

Assembly Hearing Slip

(Please print plainly)

Date: April 14, 1999

Bill No. AB 201

Or Subject \_\_\_\_\_

(Name) Rep. Scott Walker

(Street Address or Route Number) \_\_\_\_\_

(City & Zip Code) \_\_\_\_\_

(Representing) 14th Assembly District

Speaking In favor:

Speaking against:

Registering In favor:

Registering against:

Speaking for information only:

Neither for nor against:

Please return this slip to a messenger promptly.  
Assembly Sergeant at Arms:  
Room 411 West  
State Capitol  
Madison, WI 53702

Assembly Hearing Slip

(Please print plainly)

Date: April 14, 1999

Bill No. AB 201

Or Subject \_\_\_\_\_

(Name) Sen. Alberta Darling

(Street Address or Route Number) \_\_\_\_\_

(City & Zip Code) \_\_\_\_\_

(Representing) Senate District

Speaking In favor:

Speaking against:

Registering In favor:

Registering against:

Speaking for information only:

Neither for nor against:

Please return this slip to a messenger promptly.  
Assembly Sergeant at Arms:  
Room 411 West  
State Capitol  
Madison, WI 53702

Assembly Hearing Slip

(Please print plainly)

Date: 4-14-99

Bill No. AB 201

Or Subject \_\_\_\_\_

(Name) Rep. Peggy Krusick

(Street Address or Route Number) \_\_\_\_\_

(City & Zip Code) \_\_\_\_\_

(Representing) \_\_\_\_\_

Speaking In favor:

Speaking against:

Registering In favor:

Registering against:

Speaking for information only:

Neither for nor against:

Please return this slip to a messenger promptly.  
Assembly Sergeant at Arms:  
Room 411 West  
State Capitol  
Madison, WI 53702

Assembly Hearing Slip

(Please print plainly)

Date: 4/14/99

Bill No. AB 201

Or  
Subject \_\_\_\_\_

Rep Phil Montgomery  
(Name)

1305 OAK Crest Dr  
(Street Address or Route Number)

Green Bay WI 54313  
(City & Zip Code)

4th Dist.  
(Representing)

Speaking In favor:

Speaking against:

Registering In favor:

Registering against:

Speaking for Information only:   
Neither for nor against:

Please return this slip to a messenger promptly.

Assembly Sergeant at Arms:  
Room 411 West  
State Capitol  
Madison, WI 53702

Assembly Hearing Slip

(Please print plainly)

Date: 4-14-99

Bill No. AB 201

Or  
Subject \_\_\_\_\_

Jenny Boese  
(Name)

\_\_\_\_\_  
(Street Address or Route Number)

\_\_\_\_\_  
(City & Zip Code)

State Bar of WI  
(Representing)

Speaking In favor:

Speaking against:

Registering In favor:

Registering against:

Speaking for Information only:   
Neither for nor against:

Please return this slip to a messenger promptly.

Assembly Sergeant at Arms:  
Room 411 West  
State Capitol  
Madison, WI 53702

**ASSEMBLY COMMITTEE ON  
CORRECTIONS AND THE COURTS**

AGENDA

Wednesday, April 14, 1999

10:00am Room 424-northeast

✓ I. Call to Order

✓ II. Roll Call

✓ III. Public Hearing

✓ A. **Assembly Bill 201** (*Walker/Krusick/Darling*) eliminating substitution of judges in criminal matters.

✓ B. **Assembly Bill 250** (*Musser/Moen*) prisoners throwing or expelling certain bodily substances at or toward others, testing for the presence of communicable diseases in certain criminal defendants and juveniles alleged to be delinquent or in need of protection or services and providing a penalty.

✓ V. Announcements

✓ A. Next meeting

✓ VI. Adjournment

ASSEMBLY COMMITTEE ON  
CORRECTIONS AND THE COURTS

AGENDA

Wednesday, April 21, 1999

2:00pm Room 424-northeast

- ✓ I. Call to Order
- ✓ II. Roll Call
- ✓ III. **Executive Session**
  - ✓ A. **Assembly Bill 201** (*Walker/Krusick/Darling*) eliminating substitution of judges in criminal matters.
  - ✓ B. **Assembly Bill 250** (*Musser/Moen*) prisoners throwing or expelling certain bodily substances at or toward others, testing for the presence of communicable diseases in certain criminal defendants and juveniles alleged to be delinquent or in need of protection or services and providing a penalty.
- ✓ V. Announcements - *Ed's last Committee meeting as a clerk.*
  - ✓ A. Next meeting
- ✓ VI. Adjournment

# Vote Record

## Assembly Committee on Corrections and the Courts

Date: April 21, 1999  
 Moved by: 1 Rep. Balow      Seconded by: Rep. Staskunas  
 AB: 201  
 AB: \_\_\_\_\_ SB: \_\_\_\_\_ Clearinghouse Rule: \_\_\_\_\_  
 AJR: \_\_\_\_\_ SJR: \_\_\_\_\_ Appointment: \_\_\_\_\_  
 A: \_\_\_\_\_ SR: \_\_\_\_\_ Other: \_\_\_\_\_

A/S Amdt: 1  
 A/S Amdt: \_\_\_\_\_ to A/S Amdt: \_\_\_\_\_  
 A/S Sub Amdt: \_\_\_\_\_  
 A/S Amdt: \_\_\_\_\_ to A/S Sub Amdt: \_\_\_\_\_  
 A/S Amdt: \_\_\_\_\_ to A/S Amdt: \_\_\_\_\_ to A/S Sub Amdt: \_\_\_\_\_

- Be recommended for:
- Passage
  - Introduction
  - Adoption AA 1 to AB 201
  - Rejection 0314/1
  - Indefinite Postponement
  - Tabling
  - Concurrence
  - Nonconcurrence
  - Confirmation

Committee Member

	<u>Aye</u>	<u>No</u>	<u>Absent</u>	<u>Not Voting</u>
Rep. Scott Walker, Chair	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Rep. Robert Goetsch	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Rep. Carol Owens	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Rep. Tim Hoven	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Rep. Eugene Hahn	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Rep. Mark Gundrum	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Rep. Scott Suder	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Rep. Larry Balow	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Rep. G. Spencer Coggs	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Rep. Mark Pocan	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Rep. Tony Staskunas	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Rep. David Travis	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

Totals:    10    1    1    0

Motion Carried       Motion Failed

# Vote Record

## Assembly Committee on Corrections and the Courts

Date: April 21, 1999  
 Moved by: Rep. Gundrum      Seconded by: Rep. Goetsch  
 AB: 201  
 AB: \_\_\_\_\_ SB: \_\_\_\_\_ Clearinghouse Rule: \_\_\_\_\_  
 AJR: \_\_\_\_\_ SJR: \_\_\_\_\_ Appointment: \_\_\_\_\_  
 A: \_\_\_\_\_ SR: \_\_\_\_\_ Other: \_\_\_\_\_

A/S Amdt: \_\_\_\_\_  
 A/S Amdt: \_\_\_\_\_ to A/S Amdt: \_\_\_\_\_  
 A/S Sub Amdt: \_\_\_\_\_  
 A/S Amdt: \_\_\_\_\_ to A/S Sub Amdt: \_\_\_\_\_  
 A/S Amdt: \_\_\_\_\_ to A/S Amdt: \_\_\_\_\_ to A/S Sub Amdt: \_\_\_\_\_

- Be recommended for:
- Passage *as amended*
  - Introduction
  - Adoption
  - Rejection
  - Indefinite Postponement
  - Tabling
  - Concurrence
  - Nonconcurrence
  - Confirmation

Committee Member	Aye	No	Absent	Not Voting
Rep. Scott Walker, Chair	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Rep. Robert Goetsch	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Rep. Carol Owens	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Rep. Tim Hoven	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Rep. Eugene Hahn	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Rep. Mark Gundrum	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Rep. Scott Suder	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Rep. Larry Balow	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Rep. G. Spencer Coggs	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Rep. Mark Pocan	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Rep. Tony Staskunas	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Rep. David Travis	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Totals:	<u>6</u>	<u>5</u>	<u>1</u>	<u>0</u>

Motion Carried       Motion Failed

LRB or Bill No./Adm. Rule No.  
 LRB 0350/1 AB 201  
 Amendment No. if Applicable

**FISCAL ESTIMATE**  
 DOA-2048 N(R10/98)

ORIGINAL       UPDATED  
 CORRECTED       SUPPLEMENTAL

**Subject**  
 Eliminating substitution of judges in criminal matters

**Fiscal Effect**

State:  No State Fiscal Effect

Check columns below only if bill makes a direct appropriation or affects a sum sufficient appropriation.

Increase Costs - May be possible to Absorb Within Agency's Budget  Yes  No

Increase Existing Appropriation       Increase Existing Revenues  
 Decrease Existing Appropriation       Decrease Existing Revenues  
 Create New Appropriation

Decrease Costs

Local:  No local government costs

1.  Increase Costs  
      Permissive       Mandatory  
 2.  Decrease Costs  
      Permissive       Mandatory

3.  Increase Revenues  
      Permissive       Mandatory  
 4.  Decrease Revenues  
      Permissive       Mandatory

5. Types of Local Governmental Units Affected:  
 Towns       Villages       Cities  
 Counties       Others \_\_\_\_\_  
 School Districts       WTCS Districts

**Fund Sources Affected**

GPR    FED    PRO    PRS    SEG    SEG-S

**Affected Ch. 20 Appropriations**

s. 20.550(1)(d)

**Assumptions Used in Arriving at Fiscal Estimate**

This bill would eliminate the right under section 971.20 to substitute a judge in criminal cases. If the right to substitute were eliminated, then defendants would be required to file motions for recusal in order to have a different judge assigned to the case. This would increase costs to the SPD as follows:

- 1) In FY98, the private bar handled approximately 13,800 felony and misdemeanor cases (this figure excludes the misdemeanor cases assigned to the contract attorneys). Assuming that a motion for recusal is filed in 2% to 3% of these cases, then 276 to 414 private bar SPD cases would involve such a motion. (Per data from the Director of State Courts Office, substitution requests were filed in 2% to 3% of criminal cases from 1993 through 1997.) Assuming that each motion requires 1 hour of attorney time (.5 hours to prepare the motion and .5 hours to argue the motion in court), the increase in attorney time would be 276 to 414 hours. At the \$40 per hour private bar rate, the increased costs would be \$11,040 to \$16,560.
- 2) Because SPD staff attorneys currently handle the maximum number of cases they are able to do in a given year, the additional time required to prepare motions for recusal would require the addition of more staff attorneys or the assignment of additional cases to the private bar. In FY98, SPD staff attorneys handled 44,200 felony and misdemeanor cases. If a motion for recusal were filed in 2% to 3% of these cases, then 884 to 1326 SPD staff cases would involve a motion for recusal. Assuming that each motion requires 1 hour of attorney time (.5 hours to prepare the motion and .5 hours to argue the motion in court), the increase in attorney time would be 884 to 1326 hours. If we assume that all of these additional hours would ultimately end up in the private bar (rather than hiring additional staff attorneys), then the additional costs would be \$35,360 to \$53,040 (assumes \$40 per hour rate).

Also, depending on the number of recusal motions that are denied, the number of interlocutory appeals could also increase, thereby further increasing costs to the SPD.

The SPD does not have any data from which to estimate local government costs.

**Long-Range Fiscal Implications**

Using the above assumptions, an annual increase in costs of \$46,400 to \$69,600.

Agency/Prepared by: (Name & Phone No.)  
 SPD/Gina Pruski/266-6782

Authorized Signature/Telephone No.

*Gina Pruski* #6-6782

Date  
 March 12, 1999

**FISCAL ESTIMATE WORKSHEET**

Detailed Estimate of Annual Fiscal Effect  
DOA-2047 (R10/98)

ORIGINAL       UPDATED  
 CORRECTED       SUPPLEMENTAL

1999 Session

LRB or Bill No./Adm. Rule No. LRB 0350/1      AB 201	Amendment No.
---------------------------------------------------------	---------------

**Subject**  
Eliminating substitution of judges in criminal matters

**I. One-time Costs or Revenue Impacts for State and/or Local Government (do not include in annualized fiscal effect):**

**II. Annualized Costs:**

A. State Costs by Category	Annualized Fiscal impact on State funds from:	
	Increased Costs	Decreased Costs
State Operations - Salaries and Fringes	\$	\$ -
(FTE Position Changes)	( FTE)	(- FTE)
State Operations - Other Costs (Private Bar Appropriation)	\$46,400 to \$69,600	-
Local Assistance		-
Aids to Individuals or Organizations		-
<b>TOTAL State Costs by Category</b>	<b>\$46,400 to \$69,600</b>	<b>\$ -</b>
B. State Costs by Source of Funds	Increased Costs	Decreased Costs
GPR	\$46,400 to \$69,600	\$ -
FED		-
PRO/PRS		-
SEG/SEG-S		-
State Revenues	Increased Rev.	Decreased Rev.
Complete this only when proposal will increase or decrease state revenues (e.g., tax increase, decrease in license fee, etc.)		
GPR Taxes	\$	\$ -
GPR Earned		-
FED		-
PRO/PRS		-
SEG/SEG-S		-
<b>TOTAL State Revenues</b>	<b>\$</b>	<b>\$ -</b>

**NET ANNUALIZED FISCAL IMPACT**

	<u>STATE</u>	<u>LOCAL</u>
NET CHANGE IN COSTS	\$46,400 to \$69,600	\$ _____
NET CHANGE IN REVENUES	\$ _____	\$ _____

Agency/Prepared by: (Name & Phone No.) Public Defender/Gina Pruski/6-6782	Authorized Signature/Telephone No. <i>Gina Pruski</i> #6-6782	Date March 12, 1999
------------------------------------------------------------------------------	------------------------------------------------------------------	------------------------

FISCAL ESTIMATE FORM

1999 Session

ORIGINAL

UPDATED

LRB #-0 350/1

CORRECTED

SUPPLEMENTAL

INTRODUCTION #

AB 201

Admin. Rule #

Subject

Eliminating substitution of judges in criminal matters.

Fiscal Effect

State:  No State Fiscal Effect

Check columns below only if bill makes a direct appropriation or affects a sum sufficient appropriation.

Increase Costs - May be possible to Absorb Within Agency's Budget  Yes  No

Increase Existing Appropriation

Increase Existing Revenues

Decrease Existing Appropriation

Decrease Existing Revenues

Decrease Costs

Create New Appropriation

Local:  No local government costs

1.  Increase Costs

Permissive  Mandatory

3.  Increase Revenues

Permissive  Mandatory

5. Types of Local Governmental Units Affected:

Towns  Villages  Cities

2.  Decrease Costs

Permissive  Mandatory

4.  Decrease Revenues

Permissive  Mandatory

Counties  Others \_\_\_\_\_

School Districts  WTCS Districts

Fund Sources Affected

GPR  FED  PRO  PRS  SEG  SEG-S

Affected Ch. 20 Appropriations

Assumptions Used in Arriving at Fiscal Estimate:

This bill eliminates a defendant's right to substitute a judge in criminal cases. This will have no fiscal impact on the Department of Justice and is indeterminable for local governments.

Long-Range Fiscal Implications:

Prepared By: / Phone # / Agency Name

Steve Tinker/6-0764/DOJ

Authorized Signature / Telephone No.

*Jolanna M. Richard*

7-1932

Date

3/16/99



RACINE COUNTY COURT HOUSE  
1931

730 Wisconsin Avenue

**RACINE, WISCONSIN**  
53403

CIRCUIT COURT BRANCH NO. 5  
DENNIS J. BARRY  
JUDGE

PHONE 414-636-3333  
Racine County Courthouse Toll Free  
1-800-242-4202 Ext. 3333

To. REP WALKER

4/14/99

RE: AB 201

I just learned of the hearing on this bill. I am sending by fax a copy of a commentary that I wrote almost 10 years ago about judicial substitutions. I feel the same way today! If I can be of help, please call.

Dennis J. Barry  
(414) 636-3150

Patricia Breslin  
General Manager

Peter D. Fox  
Editor

Sean P. Devlin  
Opinion Editor

Steven T. Lovejoy  
News Editor

the Journal Times

SUNDAY  
Sept. 24, 1989

SECTION

C

Commentary

# The law criminals love

By Dennis Barry

September's Reader's Digest contains a special report entitled "The Law Criminals Love." It deals with confidentiality laws in several states which prevent the public from knowing the records of chronic or serious criminal offenders.

In Wisconsin, we have a different law that criminals love. It is the "substitution of judge" law. The effect of the law is to allow accused drug pushers, sexual assaulters, spouse abusers and the like to have judges removed from their cases when they think they may receive a stiff sentence if they are found guilty.

## Playing the odds

Instead, such a defendant is able to play to the odds that a more lenient judge will be assigned to their case. Why wouldn't a criminal love such a law?

Obviously, not all judges are alike, just as not all people are alike. Some judges have reputations for being "tough" and others have reputations for being "soft." While all judges must operate within the law, judges still have wide discretion when making their decisions. That is one reason why the drafters of the Wisconsin Constitution provided for judges to be elected by the people.

The citizens of the community were given the opportunity to choose which candidate has the qualities they most want on the bench. Yet, the current substitution of judge law can defy the will of the electorate.

## Rendered meaningless

For example, Racine County had a judicial election last spring in which one issue was the candidates' past sentencing positions for convicted drug dealers. Under the system of judicial selection granted by our state constitution, this was a legitimate issue to be evaluated by the electorate. However, regardless of how Racine County citizens voted in that race, their decision would have been rendered meaningless by an

Dennis J. Barry is presiding judge of Racine County Circuit Court, Branch 5, and a former Racine County District Attorney.



The substitution law allows criminal defendants to have an assigned judge removed from their case without giving a reason.

- Dennis Barry

accused drug dealer simply requesting a different judge for his or her case. Isn't that ridiculous?

Judges in Wisconsin are perhaps the most accountable of all public officials. Besides being accountable for their performance to the electorate every six years, their legal decisions are always subject to review by both the Wisconsin Court of Appeals and the Wisconsin Supreme Court.

## Subject to sanctions

Judges are also subject to sanctions from the Wisconsin Judicial Commission for any behavior which is improper or unethical. Of course they also labor under the scrutiny of lawyers, litigants, court administrators, the media and others.

In spite of these layers of accountability, a criminal

defendant still can get a new judge assigned to his or her case by the stroke of a pen. What is even more outrageous is that the district attorney, who represents the citizens of the community in criminal matters, and/or the victims of crimes, does not have a corresponding ability to request a different judge.

In other words, a judge who may have a reputation of pampering convicted criminals cannot be challenged by the D.A.

Those who support the current substitution law claim that it is necessary to guarantee a fair and impartial trial for criminal defendants. Certainly no one would quarrel with a person's right to a fair trial.

## Is leniency good?

Yet, the substitution law tacitly equates leniency with fairness. Experience and common sense tell us that one need not be lenient to be fair. If one is a lenient parent, is that person necessarily a fair or even a good parent? Of course not.

Judges are bound by a code of ethics which prevents them from presiding over cases if they can't be impartial. If a criminal defendant believes a particular judge cannot be fair toward him or her, should they not be required to state the reason for their belief? Then if the judge refuses the request, that decision might be reviewable by either the Appellate Court or the Judicial Commission. Those independent bodies are well equipped to determine whether the judge truly cannot be fair to the defendant or whether the defendant is merely using the substitution law to shop for a lenient judge.

## An affront to voters

The substitution of judge law in its current form is an outrageous affront to the voting public. A person accused of the most serious crimes can upset the results of a judicial election without ever having to give a reason.

Currently there are two bills in the Wisconsin legislature to change or repeal the substitution law. They are Assembly Bills 69 and 510. Either of these proposals would be a vast improvement over what we have now.

It's time for the Wisconsin Legislature to change this law that criminals love.



402 W. Wilson Street  
P.O. Box 7158  
Madison, WI 53707-7158

## MEMORANDUM

**To:** Members,  
Assembly Committee on Corrections and the Courts

**From:** Linda Barth, Public Affairs Director  
Jennifer Boese, Government Relations Coordinator  
Matt Bromley, Government Relations Coordinator

**Date:** April 15, 1999

**Re:** Assembly Bill 201, relating to judicial substitution

---

The State Bar of Wisconsin is *opposed to Assembly Bill 201* which proposes to eliminate judicial substitution in criminal cases.

- **Judicial substitution is not being abused.** In 1994, the State Supreme Court denied the Judicial Conference's request to eliminate the right of judicial substitution in criminal cases and found no, "empirical data, anecdotal information or judicial perception to establish that the judge substitution statutes constitute an undue burden on or substantial interference with the judicial branch."

The Court cited a Judicial Conference study on the impact of judicial challenges and found that judge substitutions were requested in less than two percent of all contested cases (civil and criminal) in 1991. A review of criminal cases since 1993 shows that judge substitutions were only requested in less than three percent of the cases.

### Number of Criminal Cases Substituted (includes felony, misdemeanor and criminal traffic cases)

	1993	1994	1995
Total number of criminal cases	114,872	112,467	119,131
Number of substitutions	2,753	3,179	3,042
% of cases substituted	2.4%	2.8%	2.6%

(source: Office of the Director of State Courts)



	1996	1997	1998
Total number of criminal cases	131,479	140,436	NA
Number of substitutions	3,971	3,178	3,374
% of cases substituted	3%	2.26%	NA

(source: Office of the Director of State Courts)

Clearly, despite what opponents of judicial substitution claim, the right of substitution is NOT abused, and is in fact, only occasionally used.

- **Often, judges who are substituted are done so to insure a fair trial.** If there is potential prejudice, defendants MUST have the right to seek a different judge. Public confidence in the judicial system rests on the public's belief that they will receive a fair trial before an impartial judge. If a person perceives, for whatever reason, that the judge may be less than fair, public confidence will be eroded.
- **It is not judge shopping.** Under current law, a defendant may only substitute a judge once and there are no guarantees about who will be assigned to the case instead. Defendants cannot "shop" for, or choose, a more lenient judge.
- **The right to request a new judge after appeal is needed to maintain impartiality.** Assembly Bill 201 includes the elimination of the right to a new judge after appeal. Under the bill, a defendant who appeals a case because of a trial judge's error and is granted a new trial by the appellate court may appear in front of the same trial judge who was reversed. There may be less impartiality by a judge who has been reversed making the right to substitution in these circumstances perhaps even more important.
- **Other states have recognized the importance of allowing judge substitution.** A majority of the states have statutes or rules allowing substitution of judges in some form. Below are some of the procedures similar to Wisconsin's used in other states.

Minnesota Judge substitution law similar to Wisconsin's. Allows a criminal defendant to request a substitution of judge without showing cause. (Minn. Stats. Annot., sec. 487.40)

Missouri Judge substitution rule more expansive than Wisconsin's. Allows *both* parties in a criminal case to request one substitution of judge without showing cause. (Missouri SCR 32.06)

- Montana Judge substitution law more expansive than Wisconsin's. Allows *both* parties to request one substitution of judge without showing cause. (Montana Code Annotated sec. 3-1-804)
- Alaska Judge substitution rule more expansive than Wisconsin's. Allows *both* parties to request substitution of judge without showing cause. If more than one defendant, each defendant is allowed a substitution and the prosecution is allowed one for each defendant request. (Alaska Rules of Criminal Procedure, sec. 25(d))
- Arizona Judge substitution rule more expansive than Wisconsin's. Allows *both* parties to request a change of judge without showing cause. (Arizona Rules of Criminal Procedure, sec.10.2)
- Wyoming Judge substitution rule more expansive than Wisconsin's law. Allows *both* parties to request a change of judge without showing cause. (Wyoming Rules of Criminal Procedure, sec. 40.1)

The right to request another judge is an important tool to help insure fair trials. The Wisconsin Supreme Court has reviewed the system and found that it works. Efforts to repeal the law have failed in previous legislative sessions and for good reason --- repealing a law that provides fairness in our courtrooms is misguided. The State Bar of Wisconsin urges you to oppose Assembly Bill 201.

If you have any questions or would like more information, please contact Matt Bromley, government relations coordinator, at 250-6128.



# STATE BAR OF WISCONSIN

402 W. Wilson Street  
P.O. Box 7158  
Madison, WI 53707-7158

## KEEP CURRENT JUDGE SUBSTITUTION LAW SURVEY SHOWS

A majority of judges and lawyers in Wisconsin believe the current judge substitution laws should not be changed according to a 1997 survey conducted by the State Bar's Bench/Bar Committee.

Respondents were asked to indicate their level of agreement or disagreement with statements about judicial substitution on a scale where 1 = *strongly disagree* and 7 = *strongly agree*. Persons who had no opinion circled 4 or did not answer the question. Results reported below reflect the opinions of persons who circled a number other than 4.

*Q 1. Substitution of judges should continue in its present form (i.e. automatic upon request pursuant to Sec. 801.58, Stats.) in civil cases.*

**More than one-half (53%) of the respondents *strongly agreed* that substitution of judges should continue in its present form in civil cases. Another 20% *agreed* with the statement, while only 12% *strongly disagreed*.**

- Average response rating from lawyers = 6.1
- Average response rating from judges = 4.5

*Q 2. Substitution of judges should continue in its present form (i.e. automatic upon request pursuant to Sec. 971.20, Stats.) in criminal cases.*

**Over two-thirds (68%) *agreed* or *strongly agreed* that substitution of judges should continue in its present form in criminal cases, while only 19% *disagreed* or *strongly disagreed*.**

- Average response rating from lawyers = 5.9
- Average response rating from judges = 4.5



'NASA management is deciding to fly in spite of potentially fatal problems.'

Keith E. McInnis

WI State  
Journal  
1/31/94

# OPIN

## OUR OPINION

# It's an unnecessary bill

Amid all the get-tough-on-crime bills that will be roiling the legislative waters in Madison this year, there's one that deserves to sink like a stone: Sen. George Petak's bill ending judicial substitution without cause.

If issues were fish, judicial substitution would be a tarpon: It's flashy and has a lot of fight — but once you boat it, there's just not much meat there. And as a problem, it's about as rare as tarpon in Wisconsin.

Under current law, defense lawyers in a criminal case may request that the case be assigned to a different judge without stating a reason. In large counties, judicial substitution is a fairly simple matter. In rural one-judge counties, that means bringing in a judge from another county, which can slow the wheels of justice.

It can also harm a judge's reputation — or help it. Since no reason must be stated, most judges who get substituted on a lot like to say it's because they're tough on crime. Maybe — or maybe not. In theory, judicial substitution allows the defense to escape a judge whom its perceives as too tough — or prejudiced, or lazy, or not scholarly enough.

Realistically, most of the time none of those reasons exist and it's just a delaying tactic. So why not just eliminate it altogether, as is done in the federal court system, or require those attorneys requesting a different judge to sign an affidavit stating why, as Petak wants done?

Because: Once in a while the law does what it's supposed to do, which is spare a defendant from appearing in front of a judge who for whatever reason might not do a good job on that particular case. And that's a greater good than remedies for the law's ills would provide.

Take Petak's affidavit solution. No attorney in his or her right mind is going to stand before a judge whom he or she has any hope of practicing before in the future and accuse that judge, in writing, of being prejudiced, lazy or stupid. Thus, the right of substitution would be effectively eliminated.

It's true that the current system is not perfect. In one northern Wisconsin county,

or so the story goes, a judge reported a member of the county's only law firm for an ethical infraction. In retaliation, every member of the law firm requested a substitution every time they had cases before him. Since he was the only judge in the county, an enormous scheduling problem arose. In Petak's district, one Kenosha County judge was substituted on 367 times during a three-month period.

But remedies also exist. In Dane County some years ago, one judge was targeted with an unreasonable number of substitution requests. The chief judge of the district, having determined there was no valid reason for the requests, then announced that such cases would automatically be assigned to Lafayette Circuit Judge Daniel McDonald — whose intemperance was infamous in courthouse circles long before he murdered a political opponent's law partner and subsequently killed himself. The rash of substitutions ended abruptly.

And substitutions can be educational. Not every judge has the temperament or intellectual abilities for criminal court work, but few will admit to such a failing. In multi-judge counties, a rash of substitution requests can indicate a problem that can be solved by reassignment to another division.

Regardless of how annoying the substitution problem can be on a local-level, it's not a burning issue statewide: Substitutions were requested in fewer than 5 percent of all criminal cases. And the judges themselves are not united on either the severity of the problem or what the solution should be. A recent poll showed 45 percent of the judges in favor of the current system, 30 percent in favor of eliminating the right of substitution altogether, and only 25 percent in favor of Petak's affidavit of prejudice.

In their frenzy to hook onto workable solutions to the state's crime woes, lawmakers should resist the temptation to boat the right to judicial substitution. It's a law that does some good and causes some mischief, but on balance, it's a keeper.

## MISTRIAL



## Comp:

For pathos and b it's getting harder between the daytime fast-moving, real-li ning news.

In case you've checking on the oz the strange life fe vents under the P. hibernating to avo here is a synopsis o — a periodic serv.

"As the World Twirls": Nancy's knee is much better. But no one knows how much damage the kneecapping did to her fragile emotional state. Tonya insists she had nothing to do with it, although Shane is

MADISON  
Wisconsin State Journal  
FEB 22 1994

## OUR OPINION

# 26 Don't bog court system

The state Senate is scheduled to vote today on a bill that would change the rules dictating when lawyers can ask for a different judge in a criminal case. There is no compelling reason to change the existing "judicial substitution" law, which works pretty well in most Wisconsin counties. There is even less reason to adopt an amendment that would allow prosecuting attorneys to request substitute judges.

Under the rubric of what's good for the goose is good for the gander, those who want to change the judicial substitution process argue that if defense attorneys can file "affidavits of prejudice" and seek a judge swap, why can't prosecutors be given the same privilege?

Here's why: Even in the smallest of Wisconsin's 72 counties, a handful of private lawyers and the public defender's office are available to represent people accused of crimes. There is only one prosecuting "firm," and that's the district attorney's office. If that monopoly is given the power to avoid trying cases in front of any particular judge, that branch of court basically would be shut out of hearing criminal cases.

In the 35 counties where there is only one circuit court judge, that would mean bringing in a judge from another county. Net result: A bogged down court system that would cost more and defy the will of the people, who elect trial court judges to do just that — judge cases.

Elected district attorneys are politicians, too, and many of them aspire to become judges. What better way to make the incumbent look bad than to file a flurry of affidavits of prejudice to create the sense that a sitting judge is "soft on crime"?

District attorneys in Wisconsin already hold a fistful of procedural cards. They decide what charges are filed against individuals; they have the power to bargain pleas; they may appeal trial court decisions; and, because they represent the state of Wisconsin in a criminal case, they may report a truly prejudiced or

incompetent judge to the state Judicial Commission.

Those who want to change the judicial substitution law have yet to produce facts and figures that show the status quo is not working reasonably well. Until they do so, lawmakers should look with suspicion upon bills that might slow down our criminal courts in an era when those courts can ill afford to waste time.

JAN 7 1998

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THE Cap...

# 'Judge shopping' worth the cost, attorneys tell Assembly panel

By David Callender

*The Capital Times*

A bill that would prevent citizens from substituting judges in criminal cases could undermine public confidence in the state judicial system, Madison attorney Steve Hurley warned an Assembly committee on Tuesday.

Hurley, speaking for the State Bar of Wisconsin, told members of the Assembly Judiciary Committee that a defendant's ability to substitute one judge for another "is one of the tools to ensure that people leave the court system feeling that they've been treated fairly."

Rep. Scott Walker, R-Wauwatosa, said he is sponsoring the bill to prevent defendants from "judge shopping" to avoid judges tough on certain crimes.

Walker said some judges — such as Circuit Judge Dominic Amato in Milwaukee — have a reputation for imposing tougher sentences than their peers and tend to

be the ones substituted for.

Walker argued that substitutions tend to skew some sentences — although he could not provide evidence that defendants who substituted judges got shorter sentences or were less likely to be convicted of certain crimes.

He added that substitutions are especially hard on small counties with a single judge.

But Hurley and Steve Meyer, a spokesman for the Wisconsin Association of Criminal Defense Lawyers, said public confidence in the judicial system is well worth any difficulties the substitution system presents.

Meyer pointed to the case of one defendant he represented in which the judge hearing her criminal case had previously represented her ex-husband in an "extremely acrimonious divorce."

The woman was still convicted of a crime and punished by a different judge, "but what was im-

portant to her was that she got a fair shake."

Meyer argued that in some cases, judicial substitution is the only recourse some defendants have in getting away from judges of questionable competence.

He noted that former Lafayette County Circuit Judge Daniel McDonald was a frequent target of judicial substitutions because attorneys and clients believed he was incompetent but dared not challenge him directly.

It wasn't until McDonald was convicted of killing a Darlington lawyer in 1985 and then hanged himself in his jail cell that the extent of his psychological problems became public, Meyer said.

Defendants can request one substitution without having to offer a reason for the substitution.

The State Bar said substitution affected 3 percent of the more than 131,000 criminal cases tried in Wisconsin last year.

**MANITOWOC**  
 Herald Times Reporter  
**NOV 08 1998**

# Lawyers, judges support switching practice

By **ROB YOUNG**  
 Staff writer

**MANITOWOC** - A law that allows defendants to request a new judge without naming a reason, is a "non-problem," according to a University of Wisconsin-Madison law professor Walter Dickey.

The State Bar Association, the office of the State Public Defender and many judges agree.

"Our (judicial substitution laws) work quite well," Dickey said. "That's sort of a widely held view, even though there's been a fair amount of yapping about it," Dickey said.

Rep. Frank Lasec's push to get rid of judicial substitution in felony and criminal traffic cases is the latest of several attempts in the Legislature to repeal the law, Dickey said.

But judicial substitution is not a problem for most courts because it's not used much, Dickey said.

"(Substitutions) tend to be directed at a few judges," Dickey said. "And, very honestly, (the judges) are usually pretty widely viewed as not particularly fair. There are all kinds of tough judges who never get substituted on."

"It's the ones who are very unpredictable who get substituted

**Requests for substitution against Manitowoc County Judges, 1997**

	Felony Cases	Criminal Traffic Cases
Darryl Deets	3	0
Fred Hazlewood	3	3
Patrick Willis	1	0

SOURCE: Fourth Judicial Administrative District  
 HTR InfoGraphic/KIRBY

on the most. They tend to be the opponents of substitution. You won't get very many people to say that, but I think it's the fact of the matter."

Statewide, 1,954 substitutions were filed in 1997 in felony and criminal traffic cases, including 10 against Manitowoc County judges

- one against Patrick Willis, three against Darryl Deets and three against Fred Hazlewood. Another three substitutions were filed against Hazlewood in criminal traffic cases. The Manitowoc County substitutions were less than 1 percent of the statewide

Please see **SUBSTITUTES**, Page A-2

# SUBSTITUTES

From Page A-1

total.

Deets said substitution is not a problem for judges here.

"In Milwaukee County, (substitution) has virtually drummed judges out of criminal court. But here it hasn't been a problem," because all three judges are generally perceived as fair, Deets said.

"I don't think there's anyone easy here," he added. "But I don't think there's anyone who goes over the line and gets reversed on sentences that are outside their discretion."

Here, as elsewhere, there are always a few defendants who feel they've had a bad experience with one judge and request another, he said.

"Let's say if a guy comes in and you really nail him, really chew him out, and he knows you're going to remember him, he's probably going to substitute" the next time, Deets said.

"That's why the number of substitutions (correlates to) the amount of time the judge has been on the bench," the judge said. "Willis is pretty much of an unknown quantity, so he only had one. I've been here 10 years and had three, and Hazlewood's been here 18 years so he had six."

When a Manitowoc County defendant requests substitution, his case is transferred to one of the other two judges, not out of the county. Since defendants are allowed only one substitution, the case stays within the county.

Manitowoc County judges occasionally must travel to Calumet County to fill in for Circuit Judge Donald Poppy — and that's "a little bit of a hassle," Deets said.

"If we were a one-judge county and we had judges coming in all the time, I might feel differently about it," Deets said.

Rep. Bob Ziegelbauer, D-Manitowoc, said Lasee's blanket proposal to end substitution without cause "might be a little too much. ... These proposals are sort of simplistic. I think what they're talking about is eliminating it cold, and I'm not so sure we want to do that."

"I'd support restricting (substitution) in areas where there a history of abuse. In Milwaukee County, the tough judges get substituted against all the time," Ziegelbauer said.

"We clearly want accountability with the judiciary, but we don't want people playing games with the system in ways that aren't intended," he said.

In 1987, Milwaukee County Circuit Judge Ralph Adam Fine, now an appellate judge, was transferred out of felony court after defendants filed more than 500 substitutions against him in two months, the Milwaukee Journal-Sentinel reported. Fine was a strong opponent of plea bargaining.

In 1990, 400 substitution demands were filed against Louise Tesmer, also a judge in Milwaukee County, by attorneys who said they disliked her demeanor, sentencing and interpretation of the law, the newspaper said.

The State Bar Association opposed restricting substitution, said Matt Bromley, the association's government relations coordinator. While the law entails a "slight" cost to one-judge counties, it's worth the cost to ensure public confidence in

the courts, he said.

Bromley, while expressing doubt about Lasee's statement that Wisconsin is the only state to allow substitution without cause, said the state is at least in the minority.

At least one member of the State Bar Association feels interest in rescinding the law is driven by politics rather than a ground swell of public opinion.

"It's kind of a chip shot for politicians," said John Birdsall, a member of the State Bar's Criminal Law Section board of directors, in the March 1997 issue of "WisBar," the association's newsletter.

"It's an easy issue to manipulate and a difficult one for people outside the legal system to understand. It's easy to make it look like attorneys are abusing this privilege and judge-shopping when that's not the case at all."

## Memorandum

**To:** Honorable Members of the Assembly Committee on Corrections and the Courts  
**From:** Gina Pruski, SPD Deputy Legal Counsel *GP*  
**Date:** April 15, 1999  
**Re:** Assembly Bill 201 relating to judicial substitution

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The Office of the State Public Defender (SPD) is opposed to Assembly Bill 201 which would eliminate the right to judicial substitution in criminal cases. Various surveys show that most judges and attorneys, including prosecutors, believe the current judicial substitution law should be retained.

- The SPD's survey of judges throughout the state during August of 1997 shows that most judges believe the current law should be retained.
  - Many of the judges in the SPD's survey stated that if allowing a defendant to substitute a judge makes the defendant feel that he or she received a "fair shake," then the substitution law is worthwhile.
- Even the DAs surveyed by the SPD believe the current law should be retained. In fact, most DAs said they too should be given the right to substitute.
- The State Bar's 1997 Bench-Bar survey reveals that both lawyers and judges believe the current substitution law should be retained.
- In 1995, the WI Supreme Court denied the Judicial Conference's petition to eliminate judicial substitution in criminal cases, citing the lack of "empirical data, anecdotal information or judicial perception to establish that the judge substitution statutes constitute an undue burden on or substantial interference with the judicial branch"
- The Director of State Courts' 1993 survey shows that 45% of judges ranked the present judicial substitution law as their first choice. (The choices were: retain current law (1<sup>st</sup> choice for 45%); eliminate current law (1<sup>st</sup> choice for 30%) and; amend current law to require affidavits of prejudice (1<sup>st</sup> choice for 25%).)

- Elimination of judicial substitution would be expensive and result in delays because recusal motions would then have to be filed. (See the SPD's fiscal estimate.)

- Recusal motions would be adverse for judges because such motions, which are public documents, would say negative things about the judge.

- The current judicial substitution law is not being abused.

- Since 1993, substitutions were filed in *less than 3%* of criminal cases (per data from the Director of State Courts office).

<u>1993</u>	<u>1994</u>	<u>1995</u>	<u>1996</u>
2.4%	2.8%	2.6%	3.0%

- Substituting a judge is not "judge shopping."

- The defendant cannot *choose* the new judge.
- The substitution request has to be filed within a certain time period. If the defendant doesn't like how the judge is handling the case (*after* the time limits for filing the substitution have passed), defendant can't then choose to file the substitution request.
- Other than in one-judge counties, the case is assigned to another judge voted in by the citizens of that county.

- Substitution of judge ensures a fair trial, which is the hallmark of our legal system.

- Substitution of judge instills faith and confidence in our criminal justice system.

- Substitution requests are not filed for the purpose of delay.

- Rather, substitution requests are filed for reasons such as the following: the particular judge shows prejudgment in certain types of cases or doesn't take individual facts into account; the judge is unfamiliar with criminal law; the judge assists the prosecution.

If you have any questions or would like additional information, please contact me at 266-6782. Thank you for your attention to this matter.

## What was judge thinking?

From the Journal Sentinel

September 15, 1998

Fond du Lac County Circuit Judge Steven Weinke couldn't have been more wrong. By handing down last week what he admitted was a light sentence for a Brillion couple who locked their 7-year-old daughter in a cage, he sent a terrible message to society: that the rights of children are secondary to the rights of their parents.

Weinke tried to explain away his foolish decision by arguing that he gave Michael and Angeline Rogers one year in jail, rather than sending them to prison, because they had tried to find psychological help for the developmentally disabled girl but were repeatedly ignored.

While that's a scathing indictment of social agencies and people who should have helped, the judge compounded the problem.

No matter how desperate and confused the parents were, common sense and human decency should have told them that you don't lock children in tiny cages in dark, unheated basements to "correct" their behavior.

The Rogerses' conduct was monstrous, and it came to light only because another of the couple's children courageously walked barefoot and coatless through bitter cold last November to tell police.

The judge called this a Humpty Dumpty-like family that "had a great fall," adding that he hoped "they could be put back together again." Obviously, this judge doesn't get it.

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## Substitution law keeps judge's docket light

By David Doege  
of the Journal Sentinel staff

March 29, 1998

The past week would have been a good one to shampoo the grimy brown carpeting in Circuit Judge Diane S. Sykes' courtroom.

She had little use for the Safety Building courtroom where she's assigned to preside over homicide, sexual assault and sexual predator cases.

Defendants and attorneys using the state's judicial substitution law virtually shut down Sykes, who in 4 1/2 years on the felony bench has developed a reputation as being particularly punishing on sentencing day. Of the last 11 cases assigned to her, 10 left via the substitution provision.

"I've had substitutions before, but it wasn't the wholesale fleeing I'm seeing now," Sykes said on a quiet morning late last week when her calendar was completely free.

Down the hall, Circuit Judge Elsa C. Lamelas, who presides over 'general' felony cases, also found herself with increasing down time as a smaller, but nevertheless steady, flow of substitution demands were filed on her.

"I think there is a perception that I am a tougher sentencer than the other judges who were getting my substitutions," Lamelas said on an afternoon late last week when all her work could be done in chambers. "But I want to stress that I think it's only a perception."

The state law that allows defendants to demand a different judge without providing a reason has affected judges in years past the same way it is affecting Sykes and Lamelas this year.

In 1984, then Circuit Judge Ralph Gorenstein's occasionally caustic demeanor and stern sentencing habits in some kinds of cases made him the target of numerous substitution demands.

In 1987, Ralph Adam Fine, now an appellate judge but then a circuit judge, was transferred out of felony court after more than 500 substitution demands were filed on him in just two months. Fine was an outspoken critic of plea bargaining and had written a book on the topic.

In 1990, Circuit Judge Louise Tesmer, then assigned to misdemeanor court, was the recipient of 400 substitution demands from attorneys who said they were concerned about her inconsistent rulings, interpretations of the law, sentencing habits and demeanor on the bench.

Since they rotated to their current felony assignments in August, defendants have opted out of Sykes' court 66 times through last week. In the same period, Lamelas has been served 44 substitution demands.

Circuit Judge Jeffrey A. Kremers, the presiding felony judge who is assigned to drug court, has the third-highest total in the felony division, 39, but he has had only four substitution demands filed on him in the last five months.

The substitution totals drop off sharply after that. Circuit Judge Dennis P. Moroney is fourth on the list with four since August. Circuit Judge Michael J. Barron has received no substitution demands.

Sykes' total of 66 is a problem because the caseload on a homicide and sexual assault calendar averages about 80 pending cases. However, because of the substitution demands, Sykes has only 51 cases pending. The cases that leave her courtroom are sent to the other two judges handling the same kinds of cases, Circuit Judges Timothy G. Dugan and Laurence C. Gram Jr. Dugan has 99 pending cases as of last week; Gram had 88.

As she indicated, the spate of substitution demands is nothing new for Sykes. Defense attorneys say that while Sykes conducts good trials, they are wary of her sentencing habits.

"I've seen her impose the maximum sentence even when the guy pleads to the original charge," one attorney explained.

Lamelas has been in the felony division only since August, and since her substitutions represent a smaller fraction of her caseload, the reasons for the demands filed on her are less clear. However, she is viewed as a judge with an above-average tendency to automatically impose jail time for first offenses and property crimes.

"You don't spank your child the first time," one attorney remarked.

Sykes and Lamelas also are known to occasionally reject the terms of some plea bargains.

Defense attorneys who work out plea bargains with prosecutors only to see judges reject the terms or impose sentences stiffer than the district attorney recommended are inclined to head elsewhere the next time around.

To slow the flow from Lamelas' courtroom, Kremers last week signed an order that defendants who file substitution demands on her will have their cases routed to Sykes. Kremers signed a similar order in October after he was the subject of 20 substitution

demands in a single month.

The following month, when defendants were faced with either staying in Kremers' court or substituting on him and going to Sykes, no substitution demands were filed on him.

Such steps are not new. In 1984, for example, then Circuit Judge Christ Seraphim, long a controversial figure, was tabbed to receive all substitutions filed against Gorenstein.

Defense lawyers consider pairings of stern sentencers a subversion to defendants' substitution right.

"They're manipulating the system," one attorney said.

Sykes and Lamelas disagreed.

"I don't think it's at all unfair," Lamelas said. "It's necessary to manage caseloads."

Lamelas and Sykes noted that the practice was upheld several years ago by the state Court of Appeals.

To further beef up Sykes' calendar, Kremers issued an order that until further notice, all sexual assault, sexual predator and homicide cases will be tabbed to her court.

Sykes said the latest substitution binge was another reason to repeal the current substitution law.

"Tough sentencing judges, publicly elected judges, are being shut down by the criminal defense bar or the criminals themselves, which I find outrageous," she said.

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## Substitutions shut down Judge Sykes

### Attorneys, defendants also use law to avoid Lamelas' courtroom

By David Doege  
of the Journal Sentinel staff

March 29, 1998

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### **Change urged in judge substitutions**

**By David Doege**  
**of the Journal Sentinel staff**

**September 20, 1996**

Three state lawmakers announced plans Thursday to sponsor legislation to revamp Wisconsin's judicial substitution law, which allows a criminal defendant to demand a new judge without providing a reason.

State Sen. Robert T. Welch (R-Redgranite) and state Reps. Alberta Darling (R-River Hills) and Scott Walker (R-Wauwatosa) said they will introduce bills that would require defendants to provide evidence proving a judge has a personal bias or prejudice as a reason for a judicial substitution.

The legislators called for the change after a news report this week said Milwaukee County Circuit Judge Dominic S. Amato was the subject of 98 substitution demands in his felony court assignment since June.

"We don't want to abolish judicial substitution altogether, just put some parameters in place in order to avoid the abuse we've seen in the past," Walker said.

"Wisconsin is the only state that has a substitution law this liberal," Welch said.

Similar legislation to that being proposed has been introduced in the past but has failed.

Darling said the legislation was needed partly because mass substitutions against specific judges routinely create logistical problems in Milwaukee County Circuit Court.

"Unfortunately to no avail, the Milwaukee court system has tried to ease recent substitution abuse by enacting various policy decisions," Darling said. "We believe requiring evidence of justifiable cause will correct the situation."

The proposal is expected to be introduced when the Legislature convenes in January.

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## Proposal would limit judicial substitution

By Stan Milam  
 Special to the Journal Sentinel  
 February 23, 1999

Madison -- Judicial substitution, the practice of allowing a criminal defendant to change judges once for no cause, is again under attack in the Legislature.

Rep. Frank Lasee (R-Bellevue) is seeking co-sponsors for a bill that would restrict judge substitution and plans to introduce the measure late next month. Similar efforts in 1993, 1996 and last year were unsuccessful.

"Under this legislation defendants could still substitute for cause, but the practice of getting a different judge just as a matter of preference should end," Lasee said. "Judge shopping should not be a part of our judicial system."

The State Bar of Wisconsin is gearing up for a defense of the law, which is "a reasonable method of allowing defendants to avoid unfair judges," said John Birdsall, co-chairman of the State Bar's Criminal Law Section Legislative Committee.

Judge shopping is not common practice, Birdsall said.

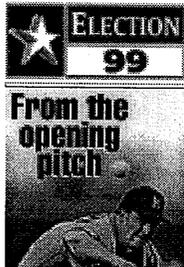
"You can only do it once, and you have no idea who you're going to get," Birdsall said. "The current system is fair and is working." Judges can be removed from a case only by disqualification and substitution. Judges are required to remove themselves if they have an interest in the case or they may be disqualified if a conflict of interest is established.

Removing a judge by substitution requires no cause. Each party in a civil case and the defendant in a criminal case have the right to one substitution.

Lasee's bill would eliminate the defendant's right to substitution in criminal matters.

Rep. Dave Travis, a former chairman of the now-defunct Wisconsin Sentencing Commission, said the system is not abused.

"The commission found that most judges are consistent in their sentencing policies," Travis (D-Madison) said. "Once in a while, you would see a judge sentence in a way others would not, but that was an extreme rarity."



Lasee argues that judge shopping happens in some counties.

"This is typically the case when a certain judge is perceived as handing out tougher sentences," Lasee said. "This creates serious problems in smaller counties where judge shopping can lead to more expense as judges from other counties need to be used."

Lasee cited statistics that show cases are delayed an average of 53 days each time a judge is substituted. In 1997, the most recent year for which figures are available, a judge was substituted in 2.2% of cases in the state.

The judicial substitution policy acts as an incentive for judges not to stray far from the norm, Travis said.

"If one judge has a bug about a certain crime other judges don't have, a defendant assigned to that judge should not be forced to take a short straw," Travis said.

Most judges and lawyers are opposed to eliminating judicial substitution, according to a poll taken by the State Bar. A 1997 survey found that 53% of the judges and lawyers questioned strongly agree that substitution should continue in civil cases, and 68% agreed that the policy should continue in criminal cases.

Lasee's bill could get a chilly reception in the Senate. If it clears the Assembly, the bill will be assigned to the Senate Judiciary Committee chaired by Sen. Gary George (D-Milwaukee), a supporter of substitution.

George said the question should be whether substitution denies justice.

"This is not a law that impedes the quality of justice," he said.

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# Representative Scott Walker

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## Elimination of substitution of judges in criminal matters Public Testimony by author - Rep. Scott Walker Assembly Committee on Corrections and the Courts - April 14, 1999

The case of Angeline Rogers has received a great deal of attention during the past few weeks. Looking at the details of her case, many people wonder how it is that she received just a one year in jail for the crime of child abuse – which included keeping her daughter in a dog cage in a dark, unheated basement.

Fond du Lac County Circuit Judge Steven Weinke handed down the light sentence because the Rogers' case was moved out of Calumet County. The reason: a judicial substitution motion by the defense. No doubt, they feared the sentence of a judge who would have to stand for election in the county – so they opted to try their luck with another judge.

Currently, there are two methods by which a judge who is scheduled to handle a case can be replaced: disqualification and substitution. A judge is required to disqualify himself or herself in a case if the judge may be considered to have an interest in the matter, such as if the judge is related to the party, has previously been involved with the case as counsel or has a significant financial or personal interest in the outcome.

Substitution (commonly referred to as “judge-shopping”) is the method by which parties in the case may have a judge who is scheduled to handle a case taken off of the case without having to give a reason. Each party in a civil case and only the defendant in a criminal case has the right to one substitution.

The bill being offered today by myself, Representative Krusick and Senator Darling retains the provisions relating to the disqualification of a judge, but eliminates the defendant's right to substitution of a judge in criminal matters.

In 1998, 6,126 cases were reassigned because of judicial substitution. Of those cases, more than half (3,374) were criminal cases.

During a ten-month period in 1997, 164 felony substitution ‘votes’ were cast by defendants and their attorneys to disregard the 92,247 residents within Milwaukee County who had voted for Circuit Court Judge Dominic Amato in April of 1995. For a while, the county Justice System Coordinator attempted to handle the caseload problem by assigning all cases resulting from substitution requests against Amato to Judge Diane Sykes, the judge against whom the formerly highest number of substitutions demands were made. Ultimately, Amato moved off of the felony bench. The same scenario has been in place for Judge Sykes and Judge Elsa Lamelas.

A similar policy had been used with Judge Rudolph T. Randa (now a federal judge) whose substituted cases were assigned to Amato. Criminal defense attorney Waring R. Fincke attempted to have the policy ruled unconstitutional. He unsuccessfully alleged that the practice denied defendants their rights to a fair trial. Fincke's motion stated that the reason lawyers filed for substitution from Randa “was because of his reputation for imposing harsh sentences in criminal cases ....”

Later, you are likely to hear the argument that judges who get a lot of substitutions in criminal cases are also the ones who get them in non-criminal cases - the kind where sentencing is not the same concern. This is a hollow argument as 28.9% more criminal cases were substituted than civil cases during the five-year study period by Attorney Michael Hartmann of the Wisconsin Public Policy Institute. Criminal cases were also substituted 32.5% more often than juvenile case and 35.8% more often than family-court cases.

Court of Appeals Judge Anderson chaired a study committee on substitution of judges that presented a report to the Wisconsin Judicial Conference in 1993. They concluded that substitution cost an estimated \$300,000 in 1991. In addition, a report prepared by the Director of State Courts for the Judicial Conference found that criminal cases with substitutions lasted an average of 53 days longer than cases without substitution.

In the report to the Judicial Conference, the Study Committee on Substitution of Judges identified five specific complaints:

1. There is widespread abuse of the substitution laws.
2. The substitution laws are used as a dilatory tactic.
3. The peremptory challenge to judges has an adverse impact on individual judges and subverts public confidence in the impartiality of the judiciary as a whole.
4. Attorneys and litigants use the substitution law to punish judges who have made correct, but unpopular (with defense attorneys) decisions.
5. The substitution laws have an adverse impact on the budget of the state court system and the administration of the courts.

Finally, I end with the comments of two former Justices of the state Supreme Court. Justice John L. Coffey noted in an opinion that the right to substitute "is frequently abused in that it is all too often invoked because the litigant's attorney does not approve of the assigned judge, or if the attorney is unprepared and expects that the substitution process will accomplish another delay. This type of substitution practice is a dilatory tactic that causes a great deal of expense and inconvenience to litigants, to witnesses, as well as the taxpayers who foot the bill for court administrators."

Justice William G. Callow states, "[T]he flood of substitutions secured 'of right' often frustrate the goal of prompt disposition without adding materially to the basic fairness of the procedure."

Wisconsin is one of only seven states that has truly peremptory criminal justice substitution and is the only state where the defendant is the only criminal party who can request substitution. Ending substitution in criminal cases will save our court system valuable time and money and will empower the judges we elect to make the decisions they see fit without fear of substitution.

**If there is a problem with a judge or with his or her rulings, let them be disqualified or appeal the decision or – as we did last week – hold them accountable for their actions on election day, but don't pretend that allowing criminal defendants to shop around for a softer judge is justice. We must act now before the end of parole and early release on December 31, 1999.**

**Eberle, Ed**

**From:** Walker, Scott  
**Sent:** Tuesday, April 13, 1999 3:54 PM  
**To:** Eberle, Ed  
**Subject:** Jud Sub

**Importance:** High

Ed,

Please take a look at the testimony for the hearing on Wednesday and make some copies of the attached editorial from the MJS.

Thanks,

Scott



Jud Sub testimony  
April 14.doc...

## **What was judge thinking?**

**From the Journal Sentinel**

**September 15, 1998**

Fond du Lac County Circuit Judge Steven Weinke couldn't have been more wrong. By handing down last week what he admitted was a light sentence for a Brillion couple who locked their 7-year-old daughter in a cage, he sent a terrible message to society: that the rights of children are secondary to the rights of their parents.

Weinke tried to explain away his foolish decision by arguing that he gave Michael and Angeline Rogers one year in jail, rather than sending them to prison, because they had tried to find psychological help for the developmentally disabled girl but were repeatedly ignored.

While that's a scathing indictment of social agencies and people who should have helped, the judge compounded the problem.

No matter how desperate and confused the parents were, common sense and human decency should have told them that you don't lock children in tiny cages in dark, unheated basements to "correct" their behavior.

The Rogerses' conduct was monstrous, and it came to light only because another of the couple's children courageously walked barefoot and coatless through bitter cold last November to tell police.

The judge called this a Humpty Dumpty-like family that "had a great fall," adding that he hoped "they could be put back together again." Obviously, this judge doesn't get it.

SPECIFIC JUDICIAL ASSIGNMENTS FOR DISTRICTS 1-10  
 REASON: SUBSTITUTION  
 FROM JANUARY - DECEMBER 1998

<u>DISTRICT</u>	<u>CIVIL</u>	<u>SM.CL.M.</u>	<u>FORF.</u>	<u>FAMILY</u>	<u>PROB.</u>	<u>JUV.</u>	<u>FELONY</u>	<u>MISD.</u>	<u>TRAF.</u>	<u>CR. TRAF.</u>	<u>TOTAL</u>
One	133	3	0	71	0	152	366	351	0	0	1,076
Two	39	16	0	59	8	68	98	110	22	24	444
Three	55	4	2	45	4	12	116	63	10	73	384
Four	34	16	20	32	7	27	134	65	56	44	435
Five	103	18	11	94	3	95	121	162	18	0	625
Six	76	37	10	63	8	15	72	45	84	51	461
Seven	71	16	18	58	5	39	216	147	77	63	710
Eight	69	23	8	40	3	9	189	98	58	62	559
Nine	104	22	20	66	13	61	158	136	94	50	724
Ten	93	15	28	69	6	68	189	119	69	52	708
<b>TOTAL</b>	<b>777</b>	<b>170</b>	<b>117</b>	<b>597</b>	<b>57</b>	<b>546</b>	<b>1,659</b>	<b>1,296</b>	<b>488</b>	<b>419</b>	<b>6,126</b>

WISCONSIN STATE ASSEMBLY



**PEGGY KRUSICK**  
STATE REPRESENTATIVE

**TO:** Corrections & the Courts Committee Members  
**FROM:** Peggy Krusick  
**DATE:** April 14, 1999  
**SUBJECT:** Judicial substitution (AB 201)

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Since 1989, I've been introducing bills to limit the number of requests for judicial substitutions in Wisconsin courtrooms. State law currently allows criminal defendants to file one judicial substitution demand per case without specifying a reason.

This liberal substitution law provides a way for defendants to avoid judges with a reputation for handing down tough sentences. A high number of substitution demands causes an uneven distribution of caseloads to a judge's peers.

In recent past, a Milwaukee felony court judge described by a colleague as "tough but fair" had to be reassigned to misdemeanor court due to an extraordinary number of substitution requests filed against him. Criminal defendants should not be able to put out of business judges with a record of issuing firm sentencing decisions.

While eliminating the defendant's right to judicial substitution, Assembly Bill 201 retains the current provisions relating to the disqualification of a judge. State statutes specifically lay out the guidelines judges must use to disqualify themselves from sitting on a case in which they may be considered to have an interest.

Criminal defendants should not be handed a free judicial peremptory strike. The current substitution rule interferes with the administration of justice. It is frequently abused – especially in felony cases – and prevents judges from completing the duties they were elected to perform.

It's time to end the unlimited right of defense attorneys and their clients to substitute a judge in an attempt to find a more lenient one. AB 201 sends a clear message to criminal defendants that they no longer have an automatic right to opt out of a tough judge's courtroom.

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