

Dear DelCOG members,

On April 2, 2009, Gov. Markell signed into law Delaware House Bill (HB) 49, a bill that contained a provision to allow Delaware Chancery Court judges to conduct arbitration hearings in secret, even though both the federal and state constitutions guarantee that the public has the right to attend judicial proceedings (as opposed to merely reviewing a transcript at a later time) and to review documents as they are filed with the Court or introduced into evidence.

On September 29, 2011, Bloomberg News reported that Chancery Court began to initiate this new secret arbitration process in which one of the five Chancery Court Judges can preside over these secret arbitrations. Unlike a lawsuit, arbitration severely limits discovery, or the exchange of evidence between parties, and can be kept confidential. Under the Chancery rules, the petition seeking arbitration is itself kept under seal.

Shortly after the Bloomberg article appeared in print, Attorney David Finger, a DelCOG member, contacted DelCOG and offered his legal services pro bono to DelCOG to file a federal civil rights lawsuit against the secret Chancery Court's arbitration hearings.

DelCOG filed suit in federal court against the five Chancery Court judges, claiming the arbitration procedure deprives the public of its Constitutional right to access trials because the program is "really litigation under another name."

The Gannett Co., the parent of The News Journal, The Associated Press, The New York Times and many other media groups that backed DelCOG, filed briefs as a friend of the court.

In August, 2012, federal district court judge Mary McLaughlin agreed with DelCOG and ruled that the secret procedures are essentially state-sponsored civil trials and, therefore, unconstitutional. The proceedings were halted under court order.

Delaware Chancery Court appealed the ruling saying the judge erred because many states confer non-judicial responsibilities on judges. They also argued that shutting down the program would have "far-reaching consequences" because it brings the constitutionality of arbitrations into question. DelCOG responded that other arbitration programs do not use sitting judges, don't have confidentiality requirements, and decisions in other arbitration venues are not binding.

In May 2013, a half-hour hearing was held before three judges on the 3rd U.S. Circuit Court of Appeals in Philadelphia. (Judge Dolores Sloviter, Judge Julio Fuentes, Judge Jane Roth).

Today, the three-judge panel of the Third U.S. Circuit Court of Appeals ruled 2-to-1 to uphold the federal judge's ruling in favor of DelCOG.

In addition to the News Journal article below, Reuters and Associated Press wire service stories on this topic appeared in Thursday edition of the New York Times, Wall Street Journal, The York Daily, Law360, San Francisco Chronicle, Reuters and The Virginia Gazette.

Thanks,  
John D. Flaherty, President  
Delaware Coalition for Open Government