ILLINOIS STATE BAR ASSOCIATION

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Bench & Bar

The newsletter of the Illinois State Bar Association's Bench & Bar Section

On the Importance of Professionalism

BY EDWARD CASMERE

We few, we (mostly) happy few, we band of advocates who have chosen a calling dedicated to the service of others.[1] It is we who have volunteered to stand for, and with, our clients in their time of need, ensuring they receive a fair shot at justice. Some of us chose the even more difficult role of administering that justice. Ours is a small community of legal professionals. Together we are the critical gears and lubricant necessary for the functioning of the greatest system of law the world has ever known. And we do so in trying and fractured times.

Merriam-Webster defines "profession" as "a calling requiring specialized knowledge and often long and intensive

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What Is the Judicial Performance Evaluation Program?: Insights From a Facilitator

BY MITCHELL L. HOFFMAN

Judges, just like the attorneys who practice in their courtrooms, benefit greatly from feedback on how well they're performing in their jobs. While attorneys typically work closely with their peers, and likely undergo regular performance reviews in their law firms, this process is more difficult for judges. Judging tends to be a solitary endeavor. While there's time for judges to talk and compare notes at the end of the day, for the most part judges work alone in their individual courtrooms while other judges do the same. Of course, judges occasionally get positive or negative feedback from the appellate court, but a candid and detailed assessment of how a judge handles his or her courtroom on a day-to-day basis can only come from the attorneys and court staff who

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On the Importance of Professionalism

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academic preparation."[2] It defines a "professional" as someone "characterized by or conforming to the technical or ethical standards of a profession; exhibiting a courteous, conscientious, and generally businesslike manner in the workplace."[3] That we each self-selected this vocation, each found a way to survive the Socratic method, and each passed the Bar exam binds us with shared experiences. Yet our advanced education prepares us only minimally for what it takes to ply our craft on a daily basis. Ours is a profession reliant on an apprenticeship model. One that requires mentoring and training and experience-based guidance not only on *what* to do, but *how* to do it. Professionalism is an essential component of that *how*, and we need more of it now more than ever.

So critical is professionalism to the practice of law that the Illinois Supreme Court established a Commission on Professionalism "to promote among the lawyers and judges of Illinois principles of integrity, professionalism and civility; to foster commitment to the elimination of bias and divisiveness within the legal and judicial systems; and to ensure that those systems provide equitable, effective and efficient resolution of problems and disputes for the people of Illinois." Ill. Sup. Ct. R. 799(a) (eff. Sept. 29, 2005). The reality, however, is such principles are at risk of becoming the exception rather than the rule in our increasingly divided society. Ours is a world where technology increases communication while at the same time de-personalizing it. We interact more by keystrokes and video calls, and less by handshakes and personal interactions. In fact, many lawyers today have negotiated or litigated without ever hearing their counterpart's voice or physically been inside a real courtroom. Civility in public discourse – and legal proceedings – is being circumvented and replaced by bitterness, anger, and vitriol. Too many incorrectly believe that the nastiness equals effectiveness.

How can we increase professionalism in this environment? We should redouble our commitment to mentoring and training, and reinforce the importance of civility. We must embrace the genuine pleasure of being a professional – a description, that like a good nickname, is bestowed upon us by others.[4] Professionalism must be practiced every day, by lawyers at every level of experience. It can be hard to always take the high road, but we must strive to do so. We must intensify our efforts to mentor our colleagues on what it means to be a professional and why it is important. We need to highlight, reward, and celebrate professionalism.

What does professionalism in the law mean? In some ways it is easier to define what it is not – we know it when we see it – rather than define what it is. To me, professionalism is not about tradition, although tradition has its place. In my mind, professionalism is about maintaining a level of respect and decorum for the responsibility and burdens we and our counterparts share. It is about honoring the process, our respective roles, and elevating our conduct. It is protecting a system that requires the rights and views and positions of others to be heard even when, especially when, they do not align with our own (or those of our client). It is about advancing the administration of justice.

Professionalism is not about being less of an advocate. It is not about compromising principles, avoiding conflict, or being disingenuous. It is about meeting our counterparts on higher ground. No lawyer's credibility or reputation – our two key portable professional assets – has suffered from being described as "too professional." The opposite, of course, is not true. Moreover, judges will tell you, jurors will tell you, and courthouse staff will tell you, that you are a more effective and persuasive advocate when you act in an uncompromisingly professional manner.

For any naysayers, perhaps here is a good place to pause and address just three of the

Bench & Bar

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countless reasons why is professionalism important.[5]

First, we all promise that we will act professionally as a condition precedent to practicing law in Illinois. The Preamble to the Illinois Rules of Professional Conduct – that we each swear to abide by – sets forth the compact we have made with each other, our institutions, and the public.[6] Among the many things to which we have committed is that: "[a] lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process." Ill. Sup. Ct. R. Preamble: a Lawyer's Responsibilities (eff. Jan. 1, 2010). The Preamble continues: "[a]s a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education. In addition, a lawyer should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority." *Id.* Technical knowledge, skill, and excellence in service delivery are necessary, but not sufficient to properly practice law.

Second, the stakes of what we do are simply too high to be done without professionalism. We live in an increasingly fractured and uncivil world, but we are the ones that shape the laws, and our society, with our arguments and advocacy. We have to be better. We ensure the peaceful and orderly administration of the law, put the "civil" in civil litigation, and create credibility in our criminal justice system. That is worth protecting and holding ourselves to a higher standard of conduct. The legitimacy of our legal system is challenged regularly in a variety of ways – and only we can prove its detractors wrong.

Third, if we don't show respect for our profession and system of justice, we cannot reasonably expect others to do so.

The term "privilege" has, in recent years, taken on a negative connotation. But being a lawyer is a privilege. A well-earned and hard-fought privilege, but a privilege nonetheless. A privilege all the members of the Bar share. With that privilege comes responsibility. One such responsibility is to ensure every generation of lawyers preserves and enhances the profession by training the next. We need to lead by example and demonstrate how one can respectfully disagree without being disagreeable – and always be exceedingly professional. Even in the most contentious situations, especially in the most contentious situations, we need to show that we can "strive mightily, but eat and drink as friends."[7] Our profession depends on it.■

Edward Casmere is the 2024-2025 chair of the ISBA's Bench & Bar Section Council, and the co-head of Litigation and Disputes, Chicago, for Norton Rose Fulbright US LLP.

1. With apologies to Shakespeare . . . . *See* Shakespeare, William, *Henry V*, Act 4, scene 3.
2. https://www.merriam-webster.com/dictionary/profession.
3.https://www.merriam-webster.com/dictionary/professional.
4. "Professional," according to former Harvard Business School professor David Maister, "is not a label you give yourself, it's a description you hope others will apply to you."
5. I invite readers to share, in future articles submitted to this publication, their own views on why professionalism is important, and how we can grow and foster it.
6. https://ilcourtsaudio.blob.core.windows.net/antilles-resources/resources/0c94eda9-0b73-4ea2-bc1d-4200e503f2a1/070109.pdf.
7. Shakespeare, William, *The Taming of the Shrew*, Act 1, scene 2 "And do as adversaries do in law, Strive mightily, but eat and drink as friends."
8. https://enjoymachinelearning.com/blog/the-gpt-3-vocabulary-size/#:~:text=After%20crunching%20the%20numbers%2C%20we,languages%20that%20use%20many%20words.

What Is the Judicial Performance Evaluation Program? Insights From a Facilitator

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share the courtroom with them, and who are able to respond to detailed questions on a confidential basis. It's this kind of information that supports professional development for judges.

In March of 2011 the Illinois Supreme Court launched a new program for mandatory judicial performance evaluation. As stated in Supreme Court Rule 58, "[T]he program is designed for the purpose of achieving excellence in the performance of individual judges and the improvement of the judiciary as a whole." Since the inception of the program, well over 1,000 Illinois judges have gone through this performance evaluation process.

Under the Supreme Court program, judges are confidentially evaluated by the attorneys who appear before them, and the court staff who serve in their courtrooms. The evaluated judges are then required to meet with another judge from outside their own circuit who is a trained facilitator. The evaluated judge and the facilitator will confidentially review the evaluation, process and discuss the information, and work together on strategies to address issues that may be presented by the results.

As the Supreme Court worked with the National Center for State Courts to develop the program, they compiled a comprehensive electronic questionnaire for the purpose of measuring many specific aspects of judicial performance. Having worked as a facilitator in the program, I can tell you that the questionnaire is far more detailed than any bar association survey. The questionnaire seeks specific information on the judge's legal ability, impartiality, professionalism, communication, and court management skills. Each of these general areas is broken down into an individual section containing many specific questions designed to gauge performance on discrete skills using a numerical scale. The questionnaire also allows for comments relating to the judge's performance in each specified area. The final evaluation is compiled with all identifying information about the responding attorneys and court staff removed.

A key part of the Supreme Court's

program is the training of the judges who will become evaluation facilitators. Facilitators are active or retired judges with at least 6 years of experience who have been selected to undergo facilitator training. The judges selected to be facilitators go through a training process which covers not only how the performance evaluation program operates, but how to best work with the evaluated judges when reviewing the evaluation results, a process which can be delicate and challenging at times (as with performance reviews in any professional setting).

I've served as a facilitator since 2012, and although I was at first concerned about the time commitment and the inherent difficulties of the assignment, looking back over the past 11 years I have to say that it's been one of the most rewarding experiences of my judicial career (and one that I continue in my retirement). Sometimes, the evaluations provide a lot of positive feedback and very little negative. Other evaluations clearly highlight one or more areas that need improvement. Reading the report can be a difficult and humbling experience for some evaluated judges, and their reactions can range from relief to surprise, irritation or even dejection.

As I see it, the interaction between the evaluated judge and the facilitator is really a two-way street, and the best way to help another judge work through a performance issue is to acknowledge that each of us sometimes share the same frustrations, problems and shortcomings in fulfilling our judicial duties. The important thing is to be able to assess and respond to any criticism you receive in a positive and productive way. Often this involves the evaluated judge and the facilitator comparing notes on how the court calls or legal cultures in their respective circuits may be similar or different. It's also important to identify what stressors may affect the judge's performance. Ultimately these discussions lead to brainstorming specific solutions for improvement in the identified problem areas. Depending on the results of the evaluation, these discussions could include strategies for keeping your cool in stressful circumstances, how to determine when to speed up or slow down while managing a high-volume court call, making sure to clearly state the reasons for a ruling, or how to deal with self-represented litigants fairly and effectively. I have frequently learned quite a bit from the judges I work with in the program, and often continue to communicate with them after the formal process is completed.

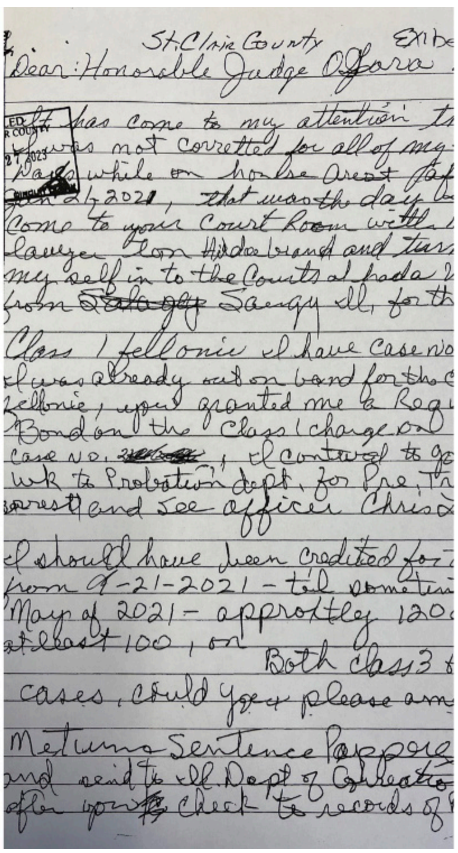
I think the most important takeaway for attorneys reading this article is that they should trust that the process is taken very seriously by the evaluated judges. Although I've seen a wide array of responses to the evaluations from different judges, I can honestly say that judges take the results very seriously and that most of them benefit from the process and develop concrete plans for improving their performance. This of course is not possible unless attorneys also take the process seriously, and that means taking the time and making the effort to fill out the questionnaire honestly and completely. By responding with your honest input, you'll be doing your part to improve the judiciary and to thereby enhance the quality of justice delivered to the public. That's the ultimate goal that both the bench and the bar are focused on achieving.■

MITCHELL L. HOFFMAN is a senior mediator and arbitrator at ADR Systems. He previously served as the presiding judge of the Civil Division in the 19th Circuit Court in Lake County.

Illinois Supreme Court Decision in *People v. Wells*: ‘A Deal’s a Deal’

BY HON. JOHN J. O’GARA

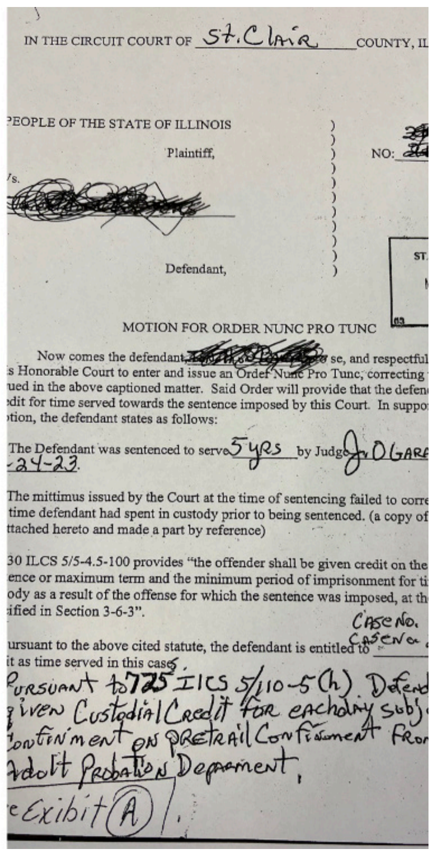
A familiar sight to practitioners and judges in the felony courts is a letter / pleading sent by a person who is incarcerated in the Illinois Department of Corrections seeking to receive more credit for time or credits earned before the plea and or sentencing.



St. Clair County Exibe

Dear: Honorable Judge OGara.

It has come to my attention t
was not corretted for all of my
Days while on house arest
21, 2021, that was the day
Come to your Court Room with
lawyer Tom Hildebrand and turn
my self in to the Courts I had a
from Sauget Ill, for th
Class 1 fellonie I have Case No
I was already out on bond for the
fellonie, you granted me a Reg
Bond on the Class 1 charge on
case No. [redacted], I contured to go
wk to Probation dept. for Pre, Tr
arest and see officer Chris
I should have been credited for
from 9-21-2021 - til sometim
May of 2021 - approxtly 120
atleast 100, on
Both class 3
cases, could you please am
Metumus Sentence Paper
and send to Ill. Dept of Correctio
after you check to records of



IN THE CIRCUIT COURT OF St. Clair COUNTY, IL

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff,

vs.

[redacted]

Defendant,

NO:

MOTION FOR ORDER NUNC PRO TUNC

Now comes the defendant, [redacted] se, and respectful
s Honorable Court to enter and issue an Order Nunc Pro Tunc, correcting
ued in the above captioned matter. Said Order will provide that the defen
edit for time served towards the sentence imposed by this Court. In suppo
otion, the defendant states as follows:

The Defendant was sentenced to serve 5 YRS by Judge J. OGARA
-24-23.

The mittimus issued by the Court at the time of sentencing failed to corre
time defendant had spent in custody prior to being sentenced. (a copy of
ttached hereto and made a part by reference)

30 ILCS 5/5-4.5-100 provides “the offender shall be given credit on the
ence or maximum term and the minimum period of imprisonment for ti
ody as a result of the offense for which the sentence was imposed, at th
ified in Section 3-6-3”.

ursuant to the above cited statute, the defendant is entitled to Case No.
it as time served in this case.
Pursuant to 725 ILCS 5/110-5(h) Defend
given Custodial Credit for each day subj
confinment on pretrail confinement from
Adult Probation Deparment.
Exibit (A).

Look Familiar? Well, the Illinois Supreme Court decided *People v. Wells,* 2024 IL 129402, on March 21, 2024 which is very instructive on handling this situation, and helpful in guiding practitioners and courts of how to insure proper sentence credit for the accused.

The defendant Emmanuel Wells entered into a fully negotiated plea agreement including a plea to one count of unlawful possession of cannabis with the intent to deliver, the state dismissing the remaining counts, a minimum sentence of six years in the IDOC, defendant pays a $100,000 street value fine and Mr. Wells receives 54 days credit for time served in custody towards the 6 year sentence.

Mr. Wells served 54 days in jail but was released on a 24-hour GPS monitoring with ankle bracelet. He had a curfew and was initially only allowed to go out of his home for work, church and medical appointments. He was eventually allowed an extended curfew until the GPS conditions were removed after almost seven months.

When he pled guilty pursuant to a fully negotiated disposition, Mr. Wells confirmed the agreement for **54** days credit with the court and signed a written plea agreement as well. He did not file a postplea motion or direct appeal, but instead filed a motion titled (you guessed it), a motion for order nunc pro tunc requesting credit for the time on “GPS Monitoring.” The trial court denied the motion, and he appealed. The denial was affirmed by the Fourth District Appellate Court and then the Illinois Supreme Court granted a petition for leave to appeal.

The court first looked at how Mr. Wells labeled his request for additional credit by not filing a motion under Illinois Supreme Court Rule 472. The Rule states that in criminal cases, the circuit court retains jurisdiction to correct sentencing errors at any time following judgment and after notice to the parties, and, in section (3), includes errors in the calculation of presentence custody credit. Because the motion to correct his mittimus and sentence was to “reflect credit that he believed he was entitled to, the motion is consistent with the Rule’s remedy he did not forfeit a claim under Rule 472(a)(3). *People v. Wells,* 2024 IL 129402 ¶ 16. Quoting *People v. Patrick*, 2011 IL 111666 ¶ 34, the decision noted “Generally, the character of a motion is determined by its content or substance, not by the label placed on it by the movant.”

An initial takeaway lesson is that requests from defendants or arguably their counsel, are not so easily dismissed by their label, but rather further inquiry may be warranted. Shakespeare’s line in *Romeo and Juliet* , Act II, Scene II is brought to mind, “What’s in a name. That which we call a rose, By any other word would smell as sweet.”

Indeed, going beyond the claim of waiver of remedy under Rule 472, the state conceded that aside from the plea agreement, Mr. Wells was arguably entitled to 81 days credit on the GPS monitor served before less restrctive conditions were imposed (an additional 27 days credit beyond the plea agreement). But, that was **not** the agreement and the state “steadfastly rejected Wells claim to the credit not included in the agreement” *Wells* at ¶26. The Illinois Supreme Court ultimately turned to “the dispositive issue on Wells claim for credit is whether Wells, by

entering into a fully negotiated guilty plea that granted him 54 days of credit, agreed to forgo his right to credit for the time he spent on home detention." *Wells* at ¶19.

The court noted the long standing proposition that plea agreements are governed to some extent by contract law principles of exchanged promises to perform or refrain from performing specified actions. *People v. Evans*, 174 Ill. 2d 320, 327(1996). The *Wells* decision noted that there arises a presumption that in a fully negociated plea agreement that imports on its face to be the complete expression of the whole agreement that the parties "introduced into it every material item and term, and parole evidence cannot be admitted to add another term to the agreement although the writing contains nothing (about the additional credit thet he arguably should receive). *Wells* at ¶ 21-22.

The Wells decision looked to the "four corners" rule of contract interpretation. The language of the contract and that neither party should be able to unilaterally renege or seek modification due to an uninduced mistake, a change of mind. *Evans*, 174 Ill. 2d at 317. Noting *People v. Whitfield*, 217 Ill.2d 177, 190 (2005), when a defendant enters into a fully negotiated plea agreement for the exchange of dismissal of counts, a certain sentence recommendation"both the state and the defendant must be bound by the terms of the agreement."

Based on all of these principles, the court held that "where a fully negotiated plea deal represents a complete and final expression of the parties' agreement, a presumption arises that every material right and obligation is included and neither party may unilaterally seek modification of the agreement." ¶ 24.

The court also noted that contract principles in plea agreements are tempered in some instances by due process concerns, but here, such concerns were not raised .While Wells situation may not have been a typical waiver, an "intentional relinquishment of a known right," and it may not be clear that Wells was fully aware or his right to statutory credit for additional GPS time, the court found that Wells "waived the right to statutory credit by entering into a fully negotiated plea and that he is "forclosed from now modifying the credit term of the agreement" *Wells* at ¶ 25.

What about it being an oversight? Maybe the parties were mutually mistaken about the credit? The *Wells* decision addresses this possibility by noting that the "mutual mistake may be rectified by recourse to contract reformation, where they are in actual agreement, and their true intent may be discerned" ¶ 26. But, alas, this was not the case for Mr. Wells. Again, the state rejected the claim for more than 54 days credit and there was no "mutual mistake."

What about an "uninduced mistake " on Mr. Wells behalf? He can't unilaterally seek to modify the terms of the agreement, but instead must seek to move to withdraw or invalidate his guilty plea. "He (instead) seeks to maintain the benefits of the plea agreement, the dismissal of charges and minumum sentence, while increasing the amount of credit he receives." Wells at ¶27. He did not timely seek to withdraw his guilty plea and his claim to additional credit is finished.

This decision also "overruled" *People v. Ford*, 2020 IL App (2d) 200252 and *People v. Malone*, 2023 IL App (3d)210612 ¶ 19 to the extent that those cases were inconsistent with Wells. ¶28.

In *Ford* and *Malone*, both decisions noted that the record did not conclusively show that the parties agreed to exclude credit, and that the circuit court should not have denied the Rule 472 motions to amend the sentencing mitimus to reflect the credit. The *Wells* decision flatly states, "Contrary to these cases, the presumption runs **in favor of enforcing** the specific terms of a plea deal that is a complete and final expression of the parties agreement." *Wells* at ¶28. (Emphasis added).

So, what does this mean when we receive the letters/motions-however they are titled?And better yet, how can we adjust plea practices to make sure that all credits are fully accounted for in the plea?

As an initial matter, a written plea agreement – or a mittimus which has been reviewed by defense counsel and the defendant -should be acknowledged on the record by all the parties and the defendant. The circuit court ought to confirm the terms and the specific days of credit on the record with the defendant. If the defendant has been on GPS, home confinement or has attended classes, counselling or other additional new statutory credits which now apply, the court might want to inquire of defense counsel and the state to ascertain if the plea agreement is meant to incorporate some or all dates and activities. And if not, that would be clearly on the record, in the sentencing mittimus or a written plea agreement if one is used.

Defense counsel needs to be attuned to all the credits that the client is entitled to in entering into plea negotiations. Likewise, the prosecution needs to be aware of the credits that may accrue and whether they wish to agree to credits in light of any other sentencing concessions that they are binding the state to in reaching the agreement.

What about that letter/motion we receive? *Wells* seems to be clear that unless the parties can agree that a "contract reformation" is in order, and that an amended mittimus can be entered to give the defendant additional credit that was missed, the motion is doomed. This is predicated, of course, on whether enough attention was given to those pesky credit details at the time of the guilty plea. Often, in the author's experience, when we have received this letter, the parties and the court confer and an amended sentencing mittimus is issued ultimately resolving the problem. That was the case on the letter/motion included with this article. If the parties don't agree though, the *Wells* decision clearly answers the question by firmly holding that "a deal's a deal." ■

Judge Troemper Receives Award for Outstanding Service and Leadership

Incoming Bench & Bar Section Council chair, Edward Casmere, presented outgoing chair, Judge April Troemper, with a certificate of appreciation for her outstanding service and leadership at the 2024 ISBA Annual Meeting in St. Louis.■

Recent Appointments and Retirements

1. Pursuant to its constitutional authority, the supreme court has appointed the following to be circuit judge:

- Hon. Lloyd J. Brooks Cook County Circuit, 17th Subcircuit, April 29, 2024
- Hon. Jeffrey G. Chrones, Cook County Circuit, 18th Subcircuit, April 29, 2024
- Michael M. Chvatal, Cook County Circuit, 4th Subcircuit, April 29, 2024
- Audrey F. Cosgrove, Cook County Circuit, 11th Subcircuit, April 29, 2024
- Pablo F. deCastro, Cook County Circuit, April 29, 2024
- Rivanda Doss, Cook County Circuit, 17th Subcircuit, April 29, 2024
- Hon, John A. Fairman, Cook County Circuit, 15th Subcircuit, April 29, 2024
- James V. Murphy, Cook County Circuit, April 29, 2024
- Griselda Vega Samuel, Cook County Circuit, 14th Subcircuit, April 29, 2024
- Nadine Jean Wichern Cook County Circuit, 20th Subcircuit, April 29, 2024

2. The circuit judges have appointed the following to be associate judges:

- Tionn F. Carter, 14th Circuit, April 15, 2024
- Kenya A. Jenkins-Wright, Cook County Circuit, April 15, 2024
- Antara N. Rivera, Cook County Circuit, April 15, 2024
- Federico M. Rodriguez, Cook County Circuit, April 15, 2024
- Heidi E. Agustsson, 17th Circuit, April 16, 2024
- Gabriel G. Orenic, 12th Circuit, May 1, 2024
- Michael P. Zasadil, 22nd Circuit, May 31, 2024

3. The following judges have retired:

- Hon. Callie Baird, Associate Judge, Cook County Circuit, April 15, 2024
- Hon. Robert R. Wilt, Associate Judge, 17th Circuit, April 15, 2024
- Hon. David M. Carlson, 12th Circuit, 1st Subcircuit, April 30, 2024■