A Practitioner's Perspective on the Tenure of Chancellor William T. Allen

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Historians have engaged in a continuing debate about whether the officeholder makes the office or the office makes its holder. During his twelve-year term, which included the most dynamic period of corporate takeover activity in history, Chancellor William T. Allen carried on the substantial and rich history of his predecessors. He also added new dimensions to the position of Chancellor in his creative approach to resolving the matters brought before him. One of his most notable innovations in the area of corporate law was to breach the artificial barricade that often separates legal decision-making from fundamental principles of economics. The result was not only the reasonable resolution of corporate disputes, but also fidelity to the economic underpinnings of capital formation and to concepts of social utility.

Chancellor Allen is most widely known for his landmark decisions in the field of corporate law. However, Chancellor Allen would frequently tell people that he found the noncorporate cases within his jurisdiction to be among the most interesting. As a court of equity, the Court of Chancery has jurisdiction over a variety of matters, including applications for termination of life support. Chancellor Allen often observed that the consideration of such cases constituted many of his most challenging (and most rewarding) moments as a judge.

Chancellor Allen also brought a creative approach to the many functional tasks confronting a trial judge. Because the Court of

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Chancery has no juries, he discouraged advocates from presenting dramatic pleas, encouraging them instead to focus succinctly on a reasoned analysis of the facts and law applicable to a given case. This is not to say that Chancellor Allen did not demonstrate an appreciation for drama. In fact, Chancellor Allen was an avid supporter of the arts generally, and drama specifically. The Chancellor's love of drama is reflected in a number of his decisions, which often built a level of suspense, leaving the reader unsure of the conclusion until the final pages of his opinion.

His approach to evidentiary issues was refreshingly pragmatic. Rather than slavishly adhere to precedent on interpretation of the hearsay rule or other rules of evidence, Chancellor Allen would repeatedly adopt an approach that could be summarized in one fundamental question: assuming that the rule in question was intended to achieve justice and aid the court in determining the truth, will its proposed application in this case further revelation or concealment of the truth? While some of Chancellor Allen's rules, interpretations, and decisions have been read as aberrational, they clearly achieved just results.

Chancellor Allen taught many of us some new lessons on effective advocacy. As a practicing attorney, I had the privilege of joining Chancellor Allen on a panel presentation to new lawyers on the art of written advocacy. In Chancellor Allen's view, effective advocacy should be "transparent." Transparency, he would explain, required presentation of an argument without the use of invective, without underlining, and without bombast. If some action by an adversary truly was "clear," "irrefutable," "outrageous," or "patently false," it did not require characterization as such. Chancellor Allen emphasized that the true art of advocacy was found in the presentation of the facts in a seemingly dispassionate manner, which nevertheless had the effect of leading the reader inexorably to the conclusion that the advocate's position was the appropriate result.

Chancellor Allen also told new lawyers that the great effort expended by lawyers to find and cite back his own cases to him, in an attempt to persuade him, might well be ineffective. As he explained, it was far easier for him to accept an advocate's interpretation of a decision rendered by a fellow judge. In contrast, it was easy for him to disagree with the interpretation of decisions he had authored, because he knew better than the advocate what specific facts drove the result.

One exceedingly difficult task for any trial judge is to apply the policies established by appellate courts to specific factual situations. In

the realm of corporate governance disputes litigated in the Court of Chancery, the job involves applying the developing views of the Delaware Supreme Court on good corporate practice to situations which often do not fit the mold. For example, the Delaware Supreme Court has set strict standards for the pursuit of shareholder derivative actions. Where no demand has been made on the corporation, demand futility must be plead with a greater specificity than is required by Chancery Court Rule 12(b). Many plaintiffs' lawyers had viewed the hurdles of *Aronson v. Lewis*, which gives a board dominated by independent directors primacy over the conduct of derivative litigation, to be nearly insurmountable.[1] Perhaps sensing that the pendulum had swung too far, Chancellor Allen was one of the first judges to find that certain claims survived a motion to dismiss on the ground that they raised a reasonable doubt that board actions were protected by the business judgment rule.[2]

While giving broad deference to the informed exercise of business judgment by directors, Chancellor Allen always remained a realist. During his tenure on the bench, the court had the opportunity to review a rash of leveraged buyout transactions, which typically involve management maintaining a substantial equity stake and in which minority investors are divested of any continuing interest in the corporation. Following the decision of the Delaware Supreme Court in *Weinberger v. UOP, Inc.*,[3] special negotiating committees of independent directors became a frequent feature of the landscape. The attempt to replicate arms-length bargaining in conflicted transactions gave rise to a variety of difficult issues. Many practical guidelines are found in Chancellor Allen's decisions, which emphasized the proactive role to be played by special committees, as well as the necessary availability of true veto power if the committee is to be afforded judicial deference.[4]

Chancellor Allen consistently emphasized the pivotal role of corporate lawyers in the effective functioning of corporate governance mechanisms. His seminal article on the operation of special committees of outside directors exemplified his approach to board action generally: for the court to maintain its traditional deference to directorial prerogative, it is necessary that lawyers perform the critical

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1. 473 A.2d 805 (Del. 1984).

2. *See* Thorpe v. Cerbco, Inc., CIV. A. No. 11713, 1993 WL 35967, at *4 (Del. Ch. Jan. 26, 1993).

3. 457 A.2d 701 (Del. 1983).

4. *See, e.g.*, *In re* Trans World Airlines, CIV. A. No. 9844, 1988 WL 111271, at *7 (Del. Ch. Oct. 21, 1988).

functions of advising directors of their responsibilities and guiding the board through the consideration of the appropriate alternatives.[5] He frequently espoused his conviction that as officers of the court, attorneys could not rely on their zealous representation of clients as a factor limiting their role in ensuring good corporate practices.

Although the vast majority of Chancellor Allen's decisions were affirmed on appeal, some of his most notable opinions were reversed.[6] There are obvious ways in which trial judges can increase their chances of affirmance and decrease the likelihood of reversal. Reliance on factual, rather than legal determinations is one. Another is to write opinions in such a manner as to suggest no doubt as to any issues resolved in the context of the decision.

Chancellor Allen rejected this approach. He freely admitted that many of the issues argued before him presented extremely close calls. It is likely that Chancellor Allen's explicit discussion of his own doubts and thought processes in reaching judgments resulted in making his decisions easier to reverse. Chancellor Allen acknowledged this possibility, yet steadfastly adhered to his approach. He felt that it was his duty not only to decide the many difficult cases before him, but also to memorialize the process through which those close cases were decided.

In a larger sense, though, Chancellor Allen's style has best served the clients and those from whom he expected the most: the lawyers counseling those clients. In advising clients, the most instructive decisions are not the ones that provide black and white rulings. Such rulings allow (and perhaps encourage) clients to take extreme positions. In contrast, the struggle over difficult issues reflected in Chancellor Allen's writing permits the qualitative evaluation of facts and circumstances surrounding decisions made by clients with the help of their advisors.

Chancellor Allen's retirement from the bench was a significant loss to the judiciary. However, we can expect that his new position at New York University will allow him to continue to help us try to harmonize and improve the law governing the actions of corporate directors.

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5. W.T. Allen, *Independent Directors in MBO Transactions: Are They Fact or Fantasy?*, 45 BUS. LAW. 2055 (1990).

6. *See, e.g.*, Cede v. Technicolor, Inc., CIV. A. No. 7129, 1990 WL 161084 (Del. Ch. Oct. 19, 1990), *rev'd*, 684 A.2d 289 (Del. 1996).