

GUIDELINES FOR REQUESTING SPECIAL DESIGNATION OF JUDICIAL OFFICERS IN COURT OF CHANCERY ACTIONS

Published March 15, 2023¹

Introduction

Because of the divide Delaware maintains between its law and equity courts, there are at times disputes that could implicate the subject matter jurisdiction of both the Court of Chancery and the Superior Court. In such cases, the Chief Justice has the power under Article IV, Section 13 of Delaware's constitution to designate a judge sitting in one court to serve as a judge in another. This process is known as special designation, often referred to as cross-designation. Special designations are decided by the Chief Justice upon a written request by the administrative head of the relevant court (*i.e.*, by the Chancellor or President Judge of the Superior Court). The following guidelines are intended to help practitioners identify common examples where special designation might be appropriate, common factors that should be considered in determining whether a request for special designation should be made or will be granted, as well as certain best practices for making such a request. As with all guidelines, the particular facts and circumstances of any one case or controversy might require the parties or courts to deviate from the practices outlined herein.

By and large, requests for special designation will typically involve designating a Superior Court judge to serve as a Vice Chancellor for purposes of a case. Given the Court of Chancery's ability through its "clean-up" jurisdiction to resolve purely legal issues that arise in cases that are otherwise properly before it, requests for a Chancellor or a Vice Chancellor to be designated to serve as a Superior Court Judge are rarer, though they still occur.

The most common example of special designation involves an action that was properly instituted in Superior Court, but as the case unfolds it becomes clear that equitable relief is needed. In such a case, it would be wasteful and would create a risk of inconsistent rulings for the case to start over in the Court of Chancery or for the parties to initiate a second proceeding solely for the purposes of obtaining equitable relief. The same situation can occur if the Court of Chancery declines subject matter jurisdiction after the case has unfolded. Another example, though less common, involves two parallel cases, one properly brought in the Court of Chancery and the other that was properly brought in Superior Court. In that circumstance, it may be advisable for a unified action to proceed in one court.

Although not intended to be exhaustive, these examples show that special designation can be a useful tool if invoked properly. The process is not intended, however, to be used to cure

¹ On February 23, 2023, the Delaware Supreme Court issued a Standing Order designating the five Superior Court judges who serve on that court's Complex Commercial Litigation Division as Vice Chancellors empowered to hear and resolve any case filed under Section 111, as selected by the Chancellor of the Court of Chancery and the President Judge of the Superior Court. These guidelines are not intended to apply to special designations made pursuant to the Supreme Court's Standing Order.

jurisdictional defects where a party simply files in the wrong court. Indeed, the courts will continue to be wary of requests for special designation in those cases where granting the request would undercut the traditional allocation of jurisdiction among Delaware's courts.

Is Special Designation Appropriate?

The process for special designation should be invoked sparingly and only in those cases where special designation would (1) promote judicial economy; (2) avoid the risk of inconsistent decisions among various courts; or (3) otherwise further the interest of justice. To that end, special designation generally involves considerations such as:

- Whether the case was properly filed in the appropriate court in the first instance or whether a request for special designation is being used to try to cure a jurisdictional defect (the latter of which is disfavored);
- Whether there are multiple actions at law and equity pending simultaneously, but it makes practical sense for those actions to proceed before one judicial officer, such as where one judicial officer overseeing the matter in which special designation is sought has already expended resources becoming familiar with the case or where there is a risk of inconsistent judgements;
- Whether grounds for equitable jurisdiction are doubtful or otherwise weak (in those cases first filed in the Court of Chancery), but an outright transfer to Superior Court pursuant to 10 *Del. C.* § 1902 is opposed; and
- Whether cross-designation would address or mitigate a conflict of interest faced by judicial officers.

How Does the Special Designation Process Work?

The special designation process can be initiated by the parties or by the court *sua sponte*.

If the process for special designation is initiated by the parties, they should submit (jointly, if unopposed) a letter to the judicial officer overseeing the case stating the reasons why special designation would be advisable. For example, in a case proceeding in Superior Court, the advisability of special designation should first be considered by the judge to which the case is assigned. If there are parallel actions proceeding in both the Superior Court and the Court of Chancery, both judicial officers should have the opportunity to consider the matter. The letter seeking a special designation should be accompanied by a form of order granting the request (described below) and as an exhibit, a draft letter to the Chancellor or President Judge (described below). If the request is opposed, the opposing party may submit a short letter stating the grounds for the opposition. Copies of these submissions should be filed on the appropriate docket (or in both dockets if parallel cases are pending). Whether at the request of a party or *sua sponte*, the judicial officer overseeing the case will determine in the first instance whether special designation

is advisable and, if he or she agrees, endorse it. If the judicial officer overseeing the case does not believe a special designation is advisable, then no special designation shall be made.

If the judicial officer overseeing a case determines that special designation is advisable, the parties must present their request to the administrative judge of the Court in which the Special Designation is sought. For instance, when a Superior Court judge is to be cross-designated to sit as a Vice Chancellor, the request for special designation is presented to the Chancellor. Conversely, if the Chancellor or a Vice Chancellor is to be cross designated to sit as a Superior Court Judge, the request is presented to the President Judge of the Superior Court. In either case, it is customary for the Chancellor and President Judge to confer on any request for special designation and to refuse a request if there is any disagreement among them.

A request for special designation is typically presented to the Chancellor or the President Judge (as the case may be) in the form of a letter. Parties are encouraged to contact chambers for guidance on the appropriate means of transmitting the letter. In addition, copies of the letter should be e-filed on the appropriate docket (or both dockets if parallel cases are pending).

The request to the Chancellor or President Judge (as the case may be) should, at a minimum, address the following:

- The nature of the case;
- The posture of the case;
- The source of the request for special designation (*i.e.*, was the request initiated by the parties or *sua sponte*);
- A discussion of the relevant factors both in favor and against (if any) special designation;
- Any other information that the judge for whom special designation is sought believes should be included; and
- A proposed form of order granting the special designation to be signed by the Chief Justice.

In preparing the request, parties are encouraged to keep in mind that it is likely that the Chancellor or President Judge (as the case may be) will have no familiarity with the underlying facts of the case or the grounds for special designation and the parties should strive to succinctly present the issue to facilitate a prompt determination.

If the Chancellor or President Judge (as the case may be) agrees that special designation is appropriate, that judge will prepare a letter and submit it along with a proposed form of order to the Chief Justice for consideration. Copies of the letter to the Chief Justice and any resulting order entered by the Chief Justice will be transmitted to the appropriate judicial officer for e-filing in the case (or cases) pending. This process is typically handled internally by the Courts.