

# THE RECORDER

## TRIAL TECHNIQUES

# Off to Delaware

*Trying a case in the Court of Chancery presents stark contrast to many state courts and has its advantages*



**Stuart Gasner**

### Litigation

I had the pleasure this past summer of trying a case in the Delaware Court of Chancery. As a San Francisco business trial lawyer with clients and adversaries incorporated in Delaware, I had drafted many complaints with a Court of Chancery caption, and had even

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filed a few. But this was the first one to go to trial. In short, it was a wonderful experience, with some lessons for how litigation ought to be conducted everywhere. What follows is my rookie's guide to this interesting and innovative court.

For those unfamiliar with the Court of Chancery, it's the Delaware court system for equitable claims and equitable relief, a throwback of sorts to the English division of labor between courts "at law" and those "in equity." Most courts have abandoned the distinction, but Delaware has continued to embrace it with a passion. There is a single "chancellor" and four "vice chancellors," nominated by the governor and confirmed by the state senate. Over the last 200-plus years, these judges and their predecessors have focused on the equitable issues presented by the world's largest corporations in mergers, proxy fights and other aspects of corporate governance, as well as other business disputes with eq-

uitable issues, leading the court's website to proclaim that "its unique competence in and exposure to issues of business law are unmatched." It's hard to disagree.

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By focusing on equitable claims and remedies and developing an understanding of the Court of Chancery's jurisdiction, California lawyers will find that a surprising number of Silicon Valley business disputes could be litigated in this court, especially in light of a

special jurisdictional statute (§346) for “technology disputes.” And there is good reason to think about moving your case cross-country: unlike the currently underfunded California courts, the Court of Chancery can be lightning fast (our case was filed in May of this year, and a three-day trial concluded in September — four months from filing to trial, including expedited discovery.) And unlike many California courts where your case may not even be assigned to a single judge, let alone one expert in the subject matter of your lawsuit, in the Court of Chancery you will have the laser-like attention of a single judge who likely knows a lot more than you do about the legal subject matter.

If you find yourself in chancery, either voluntarily or involuntarily, here are a few tips that I picked up as a newcomer. First, get good local counsel and rely on them heavily. It’s required under the rules and good practice whenever you are trying a case away from home, but it is particularly important in chancery. The chancellors have strong idiosyncrasies and you need to know them in advance. The best chancery practitioners are great trial lawyers who spend a lot of time before a small number of judges, so their insights are likely to be exceptionally well-founded.

Second, fasten your seat belt and be prepared to move fast. In

our case, the vice chancellor knew the case in detail at the very first telephone conference and expected clear answers to pointed questions. And once he had set an expedited trial, it was clear that he was not going to move it. This, by the way, created a refreshing clarity throughout the pretrial phase of the case. Documents got produced (more or less) on time; depositions got scheduled and (generally) did not move; there were few motions. Chancery also has some interesting rules and practices governing depositions, especially one that forbids discussing the merits of the case during breaks, even as between lawyer and client. Also, at least one vice chancellor reads the entirety of every deposition before the trial, and will take the lawyers to task for speaking objections, as well as chide deponents for evasive answers.

Third, be ready for a no-nonsense approach at trial. The trial day started and ended at precisely the stroke of the appointed hour, as did breaks and lunch. There was zero tolerance for redundant or irrelevant questioning. Evasive witnesses were chastised on the spot. Evidentiary objections had to be very good or would be overruled with vigor. The upshot was that we got more done in three days in the Court of Chancery than in three weeks in some state courts.

Once I got used to it — including figuring out which side of the courtroom to occupy, since there is no jury box by which to orient oneself — I realized that this had been an experienced trial lawyer’s dream venue. I could fly nonstop to Philadelphia on a Saturday, stay at a nice old school hotel relatively close to the courthouse in Wilmington (the Hotel DuPont), get ready for trial in the comfort of local counsel offices that are set up for big sophisticated trials (no need to set up an elaborate “war room” at the local chain hotel), try a complex business case in front of a super-qualified judge in three days, and be back in San Francisco the following Saturday. And there was an excellent running trail along the Brandywine River and good beer from the Dogfish microbrewery in Rehoboth Beach.

California courts take note: You’ve got some serious competition for business trials. I, for one, look forward to heading back to Wilmington the next time my client is eager to cut to the chase and there is a Delaware nexus.