

Delaware – Courts

Seeking A Business Location? The Attractions Of An Even-Handed Court System

The Editor interviews **The Hon. Myron T. Steele**, Chief Justice, Supreme Court of Delaware.

Editor: In our recent survey of law firms active in assisting foreign companies to find suitable business locations, a business-friendly climate was cited as an important consideration. How has Delaware been rated and why was it accorded that recognition?

Steele: The most recent U.S. Chamber Institute for Tort Reform Survey of Litigation Climates rated Delaware as Number One among U.S. jurisdictions for the seventh year in a row. Those polled in determining the ratings are inside and outside counsel of major corporations. They focused on factors that reflect whether or not the court system (particularly the jury trial system) in a particular state is even-handed. They categorize it as “business friendly” but I prefer to categorize it as even-handed. I do so without concern that plaintiffs are filing mass tort cases in Delaware. They obviously feel that they get fair treatment. Neither defense lawyers in those cases nor any of the litigants have appealed any case management orders or raised any issues about fairness in the process.

Editor: Delaware is by far the most popular place to incorporate a publicly held company. Why is that true?

Steele: Of the Fortune 500 companies 60.5 percent are incorporated in Delaware, and 51 percent of all publicly traded United States corporations are incorporated in Delaware. There are three reasons why this is true. First and foremost it is attributable to the high quality of the Delaware judicial system.

We have a substantial body of precedent created by judges selected on the basis of merit over the hundred-year period that we have had a separate business court – our Court of Chancery. That court tries cases without juries, so there is less risk of an aberrant verdict and there is a greater chance of consistency and predictability of outcome at the trial level. While the five judges of our Supreme Court hear appeals from the trial courts, three of us are former members of the Court of Chancery.

Punitive damages are not available in a business dispute in the Court of Chancery because that court, as a court of equity, has no power to award punitive damages. This means that corporations are not subject to the whims of a jury that might be picked on a particular day as occurs in the federal system. We have an experienced judiciary selected on the basis of merit and drawn from a highly qualified bar with numerous members experienced in handling complex business issues.

The second feature is that we have an enabling statute that is very flexible and for that reason is attractive to businesses. They can shape their internal governance practices and protocols

within the statutory law without having to meet a one-size-fits-all standard. And, the legislature works closely with the Corporation Laws Committee of the Delaware Bar Association. That committee, which is balanced between in-house, outside counsel and plaintiffs’ counsel who practice in the corporate area, suggests annual revisions in the statute to make sure that it is up to date and is fair to all of the corporate constituencies. The General Assembly, almost invariably, accepts their advice. We don’t have legislators who seek to achieve some political agenda by tinkering with the DGCL.

The third feature is our highly modernized and efficient Secretary of State’s office that provides excellent service to corporations chartered here and their shareholders.

Editor: Are foreign companies locating their headquarters in Delaware?

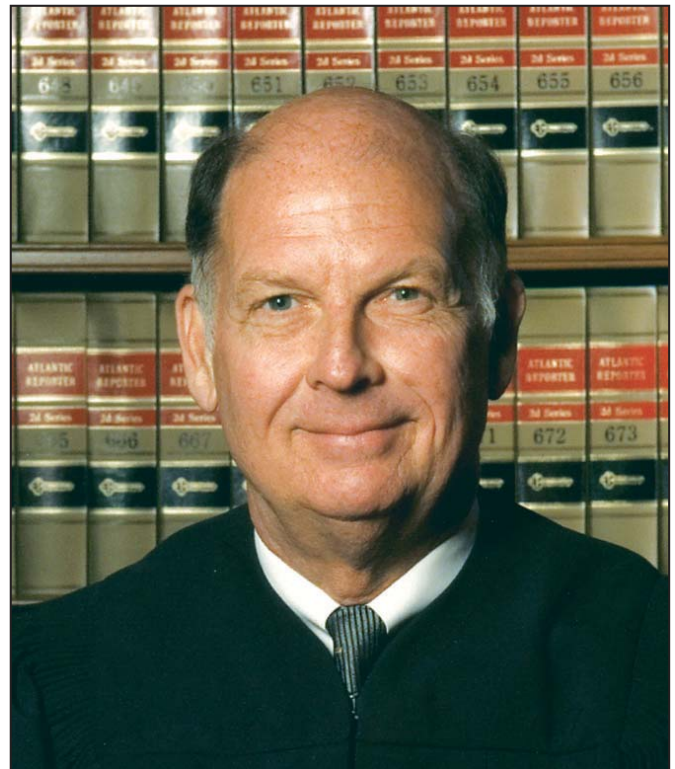
Steele: The most recent example of this is AstraZeneca. Its subsidiary responsible for its North American operations is both chartered in Delaware and headquartered here. This means that its headquarters is strategically located not far from New York, Washington or Philadelphia with good road, air and rail connections to major metro areas. Also, Delaware’s economic development office works diligently to convince businesses to come here. It is the ideal spot for an international corporation that wants the benefit of Delaware law and also wants the strategic location that Delaware gives them in the mid-Atlantic.

Editor: Poorly funded state court systems result in overworked and underpaid judges being unable to take the time to properly handle business cases with the result that business cases may face years of delays before being referred to poorly instructed juries. Are Delaware courts adequately funded?

Steele: The answer is “yes.” Our General Assembly and governors in the last thirty years have not overlooked the importance of Delaware’s court system to the economy of Delaware. They know that the court system is one of the reasons we have the chartering business and that 21 percent of our state budget comes from the chartering business and another 10 percent or more from legal services. When you think that a state should be run like a business you don’t ignore a primary profit center.

Editor: Does litigation in Delaware proceed expeditiously?

Steele: Delay is not a problem in Delaware because of the expertise and diligence of our judges. All the judges on the Supreme Court, the Court of Chancery and on the Superior Court (General Jurisdiction) have had private sector experience.



The Hon. Myron T. Steele

We are able to attract successful private practitioners for two reasons. One, it is considered a professional distinction to go on the bench in Delaware. Because it is attractive to be known as a Delaware Vice Chancellor or member of the Superior Court, we draw some of the best and brightest from a bar experienced in commercial law. Our judges are not elected but rather are put through a merit selection process.

Delaware trial judges, with the exception of two pockets in California, are the highest paid in the nation. Their compensation is on par with federal district court judges.

We have an internal administrative rule that requires that cases be completed within 90 days. If the decision is not rendered within that period, the judge has to report to the chief judge of that court why a decision has not been rendered in the allotted 90 days, give a rational explanation, and set a target date no more than 180 days later. In fiscal year 2007, 95.7 percent of the cases in the Delaware Supreme Court were decided within 90 days of submission. This year we are on a 92.7 percent track because we have had some very complex cases that have taken longer to resolve, but we are going to remain at more than 90 percent. Almost half of the cases in the Delaware Supreme Court were decided within forty days. Our trial courts are very close to the 90 percent mark.

Editor: Are judges able to give proper consideration to such matters as the

qualifications of expert witnesses, the scope of electronic discovery, motions for summary judgment and instructions to juries? What about interlocutory appeals?

Steele: I want to emphasize that counsel for the parties shape the issues. The judge considers the issues as they are presented by counsel.

We are a *Daubert* state so the parties are entitled to a *Daubert* hearing where they can challenge the qualifications of an expert. Even if the expert is qualified, they can challenge the theory on which the expert bases his or her theory. While these hearings delay the case, our judges make time for them. Our judges have been schooled in how to analyze scientific evidence, they are very familiar with *Daubert*, and we have a number of Delaware cases that explain the way it works.

With electronic discovery, the burden is on the lawyers to shape the issues and work through the problems before they submit them to the court. But, if issues arise, our judges have the time and qualifications to handle them.

As to motions for summary judgment, they are routinely used to narrow the issues, and there are very few instances where there is delay in resolving them.

We have pattern jury instructions that are reviewed every year. Every party gets to present what they think the instructions ought to be. Our law says

Corporate Counsel Organization Highlights

PLI Plans Annual Privacy And Security Law Institute

The Practising Law Institute (PLI) is planning a CLE seminar titled Ninth Annual Institute on Privacy and Security Law.

The program will take place on Monday and Tuesday, June 23 and 24, at the PLI Conference Center, 810 7th Avenue, New York City.

This program focuses on critical issues of privacy and data protection faced by all companies, including legal compliance requirements in online privacy and information security practices. Attendees will learn the latest federal and state legislation, regulations and

decisions regarding privacy and security, how to respond to a security breach and privacy and security risks in online marketing and advertising.

The program co-chairs are John B. Kennedy of Dewey & LeBoeuf LLP and Paul M. Schwartz of the University of California-Berkeley School of Law.

For information on registration fees and available CLE credits, see the Bulletin Board on *The Metropolitan Corporate Counsel* website at www.metrocorp-counsel.com.

To register for the program, call (800) 260-4754 or visit www.pli.edu.

Society Of Corporate Secretaries Schedules National Conference

Hot Topics In Corporate Governance is the theme of the Society of Corporate Secretaries & Governance Professionals 62nd National Conference scheduled for June 25 to 29 at the Boca Raton Resort & Club in Boca Raton, Florida. Included in the program are tours, sporting events and special programs for spouses and children.

Among the conference topics to be covered are What's Hot with the Pension Funds; Hot Issues in Executive Compensation; What's Hot with the Delaware Judiciary; Hot Issues in Health, Environment and Safety Governance; Hot Issues for Audit & Governance Committees, and workshops on Ethics, Law & Corporate Governance and Managing Stress.

Speakers will include: Michael G. Oxley, former Congressman and current Vice Chairman of The Nasdaq Stock Market; Richard D. Parsons, Chairman, Time Warner; John White, Director of the SEC's Division of Corporation Finance; Martin Lipton, Wachtell, Lipton, Rosen & Katz; Ronald Duska, Charles Lamont Post Chair of Ethics and the Professions, The American College, and Bob Woodward of the *Washington Post*.

For information on registration fees and CLE credits, see the Bulletin Board on *The Metropolitan Corporate Counsel* website at www.metrocorp-counsel.com.

To register for the program, contact Ophelia King at (212) 681-2009 or oking@governanceprofessionals.org.

NJCCA Plans IT Contracting Seminar

Titled Advanced Outsourcing & Transformational IT Contracting, NJCCA's seminar is scheduled for Wednesday, June 11 from 8:30 a.m. to 12:30 p.m. at the offices of Morgan, Lewis & Bockius LLP, 502 Carnegie Center, Princeton, New Jersey.

The program will consist of an expert panel that comprises world-class practitioners of relationship-based contracting and in-house counsel with experience in contracting for IT-centric transformational deals.

The moderator will be Eugene M.

Weitz, Counsel, Alcatel-Lucent. The panelists will be Morgan Lewis partners Akiba Stern and Edward Hansen. Dana Gilbert, Vice President, Legal Cognizant Technology Solutions will present the in-house counsel perspective.

For information on registration fees and available CLE credits, see the Bulletin Board on *The Metropolitan Corporate Counsel* website at www.metrocorp-counsel.com.

To register for the program, contact (908) 582-4820 or weitz@alcatel-lucent.com.

How To Litigate Sexual Harassment Claims

On Thursday, June 5 from 6 to 9 p.m. the New York City Bar Association will present a seminar on Litigating Sexual Harassment Claims, to be chaired by Lloyd B. Chinn, Proskauer Rose, LLP. The other speakers will be Penny Domow, Bear Stearns & Co. Inc.; Professor Merrick T. Rossein, CUNY, and Anne Vladeck, Vladeck Waldman Elias & Englehard PC.

The program will not only highlight the various ways to prevent and address sexual harassment, but will also discuss the latest legal developments affecting the litigation of these claims. The panelists will address, among other topics: anti-sexual harassment policies and sexual harassment prevention training;

implementing a complaint procedure and investigating complaints; in-office dating, sexual favoritism; third party, off-premises harassment; e-discovery in sexual harassment litigation after the December 2006 Federal Rules of Civil Procedure amendments; the impact of Federal Rule of Evidence 412 in litigating sexual harassment claims; multiple plaintiff class actions; use of experts and ethical issues arising during sexual harassment litigation.

For details on registration fees and available CLE credits, see the Bulletin Board on *The Metropolitan Corporate Counsel* website at www.metrocorp-counsel.com.

To register visit www.nycbar.org.

Current Issues In D&O Liability & Insurance

The New York City Bar Association has planned a seminar to help attorneys understand the potential exposures facing director and offices. The program, titled Understanding Current Issues in D&O Liability & Insurance, is co-sponsored with the Insurance Federation of New York, Inc.

It will take place on Friday, June 6 from 8:30 a.m. to 2 p.m. at the House of the Association, 42 West 44th St, New

York City.

Program co-chairs will be Scott R. Schaffer, Wilson Elser, Moskowitz, Edelman & Dicker LLP and Jill Levy, Boundas, Skarzynski, Walsh & Black LLC.

For details on registration fees and CLE credits, see the Bulletin Board on *The Metropolitan Corporate Counsel* website at www.metrocorp-counsel.com.

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Myron T. Steele

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we are to shape those pattern instructions to fit the facts of a particular case to better instruct the jury on the law being applied to the facts of the case. There is significant time spent in conferences where the parties work through what the instructions ought to be and they have the option to appeal an adverse ruling.

Interlocutory appeals are permitted under our rule. The trial judge first reviews the basis for the appeal. The Supreme Court then reviews the rationale for a trial judge's decision. We decide independently whether we think the rule has been met. We are very conscious that costs to parties can be lessened by taking interlocutory appeals.

Editor: What about the quality of Delaware juries?

Steele: Juries in Delaware are selected from voter registration and motor vehicles lists. Thus, they are a very good cross section of the community. In New Castle County where most of the litigation takes place, the population is above average in education and experience. Secondly, we have a procedure whereby subject to paying a very reasonable fee, a party can ask for what is called a special jury drawn from people with higher levels of education and experience.

Editor: Is the use of ADR encouraged?

Steele: At every level of our system, both arbitration and mediation are available. Arbitration is a mandatory first step in cases involving less than \$100,000. If the parties agree, the Court of Chancery will for a very reasonable fee even mediate cases under circumstances where Delaware has no jurisdiction over a dispute.

Editor: You mentioned that judges are selected on the basis of merit. Tell us more about the process.

Steele: Our judges are not elected. We have a state constitution that requires that there be political balance on each of our major courts. Every governor for the last 35 years has had a judicial nominating commission. It is chaired by a practicing lawyer in the state and is made up of both lay people and lawyers from all three counties of the state. It is balanced politically as well as with respect to gender and race. When a

vacancy occurs in a judicial position or a new position is created on a court, anyone who is a member of the Delaware bar can apply. The nominating commission interviews the most likely applicants and does background checks. It is mandated to pick no fewer than three candidates but no more than five. Those candidates are then vetted by the Delaware State Bar Association's judicial appointments committee which is made up of 25 lawyers from around the state. The governor then selects one candidate from the list. The State Senate then holds a public hearing and the candidate must be approved by a majority vote. Since judges' terms in office are only 12 years, they must face this process again so that it is unlikely that a judge who has not performed well will even seek a new term.

Editor: Do the federal courts that serve Delaware offer similar advantages?

Steele: Our Third Circuit members from Delaware are highly experienced business lawyers. Our federal District Court as it is currently constituted is made up of well-qualified people. It has developed a special expertise and is nationally known for its ability to handle patent and bankruptcy work. While the federal District Court doesn't see the kinds of cases that other federal courts may see because our state court system is so good that very few cases are removed to that court, its expertise in patent and bankruptcy matters makes it an excellent complement to our state court system.

Editor: Assuming that the U.S. or Western Hemisphere headquarters of a foreign company were located in Delaware and incorporated as a subsidiary in Delaware, what is the likelihood that litigation commenced in a state or federal court in another state against that subsidiary could be moved to a Delaware state or federal court or that Delaware law would be applied?

Steele: Delaware follows the "first filed" rule. If a case is filed first in another jurisdiction, Delaware will stay its filing and let the case proceed in the other jurisdiction. But there is an important exception which occurs when the issue is uniquely one of Delaware law and one of the parties is chartered in Delaware. We will take any case that the parties elect to bring to us, such as when the parties have selected Delaware as a forum by contract.