civil trials, and thus, must be open to the public; and (2) because sitting judges act as arbitrators, a right of access to Delaware arbitrations exists regardless of experience or logic.

First, in finding that arbitrations administered under Delaware's Arbitration Statute are no different than civil trials, the court below failed to appreciate, or failed to give appropriate weight to, the fundamental difference between a civil trial and a voluntary arbitration administered under Delaware's Arbitration Statute. Civil trials lie at the heart of our democratic government and, from their inception to their conclusion, are conducted under the auspices of the

government's coercive power over its citizens. For that reason—*i.e.*, the pivotal role the state's imposition of coercive power in a civil trial plays in the administration of justice—civil trials are held open to the public to “assure the public that procedural rights are respected, and that justice is afforded equally.” See *Richmond Newspapers, Inc. v. Va.*, 448 U.S. 555, 595, (1980) (Brennan J., concurring); Lawrence H. Tribe, *American Constitutional Law* 958 (2d ed. 1998) (commenting on *Richmond Newspapers* and noting Justice Brennan's observation that “a right of access was a necessary corollary to the constitutional purpose of ensuring government accountability”); see also *Publicker Indus., Inc. v. Phila. Newspapers, Inc.* 733 F.2d 1059, 1071 (3d Cir. 1984) (applying same principles to extend a qualified right of access to civil trials).

In stark contrast to a civil trial, arbitrations administered under Delaware's Arbitration Statute are voluntary; the only interests at stake are those of the parties to the arbitration; the arbitration awards carry no precedential value and cannot be cited as authority for or against future litigants; and the public's interest in the proper functioning of the courts is not implicated during the voluntary proceedings. Thus, the private portion of arbitrations administered under Delaware's Arbitration Statute is simply a privately-ordered, contractual arrangement that lacks the fundamental characteristic of a civil trial that compels public access—coercive state action. Indeed, to the extent that the winning party

seeks to enforce an award against its adversary through invocation of coercive state power, Section 349(c) of the Delaware Arbitration Statute provides for a *public* proceeding to “vacate, stay or enforce.” Del. Code Ann. tit. 10, § 349(c).

Second, the District Court erred by assuming that, regardless of experience or logic, a right of access attaches to arbitrations administered under Delaware’s Arbitration Statute simply because sitting judges conduct the arbitrations. According to the District Court, because “a judge bears a special responsibility to serve the public interest . . . the public role of that job[] is undermined when a judge acts as an arbitrator bound only by the parties’ agreement.” JA28-29. In adopting its “judge-as-arbitrator” rule of access, the District Court, while citing only to non-Delaware authority, expressed a clear aversion to sitting judges acting as arbitrators. The District Court’s aversion, however, not only has no bearing on whether the experience and logic test should have been applied to determine whether a right of access exists, it runs contrary to the many examples of sitting judges acting as arbitrators cited in Appellants’ brief, and it also erroneously assumes that, under Delaware law, the Chancellor’s and Vice Chancellors’ sole official function is to adjudicate civil lawsuits.

To the contrary, the authority to adjudicate lawsuits is only one of the powers that inhere under Article IV of the Delaware State Constitution in the office of the Chancellor and Vice Chancellors. Del. Const. art. IV, § 10. The Delaware

State Constitution also vests the Delaware General Assembly with the power to assign the Chancellor and Vice Chancellors additional duties apart from their authority to adjudicate lawsuits. *See, e.g.*, Del. Const. art. IV, § 18. And there are instances under the Delaware Constitution and Delaware Code where the proceedings in which sitting judges participate may be closed to the public notwithstanding the judge's participation.

Thus, contrary to the non-Delaware authorities relied upon by the court below to bypass the experience and logic test, under Delaware's constitutional regime, the Chancellor and Vice Chancellors may permissibly be empowered to perform duties apart from adjudicating civil lawsuits, including acting as arbitrators. Doing so does not offend the judge's "special responsibility" to serve the public interest when adjudicating lawsuits; nor does it transmogrify arbitrations administered under Delaware's Arbitration Statute into proceedings inherently imbuing a public right of access. In short, the fact that the Chancellor and Vice Chancellors are authorized under Delaware's Arbitration Statute to sit as arbitrators is not a basis to bypass the experience and logic test, and the District Court's self-proclaimed "judge-as-arbitrator" rule of access is legally erroneous.

For these reasons, and for purposes of applying the experience and logic test, arbitrations administered under Delaware's Arbitration Statute are no different than any other form of private arbitration which, for all of the reasons set

forth in Appellants' brief, has historically been closed to the public. The District Court's order should be reversed.

ARGUMENT

The First Amendment provides a right of *limited* access—applicable to some, but not all, government proceedings. *See, e.g., N.J. Media Grp., Inc. v. Ashcroft*, 308 F.3d 198 (3d Cir. 2002). Recognition of the right of access originated in *Richmond Newspapers, Inc. v. Virginia*, in which the Supreme Court held that the First Amendment guarantees the public and press the right of access to criminal trials. 448 U.S. 555, 580 (1980). This Court extended the holding of *Richmond Newspapers* to civil trials to require that these proceedings be open as well. *See Publicker Indus., Inc. v. Phila. Newspapers, Inc.*, 733 F.2d 1059, 1071 (3d Cir. 1984). In extending the First Amendment right of access to other government proceedings, the Court has considered two factors: (1) whether the place and process of the proceeding have historically been open to the press and public (*Press-Enterprise Co. v. Super. Ct. of Cal. for the Cnty. of Riverside*, 478 U.S. 1, 8 (1986)); and (2) whether public access plays a significant positive role in the functioning of the particular process in question (*id.*). Courts have referred to this test as the “experience and logic test.” *N.J. Media Grp.*, 308 F.3d at 200.

In striking the Delaware Arbitration Statute because of its confidentiality provision, the District Court did not apply the experience and logic

test to arbitration proceedings. Instead, the District Court held that public access was required because: (1) arbitrations administered under Delaware’s Arbitration Statute so closely resemble a civil trial that this Court’s holding in *Publicker Industries* mandated public access, JA29-31; and (2) a right of access exists because sitting judges act as arbitrators, JA25-29. In so holding, the District Court committed two fundamental errors that require the decision below be reversed.

I. THE DISTRICT COURT ERRED IN EQUATING A DELAWARE ARBITRATION WITH A CIVIL TRIAL.

The District Court’s first rationale for extending a right of access to Delaware arbitrations rests on its erroneous conclusion that an arbitration administered under Delaware’s Arbitration Statute so closely resembles a civil trial that this Court’s holding in *Publicker Industries* mandates public access. JA29-31. In extending a First Amendment right of access to civil trials, this Court—while tracking the U.S. Supreme Court’s rationale for extending a right of access to criminal trials—focused on the role a civil trial plays in the administration of justice. Civil trials lie at the heart of our democratic government. From their inception to their conclusion, civil trials are conducted under the auspices of the government’s *coercive* power over its citizens and the essence of the public’s right of access to civil trials is the public’s right to monitor the *administration of justice*. See *Black’s Law Dictionary* 47 (8th ed. 2004) (defining the “administration of justice” as “[t]he maintenance of right within a political community by means of

the physical force of the state; the state's application of the sanction of force to the rule of right."). This hallmark of a civil trial is a feature absent from Delaware arbitrations.

The right of access was first extended to criminal trials in *Richmond Newspapers*. In discussing the history of open criminal trials, the Supreme Court remarked that "[t]he crucial prophylactic aspects of the *administration of justice* cannot function in the dark; no community catharsis can occur if justice is 'done in a corner [or] in any covert manner.'" *Richmond Newspapers*, 448 U.S. at 571 (emphasis added). Likewise, in his concurrence, Justice Stevens noted that public access is essential "if trial adjudication is to achieve the objective of maintaining public confidence in the *administration of justice*." *Id.* at 595; *see id.* at 604 ("[T]he public has an intense need and a deserved right to know about the *administration of justice* in general . . .") (Blackmun, J., concurring).⁶

In extending the holding of *Richmond Newspapers* to civil trials, this Court in *Publicker Industries* cited with approval Justice Oliver Wendell Holmes' concern for the "vast importance" of public access to civil judicial proceedings because of the "security which publicity gives for the proper *administration of justice*." 733 F.2d at 1069 (citing *Cowley v. Pulsifer*, 137 Mass. 392, 394 (1884)

⁶ Justice Stevens also emphasized the fact that "court rulings impose official and practical consequences upon members of society at large." *Richmond Newspapers*, 448 U.S. at 595.

(emphasis added). According to Justice Holmes, “it is of the highest moment that those who *administer justice* should always act under the sense of public responsibility, and that every citizen should be able to satisfy himself with his own eyes as to the mode in which a public duty is performed.” *Cowley*, 137 Mass. at 394 (emphasis added).

Here, the concerns animating a public right of access to civil trials—*i.e.*, the right of the public to observe the administration of justice through which courts wield the coercive power of government over citizens—are absent. Parties to Delaware arbitrations submit to the process voluntarily and cannot be compelled to participate. JA30-31 (citing Delaware’s Arbitration Statute and noting “[a]ccess to [Delaware’s] arbitration procedure requires the parties’ consent”). Further, as the District Court noted, arbitration awards carry no precedential value and cannot be cited as legal authority for or against future litigants. JA24-25, JA30 (“Because the Delaware proceedings and awards are confidential, the judge does not publish his rulings or reasoning.”). Finally, to the extent that the winning party seeks to enforce an award against its adversary through invocation of coercive state power, Section 349(c) of the Delaware Arbitration Statute provides for a *public* proceeding to “vacate, stay or enforce.” Del. Code Ann. tit. 10, § 349(c).

In short, Delaware arbitrations are a form of voluntary, *private* ordering among parties to contracts—not public justice administered under the

auspices of coercive government power. For that reason, Delaware arbitrations lack the hallmark of a civil trial that compels public access. Thus, the District Court erred in concluding that Delaware arbitrations are “a civil judicial proceeding,” such that “it [was] not necessary to reiterate the thorough analysis of the experience and logic test performed by the Court of Appeals in *Publicker Industries*.” JA32.

II. THE DISTRICT COURT ERRED IN CONCLUDING THAT, BECAUSE SITTING JUDGES ACT AS THE ARBITRATORS, A RIGHT OF ACCESS ATTACHES REGARDLESS OF EXPERIENCE OR LOGIC.

In refusing to apply the experience and logic test, the District Court also relied on the fact that under the Delaware Arbitration Statute, sitting judges serve as arbitrators. JA11, JA25-29. The court below concluded that “judges in this country do not take on the role of arbitrators” and that states with court-annexed arbitration programs appoint third-party neutrals such as attorneys and retired judges, but not sitting judges, to serve as arbitrators. JA27. To support that conclusion, the District Court cited a judicial opinion from California that observed that a “judge’s public role and obligations prevent a sitting judge from acting as an arbitrator for even consenting parties” and authority from the Southern District of New York noting the “inherent difficulty in and serious potential problems with having judicial officers step out of their traditional adjudicatory roles.” JA28 (citing *Elliott & Ten Eyck P’ship v. City of Long Beach*, 67 Cal. Rptr. 2d 140, 144

(Cal. Ct. App. 1997) and *Ovadia v. N.Y. Ass'n for New Americans*, 1997 WL 342411, at *10 (S.D.N.Y. June 23, 1997)). Resting principally on those non-Delaware authorities, the District Court determined that Delaware arbitrations must be public because a judge's "special responsibility to serve the public interest" will be undermined where a "judge acts as an arbitrator bound only the parties' agreement." JA29. The District Court erred.

As a threshold matter, as shown above, a Delaware arbitration is not the same as a civil trial. As such, a judge's service as an arbitrator has no bearing on whether that particular proceeding should be open to the public regardless of experience and logic.

In addition, the District Court's general aversion to judges-as-arbitrators lacks support. Even the District Court recognized countervailing authority that supports the notion of a sitting judge acting as an arbitrator. JA27 (citing American Bar Association Code of Judicial Conduct permitting judge "to act as an arbitrator or a mediator"). Appellants' brief is also replete with examples of judges being authorized under state law to serve as arbitrators. *See* Br. for Appellants at 44-48. Indeed, the Federal Alternative Dispute Resolution Act expressly allows the District Court to appoint sitting federal magistrate judges to serve as arbitrators in confidential, court-annexed arbitration in the federal court. *See* 28 U.S.C. § 653(b).

Beyond that, the non-Delaware authorities cited by the District Court to support the conclusion that sitting judges cannot serve as arbitrators have no bearing on whether *Delaware* law prohibits or otherwise disapproves of its judges assuming duties apart from adjudicating lawsuits, including service as arbitrators under Delaware's Arbitration Statute. To the contrary, under Delaware law, the authority to adjudicate lawsuits is only one of the powers that inheres under Article IV of the Delaware State Constitution in the offices of the Chancellor and Vice Chancellors. Del. Const. art. IV, § 10.⁷ Aside from that authority, the Delaware State Constitution expressly authorizes the Chancellor and Vice Chancellors to exercise "all the powers which any law of the State vests in the Chancellor, *besides the general powers of the Court of Chancery . . .*" Del. Const. art. IV, § 18 (emphasis added). In those instances where the Chancellor or Vice Chancellors exercise duties apart from adjudicating lawsuits, whether or not the proceedings are open to the public turns on considerations other than whether a sitting judge performs the duty.

By way of example, title 12, section 3991(a) of the Delaware Code requires that a member of the Court of Chancery (as designated by the Chancellor) sit on the Delaware Guardianship Commission. The Guardianship Commission

⁷ Article IV, § 10 of the Delaware Constitution specifically provides that the Chancellor and Vice-Chancellors "shall have all the jurisdiction and powers vested by the laws of this State in the Court of Chancery."

otherwise consists of representatives from the Department of Justice, the legislature and various state administrative agencies. *Id.* A record of the Guardianship Commission's meetings is typically made public.⁸ The Chancellor also is partly responsible for ascertaining state elections in Kent County by calculating the aggregate amount of all the votes for each office that shall have been given in all of the county's election districts. *See* Del. Code Ann. tit. 15, § 5701. Pursuant to Article V, § 6 of the Delaware State Constitution and title 15, Section 5701 of the Delaware Code, those proceedings are public. *Id.* § 5701(a).

In contrast, under Article IV, § 37 of the Delaware State Constitution, the Chancellor is authorized to sit on a "Court of the Judiciary" whose charge it is to determine whether any judicial officer appointed by the Governor may be censured or removed or retired. Those proceedings do not imbue a public right of access merely because a sitting judge presides over them.⁹ Del. Const. art. IV § 37 ("All hearings and other proceedings of the Court on the Judiciary shall be private and all records except a final order of removal or retirement shall be confidential . . ."); *cf. First Amendment Coal. v. Judicial Inquiry & Review Bd.*, 784 F.2d 467 (3d

⁸ *See, e.g.*, <http://courts.delaware.gov/publicguardian/dgc.aspx>.

⁹ The Court of Chancery likewise appoints one member to serve on the Judicial Ethics Advisory Committee whose opinions on proper judicial conduct "are confidential and not public information" unless the confidentiality is waived by the judicial office who requested the opinion. *See* Ct. on the Judiciary Rules, R. 18(d).

Cir. 1986) (confidential records and proceedings of Pennsylvania Judicial Inquiry and Review Board did not violate First Amendment right of access).

The Delaware State Constitution likewise requires that the Chancellor sit on Delaware's Board of Pardons, on which also sit four members of the State's executive branch: the Lieutenant-Governor, Secretary of State, State Treasurer and Auditor of Accounts. Del. Const. art. VII, § 2. Notably, Delaware's Freedom of Information Act expressly exempts the "Board of Pardons and Parole" from its reach, and its proceedings may be held in executive session closed to the public. *See* Del. Code Ann. tit. 29, § 10004(c) & (h)(5). Thus, proceedings of the Delaware's Board of Pardons may be private notwithstanding the fact that a sitting judge serves on the board.

In short, Appellants' brief is replete with examples that undercut the District Court's assumption that sitting judges do not act as arbitrators. Further, under Delaware law, judges perform duties (both publicly and privately) apart from their "special responsibility to serve the public interest" when adjudicating lawsuits. JA29. Accordingly, the fact that sitting judges conduct private arbitrations does not in itself convert those arbitrations into proceedings inherently imbued with a public right of access, irrespective of the experience and logic test.

CONCLUSION

Arbitrations administered under Delaware's Arbitration Statute are a form of voluntary, private dispute resolution lacking the hallmark of government coercion that compels open civil trials. Moreover, there is no nationally-applicable constitutional prohibition against sitting judges conducting arbitrations. Delaware has long established—and constitutionally provided—for the service of its judges in roles apart from their duty to adjudicate lawsuits. Under Delaware's legal regime, proceedings conducted with a sitting judge do not become public for that reason alone. Thus, the two fundamental premises on which the District Court refused to apply the experience and logic test were legally infirm. For the reasons set forth in Appellants' brief, the qualified right of access does not extend to Delaware arbitrations, and *amicus curie* respectfully urges that the decision below be reversed.

December 18, 2012

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. **Certification of Bar Membership**

I hereby certify that I, S. Mark Hurd, am a member in good standing of the bar of the United States Court of Appeals for the Third Circuit.

2. **Certification of Word Count**

I hereby certify that this brief complies with the type-volume limitation set forth in 32(a)(7)(B) because it contains 3,280 words, including footnotes and excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii). This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Rule Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 and it is set in 14-point sized Times New Roman font.

3. **Certification of Service**

I hereby certify that electronic copies of the foregoing *Brief of Amicus Curiae The Corporation Law Section of the Delaware State Bar Association In Support of Defendants-Appellants*, was sent to all CM/ECF Filing Users through the CM/ECF system, and that no parties are Non-Filing Users. The Brief is identical to the ten hard copies sent to the Clerk of the Court on December 18, 2012 via overnight courier service.

4. **Certification of Virus Check**

I hereby certify that a virus check of the electronic .PDF version of the foregoing brief was performed with a virus detection program and the .PDF file was found to be virus free.

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ADDENDUM

C**Effective:[See Text Amendments]**

West's Delaware Code Annotated Currentness

Constitution of the State of Delaware

☞ Article IV. Judiciary

→→ § 10. Composition and jurisdiction of Court of Chancery; initiation and decisions in causes and proceedings

Section 10. The Chancellor and the Vice-Chancellor or Vice-Chancellors shall hold the Court of Chancery. One of them, respectively, shall sit alone in that court. This court shall have all the jurisdiction and powers vested by the laws of this State in the Court of Chancery. In any cause or matter in the Court of Chancery that is initiated by an application to a Judge of that Court, the application may be made directly to the Chancellor or a Vice-Chancellor. Causes or proceedings in the Court of Chancery shall be decided, and orders or decrees therein shall be made by the Chancellor or Vice-Chancellor who hears them, respectively.

CROSS REFERENCES

Jurisdiction, Chancery Court, see 10 Del.C. § 301 et seq.

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Westlaw Key Number Searches: 150k3; 150k395.

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C**Effective: April 5, 2007**

West's Delaware Code Annotated Currentness

Constitution of the State of Delaware

☞ Article IV. Judiciary

→→ § 18. Powers of Chancellor, Vice-Chancellors and Judges

Section 18. Until the General Assembly shall otherwise provide, the Chancellor and the Vice-Chancellor or Vice-Chancellors, respectively, shall exercise all the powers which any law of this State vests in the Chancellor, besides the general powers of the Court of Chancery, and the President Judge of the Superior Court and the Judges of said Courts shall each singly exercise all the powers which any law of this State vests in the Judges singly of the former Superior Court, whether as members of the Court or otherwise.

Until the General Assembly shall otherwise provide, the Chief Judge of the Family Court and the Judges of said Court, respectively, shall each singly exercise all the powers which any law of this State vests in the Judges of Family Court, whether as members of the Court or otherwise, and the Chief Judge of the Court of Common Pleas and the Judges of said Court, respectively, shall each singly exercise all the powers which any law of the State vests in the Judges of the Court of Common Pleas, whether as members of the Court or otherwise.

CREDIT(S)

Amended by 75 Laws 2005, ch. 53, §§ 9, 25, eff. April 26, 2005 (1st passed 74 Laws 2004, ch. 299, §§ 9, 25, June 29, 2004); 76 Laws 2007, ch. 11, § 8, eff. April 5, 2007 (1st passed 75 Laws 2005, ch. 137, § 8, eff. June 29, 2005).

LIBRARY REFERENCES

Equity☞ 1.

Judges☞ 24.

Westlaw Key Number Searches: 150k1; 227k24.

C.J.S. Equity §§ 2 to 8, 10.

C.J.S. Judges §§ 78 to 80, 143 to 152.

NOTES OF DECISIONS

In general 1

1. In general

C**Effective:[See Text Amendments]**

West's Delaware Code Annotated Currentness

Constitution of the State of Delaware

▣ Article IV. Judiciary

→ → **§ 37. Court on the Judiciary**

Section 37. A Court on the Judiciary is hereby created consisting of the Chief Justice and the Associate Justices of the Supreme Court, the Chancellor, the President Judge of the Superior Court the Chief Judge of the Family Court and the Chief Judge of the Court of Common Pleas.

Any judicial officer appointed by the Governor may be censured or removed or retired by the Court on the Judiciary as herein provided.

A judicial officer may be censured or removed by virtue of this section for wilful misconduct in office, wilful and persistent failure to perform his or her duties, the commission after appointment of an offense involving moral turpitude, or other persistent misconduct in violation of the Canons of Judicial Ethics as adopted by the Delaware Supreme Court from time to time.

A judicial officer may be retired by virtue of this section for permanent mental or physical disability interfering with the proper performance of the duties of his or her office.

No judicial officer shall be censured or removed or retired under this section unless he or she has been served with a written statement of the charges against him or her, or of the grounds of his or her retirement, and shall have had an opportunity to be heard in accordance with due process of law. The affirmative concurrence of not less than two-thirds of the members of the Court on the Judiciary shall be necessary for the censure or removal or retirement of a judicial officer. The Court on the Judiciary shall be convened for appropriate action upon the order of the Chief Justice, or upon the order of any other three members of the Court on the Judiciary. All hearings and other proceedings of the Court on the Judiciary shall be private, and all records except a final order of removal or retirement shall be confidential, unless the judicial officer involved shall otherwise request.

Upon an order of removal, the judicial officer shall thereby be removed from office, all of his or her authority, rights and privileges as a judicial officer shall cease from the date of the order, and a vacancy shall be deemed to exist as of that date. Upon an order of retirement, the judicial officer shall thereby be retired with such rights and privileges as may be provided by law for the disability retirement of a judicial officer, and a vacancy shall be deemed to exist as of the date of retirement.

In the absence or disqualification of a member of the Court on the Judiciary, the Chief Justice, or in his or her absence or disqualification the Senior Associate Justice, shall appoint a substitute member pro tempore.

The Court on the Judiciary shall have:

(a) the power to summon witnesses to appear and testify under oath and to compel the production of books, papers and documents, and

(b) the power to adopt rules establishing procedures for the investigation and trial of a judicial officer hereunder.

CREDIT(S)

Amended by 72 Laws 1999, ch. 136, § 44, eff. June 24, 1999; 75 Laws 2005, ch. 53, § 11, eff. April 26, 2005 (1st passed 74 Laws 2004, ch. 299, § 11, June 29, 2004).

LAW REVIEW AND JOURNAL COMMENTARIES

Judicial discipline: Independence with accountability. Hon. Randy J. Holland and Cynthia Gray, 29 Del. Law. 22 (Summer, 2011).

LIBRARY REFERENCES

Courts 41.

Judges 11.

Westlaw Key Number Searches: 106k41; 227k11.

C.J.S. Courts §§ 93 to 100.

C.J.S. Judges §§ 78 to 135.

NOTES OF DECISIONS

Financial misconduct 4

Forfeiture 9

Isolated incidents 7

Political activities 6

Powers of court 2

Presiding over family member's case 8

Tardiness 5

Validity of statute 1

Willful misconduct 3

1. Validity of statute

Statutory provision investing Court on the Judiciary with authority to review complaints brought against candidates for state attorney general, including successful candidate, is unconstitutional and void; duties of attorney

C**Effective:[See Text Amendments]**

West's Delaware Code Annotated Currentness
Constitution of the State of Delaware
▣ Article VII. Pardons
→→ **§ 2. Composition of Board of Pardons**

Section 2. The Board of Pardons shall be composed of the Chancellor, Lieutenant-Governor, Secretary of State, State Treasurer and Auditor of Accounts.

LIBRARY REFERENCES

Pardon and Parole 23.1.
Westlaw Key Number Search: 284k23.1.
C.J.S. Pardon and Parole §§ 1 to 2, 5 to 6, 11 to 16, 22 to 26, 29 to 30.

RESEARCH REFERENCES

ALR Library

70 ALR 5, Resort to Constitutional or Legislative Debates, Committee Reports, Journals, Etc., as Aid in Construction of Constitution or Statute.

Del.C. Ann. Const., Art. 7, § 2, DE CONST, Art. 7, § 2

Current through 78 Laws 2012, chs. 204 - 409. Revisions by the Delaware Code Revisors were unavailable at the time of publication.

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C**Effective: April 2, 2009**

West's Delaware Code Annotated Currentness

Title 10. Courts and Judicial Procedure

Part I. Organization, Powers, Jurisdiction and Operation of Courts

▣ Chapter 3. Court of Chancery

▣ Subchapter III. General Jurisdiction and Powers

→ → **§ 349. Arbitration proceedings for business disputes**

(a) The Court of Chancery shall have the power to arbitrate business disputes when the parties request a member of the Court of Chancery, or such other person as may be authorized under rules of the Court, to arbitrate a dispute. For a dispute to be eligible for arbitration under this section, the eligibility criteria set forth in § 347(a) and (b) of this title must be satisfied, except that the parties must have consented to arbitration rather than mediation.

(b) Arbitration proceedings shall be considered confidential and not of public record until such time, if any, as the proceedings are the subject of an appeal. In the case of an appeal, the record shall be filed by the parties with the Supreme Court in accordance with its rules, and to the extent applicable, the rules of the Court of Chancery.

(c) Any application to vacate, stay, or enforce an order of the Court of Chancery issued in an arbitration proceeding under this section shall be filed with the Supreme Court of this State, which shall exercise its authority in conformity with the Federal Arbitration Act, and such general principles of law and equity as are not inconsistent with that Act.

CREDIT(S)

Added by 77 Laws 2009, ch. 8, § 1, eff. April 2, 2009.

HISTORICAL AND STATUTORY NOTES

2009 Legislation

77 Laws 2009, ch. 8, § 9, provides:

“Sections 2 - 8 of this bill shall become effective three months after enactment into law; the rest of the bill shall become effective upon enactment.”

C**Effective: July 8, 2011**

West's Delaware Code Annotated Currentness

Title 12. Decedents' Estates and Fiduciary Relations

Part V. Fiduciary Relations

Chapter 39. Guardianship

Subchapter VII. Delaware Guardianship Commission

→ → § 3991. The Guardianship Commission

(a) The Delaware Guardianship Commission is hereby established, and shall be known as the "Guardianship Commission." The Commission shall consist of 12 members and shall be staffed by the Office of the Public Guardian. The Guardianship Commission shall be comprised of the following:

- (1) One member from the Court of Chancery, designated by the Chancellor;
- (2) A representative from the Department of Justice, designated by the Attorney General;
- (3) The Director of the Guardianship Monitoring Program, or the Director's designee;
- (4) One member of the House of Representatives, designated by the Speaker of the House;
- (5) One member of the Senate, designated by the President Pro Tempore of the Senate;
- (6) The Director of the Division of Services for Aging and Adults with Physical Disabilities, or the Director's designee,
- (7) The Director of the Division of Substance Abuse and Mental Health, or the Director's designee;
- (8) The Director of the Division of Developmental Disabilities Services, or the Director's designee;
- (9) The Secretary of the Department of Health and Social Services, or the Secretary's designee.
- (10) A representative from the Disability Community, designated by the Secretary of Health and Social Services;

(11) A representative from the Senior Citizen Community, designated by the Secretary of Health and Social Services;

(12) A representative from the hospital community, designated by the Delaware Healthcare Association.

(b) The Public Guardian shall serve as the Executive Director of the Commission to effectuate its purposes. The Public Guardian may, with the concurrence of the members, invite other individuals to participate in the Commission to advance its work.

CREDIT(S)

Added by 78 Laws 2011, ch. 40, § 2, eff. July 8, 2011.

HISTORICAL AND STATUTORY NOTES

2011 Legislation

For related provisions of 78 Laws 2011, ch. 40, see Historical and Statutory Notes under 12 Del.C. § 3981.

Technical corrections were made to conform with revisions made by the Delaware Code Revisors (2011).

Technical corrections were made to conform with revisions made by the Delaware Code Revisors (2011).

Former Section:

A former 12 Del.C. § 3991, relating to the establishment of the office of the Public Guardian was redesignated as 12 Del.C. §§ 3981, 3988 by 78 Laws 2011, ch. 40, § 1, eff. July 8, 2011.

12 Del.C. § 3991, DE ST TI 12 § 3991

Current through 78 Laws 2012, chs. 204 - 409. Revisions by the Delaware Code Revisors were unavailable at the time of publication.

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C**Effective: May 1, 2008**

West's Delaware Code Annotated Currentness

Title 15. Elections

▣ Part IV. General Elections

▣ Chapter 57. Canvass of Vote and Proclamation of Results of Election

→→ § 5701. Superior Court as board of canvass; convening and composition of Court

(a) The Superior Court shall convene in each county on the 2nd day after the general election at 10 a.m., for the performance of the duties imposed upon it by § 6 of article V of the Constitution of this State and by this chapter. Thereupon the Court, with the aid of such of its officers and such sworn assistants as it shall appoint, shall publicly ascertain the state of the election throughout the county and in the respective election districts by calculating the aggregate amount of all the votes for each office that shall have been given in all of the election districts of the county for every person voted for such office. For this purpose, the Court shall utilize the voting machine recording tapes, voting machine certificates, absentee vote tally sheets and write-in vote tally sheets for each election district provided by the Prothonotary and the Department of Elections for its county, whose representatives shall sit as observers and assistants to the Court during said calculation of the vote.

(b) For the purposes of this chapter, the Superior Court shall consist in New Castle County of the President Judge and the Resident Judge; in Kent County of the Chancellor and the Resident Judge; and in Sussex County of the Resident Judge and one of the remaining judges. For the purpose of this chapter, the Superior Court in each county, as so constituted, shall be a board of canvass for the respective counties of this State.

CREDIT(S)

21 Laws 1898, ch. 38, § 23; 61 Laws 1978, ch. 480, § 18; 72 Laws 2000, ch. 434, § 1, eff. July 13, 2000; 76 Laws 2008, ch. 213, § 39, eff. May 1, 2008.

Codifications: Rev. Code Del. 1852, § 402; Rev. Stat. Del. 1915, §§ 1777, 1859; Rev. Code Del. 1935, §§ 1866, 1978; 15 Del.C. 1953, § 5701

HISTORICAL AND STATUTORY NOTES

Technical corrections were made to conform with revisions made by the Delaware Code Revisors (2007).

CROSS REFERENCES



Effective: July 1, 2012

West's Delaware Code Annotated Currentness

Title 29. State Government

▣ Part X. General Regulations for State Agencies

▣ Chapter 100. Freedom of Information Act (Refs & Annos)

→→ **§ 10004. Open meetings**

(a) Every meeting of all public bodies shall be open to the public except those closed pursuant to subsections (b), (c), (d) and (h) of this section.

(b) A public body may call for an executive session closed to the public pursuant to subsections (c) and (e) of this section, but only for the following purposes:

(1) Discussion of an individual citizen's qualifications to hold a job or pursue training unless the citizen requests that such a meeting be open. This provision shall not apply to the discussion by a licensing board or commission which is subject to the provisions of § 8735 of this title, of an individual citizen's qualifications to pursue any profession or occupation for which a license must be issued by the public body in accordance with Delaware law;

(2) Preliminary discussions on site acquisitions for any publicly funded capital improvements;

(3) Activities of any law-enforcement agency in its efforts to collect information leading to criminal apprehension;

(4) Strategy sessions, including those involving legal advice or opinion from an attorney-at-law, with respect to collective bargaining or pending or potential litigation, but only when an open meeting would have an adverse effect on the bargaining or litigation position of the public body;

(5) Discussions which would disclose the identity of the contributor of a bona fide and lawful charitable contribution to the public body whenever public anonymity has been requested of the public body with respect to said contribution by the contributor;

(6) Discussion of the content of documents, excluded from the definition of "public record" in § 10002 of this title where such discussion may disclose the contents of such documents;

(7) The hearing of student disciplinary cases unless the student requests a public hearing;

(8) The hearing of employee disciplinary or dismissal cases unless the employee requests a public hearing;

(9) Personnel matters in which the names, competency and abilities of individual employees or students are discussed, unless the employee or student requests that such a meeting be open.

(c) A public body may hold an executive session closed to the public upon affirmative vote of a majority of members present at a meeting of the public body. The vote on the question of holding an executive session shall take place at a meeting of the public body which shall be open to the public, and the results of the vote shall be made public and shall be recorded in the minutes. The purpose of such executive sessions shall be set forth in the agenda and shall be limited to the purposes listed in subsection (b) of this section. Executive sessions may be held only for the discussion of public business, and all voting on public business must take place at a public meeting and the results of the vote made public.

(d) This section shall not prohibit the removal of any person from a public meeting who is willfully and seriously disruptive of the conduct of such meeting.

(e)(1) This subsection concerning notice of meetings shall not apply to any emergency meeting which is necessary for the immediate preservation of the public peace, health or safety, or to the General Assembly.

(2) All public bodies shall give public notice of their regular meetings and of their intent to hold an executive session closed to the public, at least 7 days in advance thereof. The notice shall include the agenda, if such has been determined at the time, and the dates, times and places of such meetings, including whether such meeting will be conducted by video-conferencing; however, the agenda shall be subject to change to include additional items including executive sessions or the deletion of items including executive sessions which arise at the time of the public body's meeting.

(3) All public bodies shall give public notice of the type set forth in paragraph (2) of this subsection of any special or rescheduled meeting as soon as reasonably possible, but in any event no later than 24 hours before such meeting. A special or rescheduled meeting shall be defined as one to be held less than 7 days after the scheduling decision is made. The public notice of a special or rescheduled meeting shall include an explanation as to why the notice required by paragraph (1) of this subsection could not be given.

(4) Public notice required by this subsection shall include, but not be limited to, conspicuous posting of said notice at the principal office of the public body holding the meeting, or if no such office exists at the place where meetings of the public body are regularly held, and making a reasonable number of such notices available. In addition, for all non-county and non-municipal public bodies, public notice required by this subsection shall include, but not be limited to, electronic posting on a designated State of Delaware website, approved by the Registrar of Regulations by May 1, 2013, which shall be accessible to the public. In addition, all public bodies in the executive branch of state government that are subject to the provisions of this chapter

shall electronically post said notice to the designated State of Delaware website approved by the Secretary of State.

(5) When the agenda is not available as of the time of the initial posting of the public notice it shall be added to the notice at least 6 hours in advance of said meeting, and the reasons for the delay in posting shall be briefly set forth on the agenda.

(f) Each public body shall maintain minutes of all meetings, including executive sessions, conducted pursuant to this section, and shall make such minutes available for public inspection and copying as a public record. Such minutes shall include a record of those members present and a record, by individual members (except where the public body is a town assembly where all citizens are entitled to vote), of each vote taken and action agreed upon. Such minutes or portions thereof, and any public records pertaining to executive sessions conducted pursuant to this section, may be withheld from public disclosure so long as public disclosure would defeat the lawful purpose for the executive session, but no longer. All public bodies in the executive branch of state government that are subject to the provisions of this chapter shall electronically post final approved minutes of open public meetings to the designated State of Delaware website approved by the Secretary of State within 5 working days of final approval of said minutes.

(g) Every regularly scheduled meeting of a public body shall be held within the geographic jurisdiction of that public body. All such other meetings shall be held as follows:

(1) A public body serving any political subdivision of the State, including, but not limited to, any city, town or school district, shall hold all such other meetings within its jurisdiction or the county in which its principal office is located, unless it is school board training that has been approved by the Secretary of Education as beneficial to school board development activities.

(2) For the purposes of this subsection, a "regularly scheduled meeting" shall mean any meeting of a public body held on a periodic basis.

(3) The provisions of this subsection, insofar as they are not practicable, shall not apply to any emergency meeting which is necessary for the immediate preservation of the public peace, health or safety, or to a meeting held by a public body outside of its jurisdiction which is necessary for the immediate preservation of the public financial welfare.

(h) This section shall not apply to the proceedings of:

(1) Grand juries;

(2) Petit juries;

(3) Special juries;

(4) The deliberations of any court;

(5) The Board of Pardons and Parole;

(6) Public bodies having only 1 member;

(7) Public bodies within the legislative branch of the state government other than the House of Representatives, the Senate, the Joint Finance Committee, the Joint Committee on Capital Improvement, the Joint Sunset Committee, Legislative Council, committees, excluding ethics committees, specifically enumerated and created by Resolution of the House of Representatives and/or Senate or task forces specifically enumerated and created by Resolution of the House of Representatives and/or Senate;

(8)a. The Violent Crimes Compensation Board may close any meeting to the public where:

1. The claim to be considered derives from any sexual offense within the definitions of a crime in § 9002 of Title 11.

2. The claim to be considered derives from any offense by or against a child, as defined in this section, unless such child has been deemed amenable to the jurisdiction of a criminal court as to the matter before the Board.

3. The claim to be considered derives from any matter not yet adjudicated.

4. The claim to be considered involves a “victim” who is a “child” as those terms are defined in Chapter 90 of Title 11.

b. The Board shall produce a complete record of any proceedings closed to the public which record may be denied to anyone seeking access for good cause shown; and

(9) The deliberations of the following agencies for any case decision governed by the Administrative Procedures Act in Chapter 101 of this title:

a. State Human Relations Commission;

b. Industrial Accident Board; and

c. Tax Appeals Board.

(i) In an enforcement action pursuant to § 10005 of this title, a citizen or the Attorney General, as the case may be, may seek the forfeiture of all or part of the compensation of members of a board, commission or other public body for any closed meeting which such board, commission or other public body closed knowing that such action violated this chapter. Such forfeiture may only be ordered by the Court if the Court makes a specific finding that the board, commission or public body had no good faith basis to believe that the meeting could be closed. It shall be an absolute defense that an individual never voted in favor of the closed meeting. If the board, commission or public body also met validity for other purposes on the same day as the meeting which violated the act, such valid action shall be considered by the Court in determining the extent of any forfeiture award.

CREDIT(S)

60 Laws 1976, ch. 641, § 1; 63 Laws 1982, ch. 269, § 1; 65 Laws 1985, ch. 191, §§ 7-12; 66 Laws 1988, ch. 419, § 1; 67 Laws 1990, ch. 367, §§ 1, 2; 71 Laws 1997, ch. 38, § 1, eff. May 22, 1997; 71 Laws 1997, ch. 117, § 1, eff. June 30, 1997; 71 Laws 1997, ch. 191, § 1, eff. July 16, 1997; 71 Laws 1997, ch. 193, § 1, eff. July 16, 1997; 72 Laws 2000, ch. 459, § 1, eff. July 21, 2000; 72 Laws 2000, ch. 460, § 18, eff. July 21, 2000; 75 Laws 2005, ch. 178, §§ 1, 2, eff. Jan. 1, 2006; 77 Laws 2009, ch. 38, §§ 6, 7, eff. June 12, 2009; 77 Laws 2009, ch. 211, § 3, eff. Sept. 17, 2009; 78 Laws 2012, ch. 288, § 5, eff. July 1, 2012.

HISTORICAL AND STATUTORY NOTES

71 Laws 1997, ch. 191, § 2, eff. July 16, 1997, provides:

“Nothing in this Act shall supersede any existing statutory provisions which permit any board or agency to conduct its hearings or deliberations in closed session.”

71 Laws 1997, ch. 193, § 2, eff. July 16, 1997, provides:

“If any provision of this Act or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of this Act which can be given effect without the invalid provision or application, and to that end the provisions of this Act are declared to be severable.”

2009 Legislation

77 Laws 2009, ch. 38, §§ 6, 7, amended the section by substituting “(h)” for “(g)” as referenced in Subsec. (a); by redesignating Subsecs. (h)(7) and (h)(8) as (h)(8) and (h)(9) respectively and by adding a new Subsec. (h)(7).

77 Laws 2009, ch. 211, § 3, amended the section by inserting “, including whether such meeting will be conducted by video-conferencing” between “meetings” and “; however,” in Subsec. (e)(2).

West's Delaware Code Annotated Currentness

Delaware Rules of Court

▣ Rules of Procedure of the Court on the Judiciary

→→ **RULE 17. CONFIDENTIALITY**

All records and proceedings of the Panels of the Preliminary Investigatory Committee shall be private and confidential and shall not be subject to production in any later proceedings before any tribunal except future proceedings involving the respondent in the Court on the Judiciary where such prior proceedings may be relevant. All hearings and proceedings of the Board and the Court shall be private and all records, except a final order of suspension, removal, or retirement shall be confidential, unless the Court shall otherwise order on request of the judicial officer involved.

CREDIT(S)

[Effective January 1, 1999.]

COMMITTEE COMMENT

Reference: Former Rule 12. Confidentiality is governed by Article IV, § 37 of the Delaware Constitution. *See also In re Rowe*, Del.Jud., 566 A.2d 1001 (1989) (determining that an order of suspension is an order of temporary removal and not confidential).

Court on the Judiciary Rule 17, DE R J CT Rule 17

Current with amendments received through June 1, 2012.

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END OF DOCUMENT

West's Delaware Code Annotated Currentness

Delaware Rules of Court

▣ Rules of Procedure of the Court on the Judiciary

→→ **RULE 18. JUDICIAL ETHICS ADVISORY COMMITTEE**

(a) Membership. The Chief Justice shall appoint a Judicial Ethics Advisory Committee consisting of seven members. One member shall be appointed from each of the following courts: Court of Chancery; Superior Court; Family Court; Court of Common Pleas; and Justice of the Peace Court. No member of the Court on the Judiciary shall be appointed. The Chief Justice shall designate the chair, vice-chair and secretary. Members shall serve three-year terms; terms shall be staggered; and no individual shall serve for more than two consecutive terms. The Chief Justice shall designate a Justice of the Delaware Supreme Court to serve as the administrative liaison between the Court on the Judiciary and the Judicial Ethics Advisory Committee.

(b) Functions. The Judicial Ethics Advisory Committee shall have authority to:

(1) *Express Opinions.* At the request of a judicial officer, by the concurrence of a majority of its members, express its opinion on proper judicial conduct with respect to the provisions of the Delaware Judges' Code of Judicial Conduct, the Code of Conduct for Law Clerks, and other judicial branch codes of conduct adopted by the Delaware Supreme Court.

(2) *Adopt Rules.* Adopt rules relating to the procedures to be used in expressing opinions, including rules to assure a timely response to inquires.

(c) Effect of an Opinion. A judicial officer who has requested and relied upon an opinion shall be entitled to introduce that opinion as evidence that conduct conforming to the opinion is prima facie permissible pursuant to the Delaware Judges' Code of Judicial Conduct.

(d) Disclosure of Opinion. Opinions issued by the Judicial Ethics Advisory Committee are confidential and not public information, unless the judicial officer who requested the opinions waives confidentiality in writing. Opinions that the chair of the Judicial Ethics Advisory Committee determines might have precedential value shall be distributed to members of the Judicial Conference and may otherwise be published. Unless confidentiality is waived, the chair shall cause an edited version preserving the opinion's confidentiality to be prepared for distribution or publication. All opinions issued by the Judicial Ethics Advisory Committee shall be filed with the Clerk of the Court on the Judiciary.