

## Middle Atlantic – Law Firms

# Practice Before Delaware's Court of Chancery: The Lawyers' Perspective

The Editor interviews Donald J. Wolfe, Jr., and Michael A. Pittenger, Partners, Potter Anderson & Corroon LLP and co-authors of Corporate And Commercial Practice In The Delaware Court of Chancery, published by Matthew Bender. See [http://bookstore.lexis.com/bookstore/catalog?action=product&prod\\_id=7218](http://bookstore.lexis.com/bookstore/catalog?action=product&prod_id=7218)

**Editor:** Your book has become the bible with respect to practice before the Delaware Court of Chancery. Why did you undertake this project?

**Wolfe:** Delaware's Court of Chancery is the preeminent corporate and business law tribunal in the United States, if not the world. We wanted to provide a ready resource to inform attorneys how the court operates and what it is capable of doing. When the book came out about eight years ago, there were in existence at least three very distinguished volumes produced by members of Delaware law firms that focused on the common and statutory law that applied to internal corporate governance issues. There was no need for an additional treatise on that subject.

We decided instead to address the special equitable remedies that the Court of Chancery can dispense, the various proceedings, including summary proceedings, over which it has jurisdiction under the corporation law and alternative entity statutes, and other substantive topics that had not been covered, or had not been covered with a litigation focus, by the other treatises.

**Editor:** What are some of the historical reasons for Delaware being a forum of choice for business litigation?

**Pittenger:** There are many factors. You often hear about the large body of corporate law precedent and the consequent predictability of the Court of Chancery's decisions. But perhaps the most significant force behind the court's preeminence is the consistently high quality of the chancellors and vice chancellors. They are not elected. The individuals appointed to the court are, or quickly become, experts on corporate law, alternative entity law, and other complex business matters. Many of my clients have commented on how surprised they are that the chancellors appear to know the record as well as any of the attorneys in the room.

The chancellors also have a firm grasp of the realities of the business world and of the policy implications their decision can have. Even when my clients do not prevail, they typically leave with a very favorable impression of the court. They feel they were treated fairly, that the judge took the time to understand all the arguments and made a reasoned decision. The same quality and dedication is found in the justices on our Supreme Court.

**Editor:** Is there a collegial aspect to decision-making?

**Wolfe:** We, of course, are not privy to the internal processes of the court, but I have



Donald J. Wolfe, Jr.



Michael A. Pittenger

to believe the judges are not only aware of one another's decisions but that they consult with each other on the often unprecedented issues that come before them. The members of the court attend conferences and bar association events around the country not only as ambassadors of Delaware law but also to ensure that they appreciate the cutting edge issues that concern business people, transactional practitioners and litigators.

**Editor:** What is the difference between the Court of Chancery and the business and commercial courts found elsewhere?

**Wolfe:** There are other business courts around the country that have had success, but none compare to the Court of Chancery. There is a self-reinforcing cycle going on here. The 100 years of precedent in corporate law lends greater predictability to the law. Our judges are business law experts who deal with cutting edge controversies on a regular basis. Therefore, the appeal of the Court of Chancery continues to grow and that leads to more corporations incorporating in Delaware. And the cycle renews itself.

While our judges are significantly underpaid given their workload and the expertise required, the court is nonetheless able to attract superior people in the face of the monetary allurements of the private sector because the Court of Chancery is so highly respected and the issues it deals with so sophisticated.

**Editor:** Do non-U.S. companies get a fair shake in Delaware Courts?

**Wolfe:** In my experience, Delaware is not a jurisdiction that provides a home court advantage. Most corporations that are incorporated here are resident somewhere else.

**Editor:** Do Delaware courts actively manage cases so that frivolous lawsuits do not linger?

**Pittenger:** The judges actively manage their dockets and if they see a complaint that is inadequate, they are not afraid to say so and dismiss it. Under a court rule enacted several years ago, if a defendant moves to dismiss, the plaintiff has an opportunity to amend the complaint to address the arguments in the motion. If the plaintiff chooses instead to brief the motion and loses, the case is dismissed – and leave to replead is granted only in unusual circumstances.

**Wolfe:** With regard to dismissals, the

existence of a large body of precedent gives the court confidence in its ability to determine what does not state a cause of action and what warrants a trial. There is a recognition that there is a heavy docket and only five chancellors handling very sophisticated controversies. I do not see any inherent reluctance to resolve cases short of trial where that is appropriate.

**Editor:** Why do cases filed in Delaware move quickly through their various phases to a decision?

**Wolfe:** The members of the court tend to be proactive in managing their dockets and moving cases forward if the parties are not doing so. Part of the efficiency of the Delaware judicial system is that cases are assigned quickly to a particular judge upon filing. The assigned judge is responsible for taking charge of proceedings and making sure the case moves forward. Where different judges handle separate aspects of the case or judges rotate over the course of a case, it is easy for the case to get lost and to stagnate. While our system is more burdensome on the individual judges, it pays dividends in terms of efficiency and responsiveness.

**Editor:** The same efficiency seems to characterize the court's handling of discovery. How do you account for this?

**Pittenger:** Local Delaware counsel knows that the judges do not like to get embroiled in discovery disputes, but that if they do they will make a well-reasoned and balanced ruling in view of the needs of the particular case. With this in mind, local practitioners endeavor to work things out before going to the court. The judges still probably hear more discovery disputes than they would like.

**Wolfe:** The number of people who practice locally in this area is small. They know each other and respect each other. We are all aware that we can quickly develop a reputation with our colleagues and the court, for good or ill. That tends to introduce a rationality to people's practice and a degree of civility that we think is unusual. The discipline that these factors impose helps to reduce the number of controversies requiring court intervention.

**Editor:** Tell us about mediation in the Court of Chancery.

**Pittenger:** Under the court's rules, any case pending before the court can be mediated before the chancellor or a vice-chancellor. The court's jurisdiction was expanded by statute several years ago to permit it to hear and mediate technology disputes and to mediate certain high stakes business disputes over which the court would not otherwise have jurisdiction.

The mediation-only service is unique and allows parties to take advantage of the expertise and unquestioned neutrality of the chancellors. The jurisdictional requirements for a mediation-only case are that one party has to be a business entity that is incorporated in or has a prin-

cipal place of business in Delaware. The service is not available for consumer disputes. If the claims are monetary, there is a \$1 million minimum amount in controversy requirement. All parties must agree to the procedure.

Although expensive, a mediation-only case filed in the Court of Chancery offers many advantages. Proceedings are confidential and not of public record. The chancellors have instant credibility with the parties, they can candidly express views on the risks to both sides, and they are in a better position than most mediators to tell parties how a court will view a matter if it is not resolved through the mediation. It is a beneficial process and I suspect that we will be seeing more of these proceedings.

**Editor:** Tell us about the increasing use of Delaware courts by limited liability companies and entities with other structures.

**Wolfe:** Limited liability companies and other alternative business models have become increasingly popular. These entities are quite different from corporations because their governance is primarily a function of contract. Still, there are certain analogies to corporate law. Owing to its experience with corporate and business disputes, the Court of Chancery is the obvious place in which to resolve disputes among the investors and managers of alternative entities, and a large percentage of the disputes that come before the court now involve the internal governance of those newer business vehicles.

**Editor:** How can a corporation make it more likely that any litigation will be brought in Delaware courts?

**Pittenger:** One way to ensure that more of your disputes are resolved in Delaware is to move your place of incorporation here. Also, if you want the Delaware courts to decide contractual disputes, it is important to think about forum selection and consent to jurisdiction provisions in your agreements. Those provisions are often overlooked, and when disputes arise, parties often find they do not say what the parties thought they said. Consideration might also be given to including contractual provisions for recourse to Delaware's mediation-only procedures to resolve disputes.

**Wolfe:** In the case of a controversy that is ripe for resolution, a potential defendant can preempt the possibility that the plaintiff may sue in another jurisdiction by obtaining a declaratory judgment from the appropriate Delaware court.

**Editor:** Do you have any closing comments?

**Wolfe:** I count myself as lucky to practice in a jurisdiction that has the range and sophistication of controversies that make their way to our courts and in particular to practice in a court with such a high level of expertise and responsiveness. Even after 30 years, it makes it worth getting up in the morning.

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