

FEATURE

Ryan Lindsay with Vice
Chancellor Sam Glasscock III



A Presumption of Candor

Q&A with
Vice Chancellor
Sam Glasscock III

Q: Thinking back to before your distinguished legal and judicial career, you graduated from the University of Delaware before deciding to attend Duke University School of Law. What led to your decision to attend law school?

Inertia. I was a history major and had been offered a stipend to get a master's degree in history. I was on the UD campus in the summer of 1979 and decided that was not where I wanted to be, and I decided to give up my spot in the program. After that, I ended up working at Prickett Jones as a legal assistant doing mostly civil-suit investigative work. That was fun! I decided to take the LSAT. I was the first lawyer in my family. But I cannot honestly say that I had some burning desire to be a lawyer.

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Q: What was your first job out of law school and what are some other legal positions you had before joining the Court of Chancery?

My first job was back at Prickett Jones doing insurance defense. I loved the people there, but did not much enjoy the work, and decided to leave law. I actually have a certificate of retirement from the Delaware Supreme Court — retirement class of '85 — that came with a letter thanking me for my service to the Delaware Bar (all of a couple of years at that point). I spent time traveling the country and worked as a bartender at Kelly's Logan House. But then, I met the woman who would become my wife, and we got married and started a family and I realized I had to do something else. I was about to start at a chicken plant boxing chicken carcasses. The Friday night before the Monday that I was going to start at the chicken plant, my old history professor and mentor invited me to a dinner with Bill Chandler. By the end of that dinner, I became Bill Chandler's law clerk on the Superior Court and forewent the boxing job. I like to think I'd be a shift supervisor at the chicken plant by now, though.

Q: Thinking back to those first few years of your legal practice, do you have advice you would give to young Delaware lawyers about the beginnings of their own careers?

I do. First, my advice for them is do not think that you know what your career will hold, because you do not. So, stay open to opportunities and experiences. You cannot predict where those may lead and where you will end up.

My second piece of advice, which I think you would get from any judge, is that you start off in the courtroom with a presumption of candor and truthfulness. Do not lose that. It is the most valuable thing you have as a lawyer.

Q: You first joined the Court of Chancery in 1999 as what was then called a Master in Chancery, now known as Magistrates in Chancery. Why did you decide to join the Court of Chancery?

So, as I said, I clerked for Bill Chandler on the Superior Court and then in Chancery. After that, the Chancellor was kind enough to appoint me as a special discovery master on some cases during that time. I loved that quasi-judicial work. At that time, there was only one Master in Chancery and Richard Kiger was stepping down. Bill Chandler offered me the job and I was thrilled. My office was the old, long-vacant Chancery chambers in the Sussex County courthouse — it was a neat old space but everything was covered in dust. I pulled an *Atlantic Reporter* off the shelf once and moths literally flew out.

Q: You served in that position for 12 years. What was that experience like and how do you think it differs, if at all, from the current experience of the Magistrates in Chancery?

Well, first of all, the Magistrates in Chancery today are much smarter than the Master in Chancery was back in 1999. They have a much more complex docket. Of course they are still doing the traditional equity work like guardianships, trusts and estates, easements, but they also have more corporate work than before. I really enjoyed the traditional equity docket and those types of cases during my time as a Master in Chancery. It was a great gig.

Q: What was your experience like once you became a Vice Chancellor in 2011? What types of cases made up the bulk of the Court's docket at that time?

At that time, the Court was still doing mostly traditional equity corporate law cases. The LLC boom was just starting to accelerate. The docket when I first started

was still mostly made up of common-law fiduciary corporate cases. So, it was not a big stretch for me to go from a traditional equity docket as a Master in Chancery to an equity docket in the corporate arena. I had come from that background. And with the common-law fiduciary duty cases, the law itself is simple. It is the facts that are the challenge and how they comport with fiduciary duties.

Q: Over your approximately 13 years as a Vice Chancellor, what are the biggest changes you have noticed in terms of the Court's docket and case load?

It is a much more contract-heavy docket now. And those cases tend to go to trial more so than the fiduciary cases. As you know, in the fiduciary duty cases, the standard of review is so important that once the parties know whether entire fairness applies, it is not atypical for a settlement to occur. That is a rational decision by the parties.

For the contract-based cases, if there is some contractual ambiguity that the Court needs to address and it cannot be decided as a matter of the law, then those cases go to trial much more frequently. So, we have more trial work. We are also seeing many more earnout cases, and those also tend to go to trial.

Another big difference is that Chancellor Bouchard did away with the disclosure-only settlement cases with the *Trulia* decision. That decision completely changed the routine practice of bringing those cases.

Q: Throughout your time as a Vice Chancellor, you have obviously presided over many, many cases and written countless judicial opinions, orders and rulings. Thinking back over your body of judicial work, what are some of the most noteworthy changes in substantive Delaware law that you think have occurred during that time period?



Vice Chancellor Glasscock in his Sussex County courtroom with law clerks Amanda Di and Clare DaBaldo.

As I said, *Trulia* was really big. And *Trulia* was an anomalous thing. Generally, the common law develops incrementally. That's what you want for common-law decision making. There is a body of existing case law and the judge visits that body of common law in deciding the case before him or her. So, change is incremental. *Trulia* was an abrupt departure, but I think what made that appropriate in that instance was that the Court was setting a market for these cases. After every large deal, these fiduciary actions were filed almost as a matter of routine. If there were no facts to support a lucrative litigation opportunity for the plaintiff's counsel, then the parties would seek a disclosure-only settlement. It was a bad system, not because the participants were bad, but because the incentives were bad. So the Court said, we are not doing these anymore.

The other big change, again, is that generally the focus of many of the Court's decisions involves contract law now. And specifically, to what extent to allow self-ordering and whether that self-ordering is prohibited by equitable common law or statutory law.

Q: Due to the broad range of matters on your docket and the variety of issues they raise, you have a unique perspective on the cutting-edge issues for Delaware corporate law. Broadly speaking, what are some of these issues you see on the horizon that you think your colleagues will have to address in the years to come?

As just mentioned, I think the big one is the interplay between self-ordering via contract and the idea of what a traditional corporation is. You have LLCs and alternative entities and then traditional corporations. And I've always thought of the difference between an LLC and a traditional corporation as the difference between just living with someone versus marrying someone. When you live with someone, the couple can make its own rules. When you are marrying someone, that comes with a whole suite of rights, duties and responsibilities. And so, in the traditional corporation, the question is, and will be, to what extent to allow self-ordering.

Magistrate David said something on this point recently that I fully agree

with. And that is that this dispute is not a moral question. It is about what regime is best for wealth enhancement and what will be a fair system from the point of view of the expectations of the various parties. When designing a system, there are two extremes on either end of the spectrum. On one end, you can have a system where there are no fiduciary duties or limits on conduct. People may still invest under that system, maybe in their nephew's business, if they trust their nephew; but, overall, you will destroy the corporation as a means of wealth enhancement. On the other end, you could have a system that encourages nuisance litigation against the corporation, which is also destructive of wealth maximization. So, you have to find the system that gets the balance right. In the civil realm, justice is about what people's expectations are going in and then meeting those expectations. In the end, corporate law is about maintaining and creating a system through which wealth creation can be maximized and fairly distributed.

Q: One recurring issue that is presently on the minds of many and being discussed a lot is potential challenges from other jurisdictions to Delaware's historical role as the favored legal home for corporate entities. Is this a discussion you have seen arise in the past and how, if at all, has it differed from the current iteration of the discussion and debate? What, in your view, has allowed Delaware to retain its status as the favored corporate domicile for so long?

As you say, this is not a new topic. It is cyclical. Delaware is the beneficiary of the excellent legal system it has created with respect to corporations. And Delaware has an inertial advantage, but that does not prevent us from losing our position. Corporations can incorporate and can go

wherever they want to fairly easily. And as we were discussing, different corporate law regimes are possible. So, jurisdictions will find somewhere along that spectrum of options that they believe is fair and efficient.

Delaware of course has an enormous body of case law that is helpful due to the certainty it provides. This is the case law that law students learn in law school and so are familiar with when their clients come to them to ask about corporate jurisdictions. Certainty is usually a first priority for corporations.

Delaware also has a very good judicial nominating and approval process. Everyone in the state, including the governor and the legislature, know it is of enormous importance to Delaware to have good judges. And, even if someone like me slips by every once in a while, we have had and continue to have excellent judges.

But if you're asking do I think Delaware is in trouble, I do not. We have seen this before. I wish the other jurisdictions well. But I think Delaware and its body of case law and service will continue to predominate. Ultimately, it's a market, and as long as Delaware law is returning value in the market, it will remain strong. If we do not get the balance right between holding corporations and their fiduciaries accountable and limiting nuisance litigation, then the market will tell us that and we will not maintain our advantage and someone else will pick it up.

Q: Your written opinions are renowned for being extremely well-written and I think it is fair to say that you are known for using colorful and interesting metaphors and references to enhance your written decisions. Looking back over your written work, do you have a metaphor or reference that is your favorite or one that members of the bar

frequently tell you they most enjoyed reading?

Judges have very little direct feedback; if people enjoy reading my opinions, that is great.

But I will tell you the incident from which I never recovered on this. When I first came on the bench and had my first two regular law clerks, we had a case in which a controller had been stymied by the board. And this controller went through the whole range of emotions. First, he could not accept it, then he was angry about it, then he was sad, and then he resigned himself to the fact. And my law clerk and I said, hey, that is right out of Elisabeth Kübler-Ross. So, I asked the law clerk to see if he could fit the facts into her "death and dying" framework and we did, and I could not resist doing that. It is admittedly self-indulgent, but I have had a lot of fun.

Q: On that same theme, you are known for being very well read, and pulling your references from literature and books that you have read. What are you currently reading and/or what is the best book you have read this year?

I think if I'm known for being well read it's because I've had 63 years to read. But I do love reading. I am just finishing *A Month in the Country* by J.L. Carr. It is about two damaged World War I veterans and their time spent in the northern part of England. Beautiful. I am also reading *The Devil's Dictionary* by Ambrose Bierce. It's one I've just taken little sips of here and there. It's very cynical, but very fun.

I love buying used copies of books from Amazon. I like to see what people have written in the margins and handling old volumes. Amazon's rise as a secondhand bookstore has been great for me.

Q: One interesting aspect of your judicial service is that you have served in the community you grew up in. In what ways has that been a rewarding experience for you?

It *has* been rewarding. Particularly, I have had lots of guardianship cases and I am undoubtedly the last-serving judicial officer to have imposed a guardianship on someone born in the 19th century. And that was a grandparent of a high-school classmate of mine. So, although I don't consider myself to have done some big public service, I have had opportunities to do things affecting my community and have tried to reach the right results.

Q: What are you most looking forward to about retirement? And what do you expect you will miss the most about serving on the Court of Chancery?

It will be nice to get out from under pressure, particularly of the 90-day clock. There will be more time to travel, more time to think. However, I will miss the colleagues with whom I am so fortunate to work. Great people.

I will also greatly miss the law clerks. I have become so close to every set of law clerks. I actually tend to be a shy person, except, of course, on the bench. I was a little nervous when appointed as a VC about having two law clerks all of the time. But I've discovered that if I have one talent as a judge, it is picking good people to be law clerks.

Q: What do you hope people say about you in the future when seeing your name among the illustrious list of names of former Chancellors and Vice Chancellors?

I hope they say that, despite whatever limits he might have had, he treated the people in front of him with respect and attempted to give them a fair shake. ♦