

# Vexatious Vs. Virtuous: Del. Chancery Battles Dip In Decorum

By **Leslie A. Pappas**

Law360 (September 22, 2023, 4:51 PM EDT) -- Nearly three decades after a "maggot" reference in a deposition prompted the Delaware Supreme Court to rebuke a lack of civility, a certain roughness is creeping back into the state's legal proceedings — and the Court of Chancery wants it to stop.

Attorneys are taking less credible positions, being nastier during discovery, sending aggressive emails and becoming more adversarial during the litigation process, the court's judicial officers and others told Law360.

Squabbles once smoothed over with a phone call are now shuttled into letter opinions admonishing counsel to "**temper the rhetoric**" or morphing into long docket entries like: "Counsel is urged to take a more collaborative and constructive approach to this case."

The bad behavior — which many Delaware-based attorneys attributed to out-of-state lawyers — seems to be increasing as the bar has grown and Chancery's caseload has gotten busier, creating an additional strain on the court.

"All of us have more cases," Vice Chancellor J. Travis Laster told Law360. "When you have slack, you can deal with them better. When you're already maxed out, it becomes more of a burden."

## Fighting Off "Rambo"

Delaware courts have been trying to keep bad behavior out of the state since the nationwide rise of "Rambo" lawyers in the 1980s and early 1990s brought a warlike approach to litigation, using hardball tactics, unnecessary motion practice, fact manipulation, intimidation and a disdain for common courtesy.

In 1994, the Delaware Supreme Court called out flamboyant Texas attorney Joseph D. Jamail Jr. for "outrageous and unacceptable" deposition behavior that included vulgarities such as "you could gag a maggot off a meat wagon."

The justices were appalled. "This kind of misconduct is not to be tolerated in any Delaware court proceeding," they said in a **lengthy addendum** to their opinion on the case.

As the legal home to more than one million business entities, including two-thirds of Fortune 500 companies, the country's second-smallest state is the stage where many of the nation's largest and most contentious dramas play out — think Twitter vs. Elon Musk, Dominion Voting Systems vs. Fox News Network, or AMC Entertainment Inc.'s recent battle with its preferred shareholders.

Yet despite the high-profile cases, Delaware's bar was small, most attorneys knew each other, and they operated with a "cooperative mindset" that let the court take a "hands off" approach, Vice Chancellor Laster said.

Delaware was seen as a "magical place" insulated from the bad behavior happening elsewhere, according to the vice chancellor, who joined the court in 2009.

Delaware requires all litigants to have at least one local attorney; the attorneys often serve as "gatekeepers" to keep bad behavior at bay, the vice chancellor said. If attorneys from out of town

wanted to do something aggressive, Delaware attorneys would say, "We're just not doing that."

Gatekeeping has become more difficult as more out-of-state law firms opened Delaware offices and competition for local counsel heated up, Vice Chancellor Laster said.

In 1991, there were just 1,853 lawyers registered to practice in Delaware, according to figures from the Delaware Supreme Court. In 2023, that number hit a record 4,803.

Chancery Court **has also gotten busier**. New case filings hit a new peak of 5,254 in the 2023 fiscal year that ended in June, up from fewer than 4,200 in 2018, the data shows.

The Delaware State Bar Association now has 3,200 members, compared to about 700 members in 1980, according to the association's executive director, Mark S. Vavala.

### **Lawyers Being "Snotty"**

A more boorish atmosphere could tarnish Delaware's reputation for setting the "gold standard" in corporate law, says Michael C. Dalton, an attorney at Dalton & Associates PA in Wilmington.

"It would make Delaware less unique," Dalton said.

Incivility also prolongs litigation, makes it more expensive and can derail settlements and other transactions beyond the courtroom, civility advocates say. Court officers noted that often when manners disappear, so do the quality and precision of legal arguments.

When lawyers start being "snotty" to each other, they tend to litigate over things that don't really matter, Chancery Court Vice Chancellor Sam Glasscock III told Law360 recently on the sidelines of a Delaware State Bar Association event in Wilmington.

"It leads to a lot of inefficiency in litigation," he said. "It impedes the course of justice."

None of the attorneys, academics or judicial officers Law360 interviewed for this article could pinpoint exactly when incivility in Delaware started to rise, but a few had theories.

Brad Sorrels, a partner at Wilson Sonsini Goodrich & Rosati in Wilmington, said the decline of "disclosure-only" settlements may contribute to the perception that Chancery is getting rougher.

In the early 2000s, when nearly every merger announcement triggered a flood of shareholder suits, it made sense for attorneys to work together on settlements so the deals could close, Sorrels said. But after Chancellor Andre G. Bouchard's Trulia **opinion in 2016** made disclosure-only settlements more difficult, litigation shifted to complex breach of fiduciary duty claims filed after the merger.

Such derivative cases are "more hard-fought," Sorrels said. "There's more sharpness because the stakes are higher."

The "explosion of e-discovery" could be another reason behind flaring tempers, said Martin S. Lessner, a partner at Young Conaway Stargatt & Taylor LLP.

"People are incentivized to ask for everything and sort it out," Lessner says. "In almost every case, one side will ask for tons of discovery" and then "you're arguing over the edges," he said.

Some research has found that incivility can stem from implicit and explicit bias against women lawyers, young lawyers, lawyers of color and other minority groups.

Chancery Court Magistrate Bonnie W. David told Law360 that the "increasing snarkiness" she sees in attorney emails is often directed at young attorneys and people "who are already marginalized."

Others said it simply reflects the overall deterioration of civil discourse throughout the country.

"It's a larger issue," Vice Chancellor Glasscock said. "Our culture has gotten less civil and more coarse."

## Carrots and Sticks

The court has been trying to stay ahead of the problem using a "carrot and stick" approach, ranging from updating **court guidelines** to positive messaging at continuing legal education events to imposing sanctions when behavior gets out of line, Vice Chancellor Laster told Law360.

In July 2021, Chancellor Kathaleen St. J. McCormick ordered Gilead Sciences Inc. to **pay \$1.76 million in attorney fees** for "glaringly egregious litigation conduct" in response to a shareholder's books and records request, after the company refused to turn over a single document.

"Regrettably, Gilead's overly aggressive defense strategy **epitomizes a trend**," Chancellor McCormick wrote in a **post-trial ruling**. "Defendants like Gilead adopt this strategy with the apparent belief that there is no real downside to doing so, ignoring that this court has the power to shift fees as a tool to deter abusive litigation tactics."

And in July, Vice Chancellor Morgan T. Zurn **ordered** Blue Foundry Bancorp to pay a shareholder's attorney fees for "**vexatious litigation conduct**" after the bank's counsel repeatedly accused a shareholder of belonging to the "Jewish Mafia."

To be sure, Delaware is not the only place to pride itself on courtroom decorum. In fact, Arizona, Florida, Michigan and South Carolina mandate civility in the courts, according to David A. Grenardo, a professor of law at the University of St. Thomas School of Law in Minnesota who has **written extensively on civility** in the legal profession.

Standards vary within states, too. Dallas has a reputation for being abrasive, for example, but four hours south, "they will pull you aside and say, that's not how we do that in San Antonio," Grenardo said. In Naples, Florida, he once overheard one attorney chastise another, saying, "This is not Miami."

California recently took steps to require all attorneys there to affirm their oath to civility annually after **a task force found** that civility mattered not only to the functioning of the court system but also to the health and well-being of everyone in it.

"Civility in the bar is so precious because what we do is already hard," says A. Thompson Bayliss, a partner at Abrams & Bayliss LP in Wilmington. "We're under a lot of pressure, we're typically sleep-deprived. Nasty communication makes a difficult job even worse."

Bayliss says he tries hard to moderate his tone, not only for the sake of his colleagues but for the sake of his clients. Remaining tactful and presenting his opponent's arguments fairly puts him in a better position to convince the court that he is being a just advocate.

"The best argument in favor of civility is, it's persuasive," Bayliss said.

--Additional reporting by Jeff Montgomery, Hailey Konnath and Rose Krebs. Editing by Jay Jackson Jr.