

CREDITORS' RIGHTS AND BUSINESS RESTRUCTURING

ALERT

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Important Updates by Delaware Chancery Court to Its Practice Guidelines

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One of the reasons that so many corporations and other business entities are formed in Delaware is that their disputes will be resolved in the Delaware Court of Chancery, where the Chancellor and Vice Chancellors are widely considered among the nation's foremost experts in corporate law. On August 5, 2021, the Court of Chancery updated its "Guidelines for Persons Litigating in the Chancery Court" (the "Guidelines").¹ Although they are not binding Court rules, the Guidelines "offer best practices for litigating cases in the Court of Chancery." Familiarity with the Guidelines is a must for all Delaware practitioners and Chancery Court litigants. These updates are a helpful reminder to businesses and their lawyers about the Court's expectations, and can enhance their ability to obtain a favorable result.

Hearings & Trials

The most significant addition to the revised Guidelines is the new section on "Expectations for Remote Hearings and Trials." Delaware courts have continued to operate throughout the Covid-19 pandemic, conducting remote proceedings based on earlier protocols. As noted in the Guidelines, the "Court of Chancery frequently handles hearings by means of remote communication. The Court of Chancery has begun conducting evidentiary hearings and trials by means of remote communication."

Delaware courts are currently conducting both in-person and remote proceedings. See Court of Chancery Courtroom Practices.² On June 29, 2021, the

Delaware Supreme Court issued Administrative Order No. 22, lifting the judicial emergency, starting on July 13, 2021, with certain precautions to prevent the spread of Covid-19 remaining in effect. (See Standing Order No. 6).³ For example, when proceedings are in-person, face masks will be required at all Delaware state court facilities regardless of vaccination status, except when speaking in a courtroom.

The new provisions in the Guidelines reflect the Chancery Court's experience in conducting remote hearings and trials. The Chancery Court generally expects that the same protocols followed during in-person proceedings will also apply during remote hearings and trials. For instance, the Court will enforce the same standard time allocations, "courtroom" attire is mandated, and traditional rules of decorum apply. As the Guidelines emphasize, "you should approach your interactions with witnesses, your adversaries, and the court with the same degree of preparation, judgment, and professionalism that you would exhibit during an in-person hearing." However, counsel are not required to stand when the Court joins a video conference or to present argument or question a witness.

The Guidelines provide that the Chancery Court will utilize the following four technology platforms in conducting remote hearings and trials: (1) conference call using a standard conference bridge; (2) conference call using CourtSolutions; (3) video conference using Zoom; and (4) video conference hosted by CourtScribes. For each option, the Guidelines address accessibility issues and contain practice tips.

¹[https://courts.delaware.gov/chancery/docs/GUIDELINES%20\(FINAL%202021\).pdf](https://courts.delaware.gov/chancery/docs/GUIDELINES%20(FINAL%202021).pdf)

²<https://courts.delaware.gov/chancery/docs/ChanceryCourtroomProtocols.pdf>

³<https://courts.delaware.gov/rules/pdf/Court-of-Chancery-Standing-Order-No.6.pdf>

Discovery Facilitator

The new Guidelines also add provisions regarding the appointment of a Discovery Facilitator. A Discovery Facilitator serves “to promote transparency, act as an honest broker, mediate compromises, and document agreements and disagreements.” The costs of the Discovery Facilitator are “borne by the parties as directed by the Court.”

The Discovery Facilitator is empowered to convene meet-and-confer sessions, to request information from a party, and to communicate *ex parte* with a party or the Court. However, unlike a Discovery Master, a Discovery Facilitator cannot decide discovery disputes.

As the Guidelines note, historically Discovery Facilitators have been appointed in cases involving highly complex facts, an extensive discovery burden, an expedited schedule, difficult privilege questions, or a pattern of discovery disputes between counsel. For example, in 2020, Vice Chancellor Laster appointed a Discovery Facilitator in *AB Stable VIII LLC v. Maps Hotels & Resorts One LLC*, No. CV 2020-0310-JTL, 2020 WL 7024929, at *45 (Del. Ch. Nov. 30, 2020). That case dealt with significant difficulties involving delays in the production of documents. The Discovery Facilitator “provided invaluable assistance by promoting transparency, acting as an honest broker, and reducing the overall number of disputes.” *Id.*

Day-to-Day Practice

There are a variety of additional changes that attorneys and parties litigating in the Chancery Court should be aware of, affecting day-to-day practice. Parties are to contact and advise Chambers if any party requests argument or if they agree to submit a motion for decision without argument. Counsel are also directed to advise the Court that the parties have settled so the Court can free up courtroom space and ensure that judicial resources are reserved for live matters. In addition, the Guidelines provide that counsel should avoid emailing the Court or its staff unless a true emergency arises outside regular business hours or if it is in reference to a routine and non-controversial matter, such as confirming a date or

confirming that a courtesy copy will be provided. All substantive communications must be docketed.

The Guidelines state that the Court should be provided with courtesy copies of pleadings for all in-person and remote hearings and trials. Where there are expedited proceedings, courtesy copies must be delivered to Chambers promptly and the parties do not have to wait for them to be accepted when electronically filed.

When a case has had a “prolonged period of inactivity,” the Court may require a status report or contemplate dismissal for failure to prosecute. The Guidelines explain that if there has not been any docket activity for six months, sending a joint letter updating the Court “would be a good idea.”

There are two types of courtrooms in the Court of Chancery: standard and high-tech. The high-tech courtrooms include modern presentation equipment, such as: a podium with laptop computer input connections; counsel tables with computer input connections and separate monitors; a touch screen witness monitor; a personal monitor for the judge; and a large wall-mounted TV for the gallery. The Guidelines note that the high-tech courtrooms are in high demand, so counsel should confer prior to scheduling to determine if a high-tech courtroom is necessary and make a request in advance of scheduling the hearing or trial.

Takeaways for Businesses

As the Court’s website reflects, “[t]he Delaware Court of Chancery is widely recognized as the nation’s preeminent forum for the determination of disputes involving the internal affairs of the thousands upon thousands of Delaware corporations and other business entities through which a vast amount of the world’s commercial affairs is conducted. Its unique competence in and exposure to issues of business law are unmatched.” To maximize their chances of achieving a successful outcome, it is important for businesses and their counsel litigating in the Chancery Court to be very familiar with the Court’s operating procedures as highlighted in the recently updated Guidelines. ♦

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