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Special Interrogatories: Not So Special Anymore

BY JOHN J. HOLEVAS

The Illinois General Assembly recently approved extensive revisions to 735 ILCS 5/2-1108 dealing with special interrogatories. These changes will apply to trials commencing on or after January 1, 2020, and may cause litigators to rethink the effectiveness of special interrogatories.

The statute has been amended in several significant ways. Below is an excerpt of the statute, which contains its historical language as well as the amended language.

> Unless the nature of the case requires otherwise, the jury shall render a general verdict. **Within the discretion of the court, the** ~~The~~ jury may be **asked** ~~required by the court, and must be required on request of any party~~ to find specially upon any material question or questions of fact submitted to the jury in writing. **Any party may request special interrogatories**. Special interrogatories shall be tendered, objected to, ruled upon and submitted to the jury as in the

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Chicken Dinner Warrants Recusal? Not So Fast!

BY DAVID W. INLANDER & RONALD D. MENNA, JR.

Invariably, judges receive invitations to attend dinners and events celebrating worthy civic, professional and public interest causes. Usually, in addition to being served the ubiquitous chicken dinner, judges are warmly greeted by practicing attorneys, community and religious leaders, and, at times, are even recognized from the dais for their presence. After all, judges should not be asked to shy away from public recognition of their esteemed status, should they? But maybe it is not that straight-forward. How careful must a judge be before accepting an invitation for a seemingly good cause?

Last month, the Seventh Circuit Court of Appeals issued an opinion which analyzed the topic of recusal in just such a setting involving an Illinois federal judge. In ***In re Gibson***[1] the seventh circuit reaffirmed that judges may attend the "rubber chicken" circuit without fear of having to recuse themselves, can have their children follow them into our profession, and their children's law firms may appear before them. While this case was analyzed under the Federal Judicial Canons, we believe the analysis and outcome would be the same under the Illinois Code of

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case of instructions. Submitting or refusing to submit a question of fact to the jury may be reviewed on appeal **to determine whether the trial court abused its discretion** ~~as a ruling on a question of law~~. When **any** ~~the~~ special finding of fact is inconsistent with the general verdict, **the court shall direct the jury to further consider its answers and verdict. If, in the discretion of the trial court, the jury is unable to render a general verdict consistent with any special finding, the trial court shall order a new trial. During closing arguments, the parties shall be allowed to explain to the jury what may result if the general verdict is inconsistent with any special finding** ~~former controls the latter and the court may enter judgment accordingly~~.

As a litigant considers whether to use a special interrogatory, one should carefully review three major change in the statute.

Historically, the submission of a special interrogatory was **mandatory**, which if presented in proper form, **had to be given** by the trial judge. Under the amendment, the decision to give the special interrogatory is left to the sound discretion of the court. Moreover, a decision by the trial judge to allow or refuse a special interrogatory will be reviewed under the more stringent abuse of discretion standard, rather than a *de novo* review.

The second major change is that under the prior statute the parties were **prohibited** in closing arguments to advise the jury what the ramifications would be if any general verdict was inconsistent with the answer to the special interrogatory. Now, with the amendment, counsel is able to explain to the jury the precise effect of the answer to the special interrogatories.

Finally, if there is any inconsistency between the general verdict and the special interrogatory, the court will require the jury to reconsider its findings. Prior to the amendment, the special interrogatory would control, and any general verdict that was in conflict would be set aside.

These amendments will require litigators to rethink the strategy and usefulness in tendering special interrogatories, which will now be left to the discretion of the court to give. This may lead to more uncertainty than clarity. While as a general proposition giving the court discretion allows for flexibility, it may be problematic for trial court judges to be given this new discretion with no guidance as to how to exercise it.■

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Judicial Conduct.[2]

The court was presented with the question of whether a judge's adult child's employment in a party's attorneys' law firm "creates an appearance of partiality in the eyes of an objective, well-informed, thoughtful observer."[3] It held:

It does not. The fact that a relative works at a law firm representing a party is not enough. There would need to be some aggravating circumstance, and there is none here. The Code of Conduct again provides guidance: "The fact that a lawyer in a proceeding is affiliated with a law firm with which a relative of the judge is affiliated does not of itself disqualify the judge." Cmt. to Canon 3C(1)(d)(ii).[4]

The facts are straightforward. Plaintiff, an Illinois criminal defense lawyer, was tried for the murder of his wife. After being found not guilty, he brought a § 1983 action against the City of Quincy and Adams County in the

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Central District of Illinois.[5]

The case was originally assigned to Judge Sue E. Myerscough. A year later, it was reassigned to Judge Colin S. Bruce. Plaintiff moved to recuse Judge Bruce as Plaintiff was representing in post-conviction proceedings a federal defendant who had been sentenced by Judge Bruce. Plaintiff's motion was granted, and the case was reassigned back to Judge Myerscough.[6]

At the next status hearing Judge Myerscough informed counsel about several circumstances which may be relevant to her impartiality: (1) her daughter had just been hired as an attorney with the University of Chicago's Exoneration Project, which is partly funded by the Plaintiff's attorneys' law firm and whose lawyers donate time, including those of Plaintiff's attorneys of record; (2) she had recently attended a dinner for the Illinois Innocence Project (affiliated with the University of Illinois Springfield), where her daughter worked prior to joining Exoneration Project, where many "exonerees", including the Plaintiff, were recognized; (3) she was aware of Plaintiff's underlying criminal case from publicity and from brief conversations with other lawyers, given that it involved a murder trial of a local criminal defense attorney; and (4) she had had cases with the City of Quincy and Adams County (defendants in the § 1983 action), with one of the defense attorneys and with the firm of another defense attorney. Plaintiff's attorneys disclosed they had worked with the judge's daughter, Lauren Myerscough-Mueller, they and the Innocence Project preemptively had screened that attorney from working on any cases before Judge Myerscough, and they were not responsible for Ms. Myerscough-Mueller's compensation. Nevertheless, Defendants subsequently moved to disqualify Judge Myerscough pursuant to the general recusal standard in 28 U.S.C. § 455(a).[7] Judge Myerscough denied the motion. Defendants then filed a Petition for Mandamus in the 7th circuit.[8]

Initially, the 7th circuit noted that since its decision in *Fowler v. Butts*[9] it permits reviews of a denied recusal motion under any section of 28 U.S.C. § 455 only through appeal of the final judgment. It then discussed the appropriate standard of review but did not decide whether it was de novo or the deferential "clear and indisputable" standard for mandamus petitions, as the result would be same under either standard.[10] Thus, this is still an open question.

The court then turned to the grounds for recusal. To the extent the ordinary standard for a writ of mandamus applies, under 28 U.S.C. § 455(a), the petitioner must show: (1) that review after final judgment will not provide an adequate remedy for the appearance of partiality; (2) the objective appearance of partiality is "clear and indisputable"; and (3) mandamus is otherwise appropriate under the circumstances.[11] Despite Defendants' failing to address the first or third prongs, the court addressed "the central issue of apparent partiality because the standard of review is debatable and because we are reluctant to leave an unnecessary cloud hanging over the proceedings in the district court. We find that there was no reasonable question as to Judge Myerscough's impartiality on either ground offered by defendants."[12]

Defendants' first ground for recusal was Judge Myerscough's attendance at the March 30, 2019, Illinois Innocence Project fundraiser. At that time, she was not assigned this case and had no expectation she would have any further involvement. Her daughter had interviewed with the Exoneration Project but had not yet been offered a job. The judge did not attend the fundraiser in an official capacity, and "many state and local officials and judges" also attended. She was briefly acknowledged from the podium, as were other dignitaries. Plaintiff and about thirty other "exonerees" (not judges) were invited on stage to be honored. While some of the exonerees were named in the program book, Plaintiff was not.[13]

Additionally, when this case was first filed, it was inadvertently filed in the wrong division and not corrected for almost three months. As such the court found this provides evidence that no judge-shopping occurred. Further Defendants did not suggest that the reassignment to Judge Bruce occurred based on any partiality.[14] Given these facts, the 7th Circuit concluded "that no 'objective, disinterested observer' could 'entertain a significant doubt that justice would be done in the case' based on the Innocence Project fundraiser"[1], and held:

To be sure, under quite different circumstances, a judge's more extensive involvement with charitable fundraising efforts and with organizations that regularly engage in litigation can present disqualification issues. Canon 4 of the Code of Conduct for United States Judges states: "A judge may engage in extrajudicial activities that are consistent with the obligations of judicial office." Several more detailed provisions of Canon 4 are relevant here. Canon 4C allows a judge to assist in planning fundraising activities for non-profit law-related, civic, charitable, educational, religious or social organizations. A judge may even be listed as an officer, director, or trustee. But a judge may not actually solicit funds for such an organization except from members of the judge's own family and other judges over whom the judge exercises no supervisory or appellate authority. *Id*. A judge may attend fundraising events for such organizations but may not be a speaker, guest of honor, or featured on the program of such an event. Cmt. to Canon 4C.[2]

Thus, serving as a member, officer or director of a public interest entity will not automatically lead to recusal. Nor will mere attendance at a fundraiser- no matter what is served for dinner! This is true even if a close relative, who happens to be a lawyer is merely employed by an interested party, but is not an owner (equity) of such firm. [3]

The second ground for recusal was the judge's daughter's salaried employment by the Exoneration Project, a public interest entity partially funded by Plaintiff's counsel. Ms. Meyerscough-Mueller was offered the job shortly after the fundraiser. Before the judge's daughter started, the Judge Meyerscough was reassigned this case. Defendants did not question the timing of Plaintiff's motion to recuse Judge Bruce and disclaimed any notion that the Exoneration Project hired Ms. Meyerscough-Mueller in an effort by Plaintiff's attorneys to ingratiate themselves. Judge Meyerscough daughter never represented the Plaintiff and she had been screened from any involvement in any of the judge's cases, including this one. However, even if the court were to disregard the distinction between Plaintiff's attorneys' law firm and the Exoneration Project, the 7th

Circuit, as quoted above, held that "without more", this is not a basis for recusal.[4]

Thus, *without more*, a judge's adult child's salaried employment by a law firm which appears before that judge is not a basis for an automatic recusal. A recusal is called for when the adult child acts as an attorney in the case or has an interest that could be substantially affected by the outcome of the proceeding, such as being an equity partner.[5] Ultimately, each case will rise or fall on the specific facts assessing whether an appearance of partiality in the eyes of an objective, well-informed, thoughtful observer, is elevated to a level to warrant recusal. Here, the 7th circuit held it did not.■

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1. *In re Gibson*, ___ F.3d ___, 2019 U.S. App. LEXIS 39089, 2019 WL 8017895 (7th Circuit, No. 19-2342, published February 25, 2020).
2. Illinois Supreme Court Rules 61-67.
3. *Gibson*, *supra*, 2019 U.S. App. LEXIS 39089, *16-17, *citing In re Mason*, 916 F.2d 384, 386 (7th Cir. 1990).
4. *Id*. at 17.
5. *Id*. at 2-3.
6. *Id*. at 3.
7. 28 U.S.C. § 455. *Disqualification of justice, judge, or magistrate judge* (a) Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned. While Illinois does not have a statute equivalent to 28 U.S.C. § 455, its concepts are found in Illinois Canon 3(C)(1), Illinois Supreme Court Rule 63, 735 ILCS 5/2-1001(a)(3) and 725 ILCS 5/114-5.
8. *Gibson*, *supra*, 2019 U.S. App. LEXIS 39089, * 3-5.
9. *Fowler v. Butts*, 829 F.3d 788, 793 (7th Cir. 2016).
10. *Gibson*, *supra*, 2019 U.S. App. LEXIS 39089, * 5-8.
11. *Id*., 2019 U.S. App. LEXIS 39089, * 8-9, *citing United States v. Sinovel Wind Group Co*., 794 F.3d 787, 793 (7th Cir. 2015).
12. *Id*., 2019 U.S. App. LEXIS 39089, * 9-10.
13. *Id*., 2019 U.S. App. LEXIS 39089, * 10-12.
14. *Id*., 2019 U.S. App. LEXIS 39089, * 10-11.
15. *Id*., 2019 U.S. App. LEXIS 39089, * 12, *citing United States v. Herrera-Valdez*, 826 F.3d 912, 917 (7th Cir. 2016).
16. *Id*., 2019 U.S. App. LEXIS 39089, * 12-13. Illinois Judicial Canon 4(C), Illinois Supreme Court Rule 64, incorporates the rules in Federal Judicial Canon 4, 4(A)(3), 4(B) and 4(C). However, compare Federal Canon 4 – "A Judge May Engage in Extrajudicial Activities That Are Consistent With the Obligations of Judicial Office" – with Illinois Canon 5, Illinois Supreme Court Rule 65 – "A Judge Should Regulate His or Her Extrajudicial Activities to Minimize the Risk of Conflict With the Judge's Judicial Duties".
17. *Id*. See also Illinois Judicial Canon 4(C), Illinois Supreme Court Rule 64 ("A judge may serve as a member, officer or director of a bar association, governmental agency, or other organization devoted to the improvement of the law, the legal system, or the administration of justice."); and Illinois Judicial Canon 5(B), Illinois Supreme Court Rule 65 ("A judge may participate in civic and charitable activities that do not reflect adversely upon the judge's impartiality or interfere with the performance of the judge's judicial duties", and "may serve as an officer, director, trustee, or nonlegal advisor of an educational, religious, charitable, fraternal, or civic organization not conducted for the economic or political advantage of its members ….").
18. *Gibson*, *supra*, 2019 U.S. App. LEXIS 39089 at * 13-15.
19. 28 U.S.C. § 455(b)(5)(ii) and (iii). See also *Jenkins v. Arkansas Power & Light Co*., 140 F.3d 1161, 1165 (8th Cir. 1998) (recusal not required where judge's son was "a salaried associate who would not be substantially affected by the outcome"); *Nobelpharma AB v. Implant Innovations, Inc*., 930 F. Supp. 1241, 1267 (N.D. Ill. 1996) (recusal not required where judge's daughter was salaried partner, not equity partner, in law firm representing party before judge); *People v. Saltzman*, 342 Ill.App.3d 929, 931 (3rd Dist.), *appeal denied*, 206 Ill.2d 640 (2003), *quoting People v. Craig*, 313 Ill.App.3d 104, 105 (2nd Dist.), *appeal denied*, 191 Ill.2d 540 (2000) ("A judge should disqualify himself if he knows he has a substantial financial interest in the subject matter in controversy or is a party to the proceeding where such an interest might affect the outcome of the proceeding. 203 Ill. 2d R. 63 C(1)(d). 'The mere fact that a judge has some relationship with someone involved in a case, without more, is insufficient to establish judicial bias or warrant a judge's removal.' "). *But see, In re Hatcher*, 150 F.3d 631, 638 (7th Cir. 1998) (recusal required where judge's child worked on the linked prosecution of a co-conspirator); *SCA Services, Inc. v. Morgan*, 557 F.2d 110, 116 (7th Cir. 1977) (recusal required where judge's brother was an equity partner in a firm litigating before the judge); and Illinois Judicial Canon 3(C)(1)(e)(iii), Illinois Supreme Court Rule 63 ("A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where: … the judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person: … is known by the judge to have a more than *de minimis* interest that could be substantially affected by the proceeding ….").

The Unlimited Potential of Limited Scope Engagements

BY JOE SOULIGNE

In a time where many are pondering issues of access to our legal system, there is a tool that often remains overlooked and under-used, that of the limited scope engagement. With a relatively small amount of preparation, these sorts of short-term consultations and/or representations can be advantageous to both the lawyer and the client.

What Are Limited Scope Engagements?

Limited scope engagements are exactly what the name implies – representations of a client that are limited to a short, pre-determined purpose, after which the representation will automatically end. This purpose can include one or more components: providing legal advice about legal rights, drafting and/or reviewing documents, conducting negotiations, or even court appearances on the client's behalf.

Ethical Concerns in Limited Scope Engagements

The Illinois Rules of Professional Conduct allows such limited representations under Rule 1.2(c), which states that "A lawyer may limit the scope of the representation if the limitation is reasonable under the

circumstances and the client gives informed consent."[6]

Additionally, Supreme Court Rule 13(c)(6) allows an attorney to make a limited scope appearance in a civil proceeding, so long as the attorney and the party to be represented have entered into a written agreement to do so.[7] In such cases, the attorney must file a notice of limited scope appearance form as found in the Article I Forms Appendix to the Supreme Court Rules.[8]

Supreme Court Rule 13(c)(7) further explains that after the completion of the representation under Rule 13(c)(6), the attorney must withdraw by oral motion or written notice.[9] If the representation is completed during a court appearance, such motion may be made orally and the court must grant the motion, so long as the client does not object on the grounds that the representation has not been completed as agreed. Otherwise, the attorney should file a notice of withdrawal of limited scope appearance form, also found in the Forms Appendix to the Supreme Court Rules, including serving the form on the client and other parties or counsels of record. If no objection is filed within 21 days, the representation automatically terminates.

Finally, Supreme Court Rule 137(e) allows an attorney to assist a self-represented person in drafting or reviewing pleadings, motions or other documents without making an official appearance.[10] In the course of such a review, the attorney "may rely on the self-represented person's representation of facts without further investigation by the attorney, unless the attorney knows that such representations are false."[11]

Factors to Consider in Undertaking a Limited Scope Engagement

The first and most important consideration in undertaking a limited scope engagement with a client is to consider carefully both the client and the situation, as any limitations must be "reasonable *under the circumstances*" and the client must give "informed consent" under Rule 1.2(c) of the Illinois Rules of Professional Conduct.

In order to evaluate the reasonableness of such an engagement under the circumstances, it is important to consider whether the tasks involved are capable of being performed independently of other aspects of the case, such that the task to be completed can be easily defined and performed without deeper involvement in the case. Additionally, the terms of the representation, including what the attorney will and, perhaps more importantly, will not do, are disclosed and agreed to in advance.

One easy way to ensure that both the attorney and the client are clear on the scope and limitations of any arrangement is to use a simple engagement agreement. This agreement, signed by both the attorney and the client in advance of any work being completed, should establish in detail the client's goals for the duration of the representation, as well as the specific work that the lawyer plans to perform to reach those goals.

It is also prudent to include a detailed explanation of the fee structure for the representation. In many cases, the nature of the representation and the client's situation will lend itself to either a flat fee or a cap on the charges incurred—for example, a limited scope consultation may be limited to an hour at a set billing rate, while allowing the client to extend their time beyond that initial hour should they choose to do so.

Finally, consideration should also be given to potential conflicts of interest, as well as the subject matter of any advice or work done. Practitioners must be careful to vet potential limited scope clients carefully enough to ensure that they do not conflict with any past or present clients just as if they were a traditional client. Additionally, in consultations where clients may have a myriad of legal questions related to their particular issue, an attorney should take particular caution not to offer advice without adequate knowledge of the particular area of law, even if that requires additional research either before or after the client meeting.

For additional information on limited scope engagements, including sample representation agreements and best practices, see the ISBA's PracticeHQ at https://www.isba.org/practicehq/limitedscoperepresentation.■