

# The Public Servant

The newsletter of the Illinois State Bar Association's Committee on Government Lawyers

## FOIA Corner: Two of the Illinois Supreme Court's recent decisions concerning the Illinois Freedom of Information Act

BY BARBARA GOEBEN

Within the past year, the Illinois Supreme Court issued two holdings concerning the Illinois Freedom of Information Act (FOIA), granting split decisions: one for non-disclosure and one for disclosure. First, in *Perry v. Department of Financial and Professional Regulation*, the court determined that the FOIA provisions valid at the time of the FOIA request control, unless subsequent

amendments to the law controlling the documents' disclosure specifically state that the amendments apply retroactively. In this consolidated appeal, the appellants requested public records from the Illinois Department of Financial and Professional Regulations. During the pendency of this request, the Illinois legislature amended the Department of Professional

*Continued on next page*

FOIA Corner: Two of the Illinois Supreme Court's recent decisions concerning the Illinois Freedom of Information Act

1

A look at the process for removing judges in Illinois

1

## A look at the process for removing judges in Illinois

BY ROBERT P. OSGOOD

Judge Jessica Arong O'Brien was elected circuit judge of Cook County in 2012. In February of 2018, she was convicted for a mortgage fraud scheme in which she allegedly participated prior to taking the bench. She was able to remain sitting, although assigned to administrative duties, while awaiting sentencing last fall. The ARDC suspended Judge O'Brien's law license last April, and the Judicial Inquiry Board filed a complaint with the Illinois Courts Commission last June. Pending sentencing and appeal, Judge O'Brien filed for retention in the November election.

Retired Cook County Judge George Scully filed suit in the Supreme Court seeking her removal from the ballot. The Illinois Courts Commission was set to consider at a September 24 hearing whether to suspend O'Brien from her position without pay. However, O'Brien withdrew her notice to seek reelection and resigned from the bench effective September 4, after her posttrial motions were denied.

### The History of Judicial Discipline

Under the 1818 Constitution, judges could only be removed by impeachment

or a mechanism known as "legislative address." In 1833, Supreme Court Justice Theophilus Smith was impeached, acquitted by the Senate, and survived a legislative address attempt. In 1842, Supreme Court Justice Thomas Brown was impeached and acquitted by the Senate after being represented by Abraham Lincoln.

Under the 1870 Constitution, impeachment and concurrent resolution of the House and Senate were the only two ways to remove a judge. A judicial disciplinary commission was established

*Continued on page 3*

## FOIA Corner: Two of the Illinois Supreme Court's recent decisions concerning the Illinois Freedom of Information Act

CONTINUED FROM PAGE 1

Regulation Law to exempt the release of the requested documents. Citing this amendment, the circuit court dismissed the FOIA requesters' lawsuits, which the appellate court affirmed. The Illinois Supreme Court, however, reversed, noting that the subsequent FOIA amendment did not specify that it applied retroactively to pending requests.

*Practice Tip:* In determining the validity of a FOIA request, one needs to look at the status of the law at the time of the request, unless the FOIA amendment specifies retroactive application.

In *In re Appointment of Special Prosecutor*, the Illinois Supreme Court upheld the non-disclosure of grand jury documents, holding that they are exempt from disclosure under FOIA. Specifically, since the Illinois Code of Criminal Procedure protects the privacy of grand jury matters, Section 7(1)(a) of FOIA, which exempts from disclosure information specifically prohibited from disclosure by state law, applies.

As part of this opinion, the Illinois Supreme Court provided a concise summary of the legislative intent and interpretation of FOIA:

Based on this clear expression of legislative intent, this court has held that public records are presumed to be open and accessible. FOIA is to be liberally construed to achieve the goal of providing the public with easy access to government information. Consequently, FOIA's exceptions to disclosure are to be construed narrowly so as not to defeat the intended statutory purpose. Thus, when a public body receives a proper request for information, it must comply with that request unless one of FOIA's narrow statutory exemptions applies. 5 ILCS 140/3(a) (West 2014).

*Practice Tip:* In determining the validity of a FOIA request, one needs to look at whether a more specific state law (such as the Illinois Code of Criminal Procedure or the Illinois Mental Health Confidentiality Act) controls over the disclosure. ■

1. *Perry v. Department of Financial and Professional Regulation*, 2018 IL 122349 ¶ 79.
2. 20 ILCS 2105/2105-117.
3. *Perry*, *supra* note 1 at ¶ 1.
4. *Id.*
5. *Perry*, *supra* note 1 at ¶ 79.
6. *In re Appointment of Special Prosecutor*, 2019 IL 122949 ¶ 25.
7. *Id.* at ¶ 68.
8. *Id.* at ¶ 25 (other citations omitted).

## The Public Servant

This is the newsletter of the ISBA's Committee on Government Lawyers. Section newsletters are free to section members and published at least four times per year. Section membership dues are \$30 per year.

To subscribe, visit [www.isba.org/sections](http://www.isba.org/sections) or call 217-525-1760.

### OFFICE

ILLINOIS BAR CENTER  
424 S. SECOND STREET  
SPRINGFIELD, IL 62701  
PHONES: 217-525-1760 OR 800-252-8908  
WWW.ISBA.ORG

### EDITORS

Mary L. Milano

### PUBLICATIONS MANAGER

Sara Anderson

✉ [sanderson@isba.org](mailto:sanderson@isba.org)

### GOVERNMENT LAWYERS

#### COMMITTEE COUNCIL

Justin L. Leinenweber, Chair  
Athena T. Taite, Vice-Chair/CLE Coordinator  
Barbara Goeben, Secretary  
Michael S. Jadron, Ex-Officio  
Patrick T. Driscoll, Jr.  
Robert W. Fioretti  
Jennifer Lynn Gover Bannon  
Rex L. Gradeless, II  
Chelsea E. Kasten  
Kathryn A. Kelly  
Phillip B. Lenzini  
Mary L. Milano, Newsletter Editor  
Peter Joseph Orłowicz,  
Robert Paul Osgood  
Rick Joseph Veenstra  
Emily R. Vivian  
Hon. Kenneth Wright, Jr., Board Liaison  
Melissa L. Burkholder, Staff Liaison  
Edward W. Huntley, CLE Committee Liaison

## SAVE THE DATE

**ISBA LAW ED**  
CLE FOR ILLINOIS LAWYERS

**Ethics Extravaganza 2019**

**May 23, 2019 • Springfield**

Registration and details coming soon.

For more information:  
[www.isba.org/cle/upcoming](http://www.isba.org/cle/upcoming)

DISCLAIMER: This newsletter is for subscribers' personal use only; redistribution is prohibited. Copyright Illinois State Bar Association. Statements or expressions of opinion appearing herein are those of the authors and not necessarily those of the Association or Editors, and likewise the publication of any advertisement is not to be construed as an endorsement of the product or service offered unless it is specifically stated in the ad that there is such approval or endorsement.

Articles are prepared as an educational service to members of ISBA. They should not be relied upon as a substitute for individual legal research.

The articles in this newsletter are not intended to be used and may not be relied on for penalty avoidance.

## A look at the process for removing judges in Illinois

CONTINUED FROM PAGE 1

by constitutional amendment in 1964, to be convened by the Chief Justice or the Senate, and subject to Supreme Court rule. One such rule created the Illinois Courts Commission, and established the procedure by which it was to receive and hear complaints.

However, in response to misconduct by the Chief Justice and an associate justice of the Supreme Court just before the Constitutional Convention, the delegates chose to take away judicial control of judicial discipline. The 1970 Constitution gave the Supreme Court the exclusive authority to promulgate rules of judicial conduct for judges, but the convention delegates were clear that they did not want the court to be involved in judicial discipline, specifically the investigative, prosecutorial, and adjudicative functions, instead creating two independent agencies—the Judicial Inquiry Board and the Illinois Courts Commission. Both are vested with the power to draft its own rules of procedure, control its staff, and issue subpoenas. The Commission's decisions are final and nonreviewable.

Under the current Constitution, the Judicial Inquiry Board investigates complaints against judges and prosecutes the complaint before the Illinois Courts Commission. The Commission has the authority to remove a judge from office, suspend a judge without pay, censure or reprimand the judge, or retire a judge who is unable to perform his or her duties.

### Can a Judge Be Removed from Office by Disbarment?

The Attorney Registration and Disciplinary Commission filed a petition with the Supreme Court asking that it suspend Judge O'Brien's license to practice law, *and that it enjoin her from serving as judge*. However, as discussed above and noted in Respondent's Answer to Rule to Show Cause, the court does not have the power to remove a judge. The ARDC argued in its petition that this proceeding is analogous to the recent case against Rhonda Crawford, a law clerk and judicial candidate who put on a judge's robe and heard cases. In

that case, the ARDC suspended her license and enjoined her from taking the bench. But, as noted in Respondent's answer, Crawford was enjoined prior to taking the bench, not removed after she had assumed office.

### Can a Judge Be Removed for Conduct Committed Prior to Their Becoming a Judge?

One question is whether a judge can be removed from office for conduct occurring before he or she was seated. In this case, Judge O'Brien argued that she could not be removed from office for conduct occurring before she took the bench. Interestingly, the Illinois Courts Commission ruled in the case of *In re Kaye* that the Judicial Inquiry Board and Courts Commission were limited to matters that occur while a judge is in office, and that judges may not be disciplined for behavior, including criminal misconduct, that occurred before they took the bench.

The Constitution also allows for removal for "conduct that brings the judicial office into disrepute." This clause would seem broad enough to encompass a conviction while a judge is sitting, even if the conduct giving rise to the conviction occurred prior to being seated. Could this have been grounds for removing Judge O'Brien? The *Kaye* decision considered this as well, finding that "conduct that occurred before a man became judge may bring the man into disrepute, but it can hardly be said to bring the judicial office into disrepute." The Commission noted that conviction of a felony would render a judge ineligible for office under Article XIII, Section 1 of the Constitution, whether committed before or after the judge took the bench. Also, since Article VI, Section 11 requires a judge to be a licensed attorney, disbarring the judge would disqualify him or her from serving. However, as discussed above, neither her conviction nor her suspension was able to immediately remove Judge O'Brien or prevent her from taking her judicial salary.

### Conclusion

As demonstrated by the O'Brien case,

removing a judge can be a difficult process. While disbarment would make a judicial candidate ineligible for office, the ARDC cannot remove a sitting judge simply by disbarring him or her. One must also consider when the offending conduct occurred in order for it to warrant removal. And, while felony convictions make a candidate ineligible for office, it is unclear whether the Courts Commission would remove a judge convicted of conduct occurring prior to their taking office. Also, defendants are entitled to pursue posttrial remedies, and so until those remedies are exhausted, a judge may remain in office collecting their salary. ■

---

*The author is senior counsel and ethics officer for the Illinois Department of Central Management Services.*

1. [https://www.cookcountyclerk.com/sites/default/files/SummaryReportCombined\\_11\\_2012.pdf](https://www.cookcountyclerk.com/sites/default/files/SummaryReportCombined_11_2012.pdf).
2. Jon Seidel, *Cook County Judge Jessica Arong O'Brien found Guilty of Fraud in Mortgage Scheme*, Chicago Sun Times, Feb. 22, 2018.
3. [http://www.cookcountycourt.org/MEDIA/ViewPressRelease/tabid/338/articleid/2547/Default.aspx?dnnprntmode=true&mid=889&SkinSrc=\[G\]Skins%2F\\_default%2FNo+Skin&ContainerSrc=\[G\]Containers%2F\\_default%2FNo+Container](http://www.cookcountycourt.org/MEDIA/ViewPressRelease/tabid/338/articleid/2547/Default.aspx?dnnprntmode=true&mid=889&SkinSrc=[G]Skins%2F_default%2FNo+Skin&ContainerSrc=[G]Containers%2F_default%2FNo+Container).
4. *In re Jessica Arong O'Brien*, 18 PR 0010.
5. Jonathan Bilyk, *Judicial Regulators Move to Remove Cook Judge Convicted of Fraud, Block \$192K Salary*, Cook County Record, June 19, 2018.
6. <https://www.elections.il.gov/ElectionInformation/CandDetail.aspx?CandidateID=HCrhcVlu0m838cxPi0%2b1g%3d%3d&ElectionID=FL3a9Ron9Vg%3d>.
7. Jon Seidel, *Found Guilty of Fraud, Judge now Faces bid to Knock her off November Ballot*, Chicago Sun Times, Aug. 21, 2018.
8. *Id.*
9. *Scully v. White*, Ill. S. Ct. 123757 (2018), Order at 1, 9/12/18.
10. Ill. Const. 1818 Art. II, Sec. 22. The house of representatives shall have the sole power of impeaching, but a majority of all the members present must concur in an impeachment. An impeachment shall be tried by the senate, and when sitting for that purpose, the senators shall be upon oath or affirmation to do justice according to law and evidence. No person shall be convicted without the concurrence of two-thirds of all the senators present.
11. Ill. Const. 1818 Art. IV, Sec. 5. The judges of the inferior courts shall hold their offices during good behavior, but for any reasonable cause, which shall not be sufficient ground for impeachment, both the judges of the supreme and inferior courts shall be removed from office on the address of two-thirds of each branch of the general assembly [...]

12. *The Illinois Two-Tier Judicial Disciplinary System: Five Years and Counting*, 54 Chi. Kent L. Rev. 69, 70 (1977).

13. Frank Greenberg, *Justice James D. Heiple: Impeachment and the Assault on Judicial Independence*, 29 Loy. Chi. L. Rev. 741, 777 (1977).

14. Ill. Const. 1870 Art. V, Sec. 15. The governor, and all civil officers of this State, shall be liable to impeachment for any misdemeanor in office.

15. Ill. Const. 1870 Art. VI, Sec. 30. The general assembly may, for cause entered on the journals, upon due notice and opportunity of defense, remove from office any judge, upon concurrence of three-fourths of all the members elected, of each house. All other officers in this article mentioned, shall be removed from office on prosecution and final conviction, for misdemeanor in office.

16. Judicial Amendment, 1964 Art. VI, Sec. 18.

Notwithstanding the provisions of this Article relating to terms of office, the General Assembly may provide

by law for the retirement of judges automatically at a prescribed age; and, subject to rules of procedure to be established by the supreme court and after notice and hearing, any judge may be retired for disability or suspended without pay or removed for cause by a commission composed of one judge of the supreme court selected by that court, two judges of the appellate court selected by that court, and two circuit judges selected by the supreme court. Such commission shall be convened by the chief justice upon order of the supreme court or at the request of the Senate.

17. Ill. S. Ct. R. 51.

18. Greenberg, *supra* note 13 at 71.

19. Ill. Const. 1970 Art. VI, Sec. 13.

20. Ill. Const. 1970 Art. VI, Sec. 15(b) and (e).

21. Ill. Const. 1970 Art. VI, Sec. 15(d), (g) and (i).

22. Ill. Const. 1970 Art. VI, Sec. 15(f).

23. Ill. Const. 1970 Art. VI, Sec. 15.

24. Ill. Const. 1970 Art. VI, Sec. 15(e).

25. Administrator's Petition for Interim Suspension

¶ 19.

26. Answer to Rule to Show Cause ¶ 16.

27. *In re Crawford*, 2016 PR 00115.

28. Answer to Rule to Show Cause ¶ 33.

29. Seidel, *supra* note 7.

30. *In re Kaye*, 1 Ill. Cts. Comm. 36 (1974).

31. Ill. Const. 1970 Art. VI, Sec. 15(e)(1).

32. *Kaye*, *supra* note 30 at 53.

33. *Id.* at 54.

34. *Id.* at 54.

Boost your practice IQ @

# PracticeHQ

## Practice Management and Technology Resources

- ✓ Open a Firm
- ✓ Build
- ✓ Manage
- ✓ Protect
- ✓ Wind Down

[ISBA.ORG/PRACTICEHQ](https://www.isba.org/practicehq)