



ILLINOIS STATE
BAR ASSOCIATION™

Illinois Bar Journal

[December 2011](#) • Volume 99 • Number 12 • Page 604

[The Magazine of Illinois Lawyers](#)

Thank you for viewing this Illinois Bar Journal article. Please [join the ISBA](#) to access all of our IBJ articles and archives.

LawPulse

Substitution of judge for cause: the high court keeps the bar high

By Helen W. Gunnarsson

The supreme court refused an invitation to hold that "appearance of impropriety," as opposed to proof of actual prejudice, is the standard for substitution of judge for cause.

Who would expect that an alleged exchange of "hellos" between a judge and a litigant in a fitness club parking lot would generate a petition for substitution of judge for cause, an application to the Illinois Appellate Court for a certificate of importance under SCR 316, and an argument that the Illinois Supreme Court should change the statutory standard for substitution of judge for cause?

As Chicago lawyer Alyssa M. Reiter noted in her "Quick Take" on ISBA's Illinois Lawyer Now, *In re Marriage of O'Brien*, 2011 IL 109039, may have been a family law matter, but the supreme court's opinion addressed the more broadly applicable issue of when a substitution of judge should occur for cause under 735 ILCS 5/ 2-1001(a)(3).

The facts of *O'Brien*

The court's opinion reflects that Lisa O'Brien filed domestic battery charges against her husband, John, in early November 2003. Judge Joseph Waldeck presided over an evidentiary hearing and overruled John's objection as to the admissibility of certain evidence. Another judge presided over the trial in that matter, at which John was found not guilty.



Shortly after Lisa filed her charges against John, also in November 2003, John filed a petition for dissolution of their marriage. After various proceedings, that matter was assigned to Judge Waldeck.

In March 2005, prefacing a hearing on John's motion to modify temporary child support, Judge Waldeck observed that John and Lisa had previously been before him in the domestic battery case. Both lawyers stated that they and their clients had no objection to Waldeck's continuing to preside over the dissolution action.

In January 2006, after Judge Waldeck had made a number of rulings in the matter, John requested a substitution of judge pursuant to 735 ILCS 5/2-1001(a)(3), asserting that Waldeck was "prejudiced and biased" against him because of the judge's involvement in the domestic battery case, because of the judge's membership in a health club at which Lisa worked part-time and his exchange of greetings with her at the club, and because John had observed Lisa "waving to [the judge] in an inappropriate manner, indicating her familiarity with and friendliness toward [him]." John also asserted that Waldeck was biased against his lawyer.

Another judge reviewed and presided over John's request for substitution. Lisa's testimony showed that she had exchanged hellos with Waldeck, without more, on two occasions in the parking lot at a fitness club.

Although John testified that Lisa had suggested to him that she and her lawyer were "taking care of the judge" in response to his complaints that Waldeck exercised any discretion in her favor, Lisa denied that she had ever told John that she had had any contact with the judge outside the courtroom. The record showed that John had made no mention in his supporting affidavit of that allegation and that Waldeck had made numerous rulings in John's favor.

The judge denied the petition. Though the appellate court affirmed, it granted John's application for a certificate of importance under SCR 316.

Judge-shopping fears

Section 2-1001(a)(3) provides that every party in a civil matter is entitled to a substitution of judge for cause under certain circumstances. To make the request, an applicant must file a petition, verified by an affidavit from the applicant, that sets forth the specific cause for substitution. The provision requires a judge other than the judge named in the petition to conduct a hearing to determine whether the cause exists; the judge named may, but need not, testify at the hearing or submit an affidavit.

John argued that under *Caperton v A. T. Massey Coal Co.*, [556 US 868](#) (2009), the standard of section 2-1001(a)(3) violated the due process clause of the Fourteenth Amendment of the U.S. Constitution. Conceding that he could not establish actual prejudice, he asked the court to hold that a mere "appearance of impropriety" on the part of the assigned judge should constitute cause for substitution.

Rejecting John's argument, the court observed that although it had included a direction in SCR 63(c)(1) that judges voluntarily disqualify themselves where their "impartiality might reasonably be questioned," the legislature had not included such language in section 2-1001. The court commented that accepting John's argument would encourage "judge-shopping." Because section 2-1001(a)(3) requires a different judge to hear and decide a substitution request, the court said that the *Caperton* court's due process concern was not at issue.

Three justices concurred with the result but filed their own opinions. Justice Garman said that in her view, the court's opinion was merely advisory, given that

the factual allegations neither suggested an appearance of impropriety on Judge Waldeck's part nor implicated the concerns of *Caperton*. Justice Karneier, with whom Chief Justice Kilbride joined, opined that the standards of SCR 63(c)(1) should be taken into account in determining a petition for substitution for cause.

For more breaking Quick Takes on opinions of the Illinois Supreme Court, bookmark Illinois Lawyer Now at <http://iln.isba.org/blog/supreme-court-quick-takes>.

Helen W. Gunnarsson is a lawyer and writer in Highland Park. She can be reached at <helengunnar@gmail.com>

December 2011 LawPulse

- **[Substitution of judge for cause: the high court keeps the bar high](#)**
 - **[Is the Illinois Eavesdropping Act unconstitutional? The saga continues...](#)**
 - **[What's the best way out of an ethical pickle?](#)**
 - **[New bill eases substitute visitation for servicemembers; "visitation abuse" bill defeated](#)**
 - **[Client service 101](#)**
-

➔ [Login to post comments](#)