

DELAWARE COURT OF CHANCERY ISSUES GUIDELINES TO
PROMOTE EFFICIENCY, ENHANCE PROFESSIONALISM, AND
ENCOURAGE CIVILITY

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The Delaware Court of Chancery issued non-binding guidelines to help Delaware lawyers and non-Delaware lawyers as well as their clients be better prepared to handle common and sometimes complex procedural issues that arise in litigation before the court. The 18-page Guidelines issued on January 6, 2012, are intended not only to ensure that all attorneys appearing before the court understand the expectations of the court but also to "reduce conflicts among counsel and parties over non-merits issues." The Guidelines cover a variety of "best practices" for lawyers to follow that range from the elementary, such as the protocols for hearings or for contacting Chambers and scheduling expedited or summary proceedings, to advanced topics such as handling expert reports and confidentiality agreements. Importantly, the Guidelines contain sample forms for lawyers to use as starting points for such matters such as scheduling a preliminary injunction, a Rule 12(b)(6) motion, or cross-motions for summary judgment.

The Guidelines are the product of a joint effort between the judges of the Court of Chancery and the Court's Rules Committee, which is comprised of experienced Delaware practitioners. While the Guidelines include "preferred" procedures for counsel to follow, it is important to note that these Guidelines do not create a "standard of conduct" or a "standard of care." In many instances, the Guidelines memorialize what has been an accepted practice in the court to-date and in other instances, the Guidelines create new obligations for practitioners to follow. For example, with respect to an existing practice regarding expert reports, the Guidelines state:

In general, the Court prefers that parties stipulate to limit expert written discovery to the final report and materials relied on or considered by the expert. Counsel should be aware that the Court understands the degree of involvement counsel typically

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has in preparing expert reports. Cross-examination based on changes in drafts is usually an uninformative exercise.

With respect to a new approach regarding pleadings, the Guidelines state: "[a]n answer should repeat the allegations of the complaint and then set forth the response below each allegation. Otherwise the court has to look back and forth from answer to complaint to see what is being denied."

Role of Delaware Counsel

One of the more important parts of the Guidelines provides instruction to the legions of non-Delaware lawyers who coordinate with local Delaware lawyers to litigate cases in Chancery. This section is a "must read" for any non-Delaware lawyer that uses Delaware co-counsel. About these working relationships, the court gives the following specific direction:

- a. The concept of "local counsel" whose role is limited to administrative or ministerial matters has no place in the Court of Chancery. The Delaware lawyers who appear in a case are responsible to the Court for the case and its presentation.
- b. If a Delaware lawyer signs a pleading, submits a brief, or signs a discovery request or response, it is the Delaware lawyer who is taking the positions set forth therein and making the representations to the Court. It does not matter whether the paper was initially or substantially drafted by a firm serving as "Of Counsel."
- c. The members of the Court recognize that Delaware counsel and forwarding counsel frequently allocate responsibility for work and that, in some cases, the allocation will be heavily weighted to forwarding counsel. The members of the Court recognize that forwarding counsel may have primary responsibility for a matter from the client's perspective. This does not alter the Delaware lawyer's responsibility for the positions taken and the presentation of the case.
- d. Non-Delaware counsel shall not directly make filings or initiate contact with the Court, absent extraordinary circumstances. Such contact must be conducted by Delaware counsel.
- e. It is not acceptable for a Delaware lawyer to submit a letter from forwarding counsel under a cover letter saying, in substance, "Here is a letter from my forwarding counsel."

These rules militate against using Delaware counsel to merely file whatever non-Delaware counsel requests. Both Delaware and non-Delaware counsel will be subject to severe penalties for doing so without regard to Delaware standards.

Finally, there are some interesting comments with respect to what counsel should include in Compendiums and Appendices. The Guidelines show that this innovative approach is an opportunity to point the court to exactly what counsel want the court to review. There is also a humorous comment where the Guidelines tell counsel they don't have to include everything in a compendium: "Avoid the Manhattan Phonebook. If a submission is huge, uncomfortable to hold, and likely to fall apart, please break it into separate usable volumes."

As the court stated in its announcement:

The goal of the guidelines is to help litigants deal with each other and the Court in a more constructive, less contentious, and therefore more efficient and just manner. . . . All the members of the Court recognize the guidelines as sound and members of the Court will endeavor to avoid the chambers-specific approach that results in litigants having to address the idiosyncratic preferences of multiple members of the same court. All of us on Chancery recognize how challenging it is for lawyers to address complex cases especially in view of evolving issues such as electronic discovery, said Chancellor Leo E. Strine, Jr. By developing these practice guidelines with the invaluable help of our Rules Committee, we hope to make our Bar's life a little easier and to enable all of us to concentrate more on the merits, rather than procedural jousting. This will get cases resolved less expensively and faster.

Like the Delaware Supreme Court's Principles for Professionalism for Delaware Lawyers, the Guidelines also help promote and foster ideals of professional courtesy, civility and cooperation which are the fundamental tenets for all lawyers engaged in litigation before Delaware's courts.