



1997 SENATE BILL 46

January 29, 1997 - Introduced by Senators WELCH, BUETTNER and ZIEN, cosponsored by Representatives WALKER, LADWIG, KRUSICK, DOBYNS, BRANDEMUEHL, SERATTI, NASS, JENSEN, PLALE, GOETSCH, OLSEN, HAHN and FREESE. Referred to Committee on Judiciary, Campaign Finance Reform and Consumer Affairs.

1 **AN ACT to amend** 48.29 (1), 48.29 (1m), 345.315 (1), (1m) and (5), 799.205, 800.05,
2 801.56, 801.58 (1), (2), (3) and (7), 801.59, 938.29 (1), 938.29 (1m), 938.29 (2),
3 938.30 (2) and 971.20 (3) (b), (4), (5), (6), (7), (8) and (9) of the statutes; **relating**
4 **to:** substitution of judges.

Analysis by the Legislative Reference Bureau

Under current law, there are 2 methods by which a judge who is scheduled to handle a case is replaced: disqualification and substitution. A judge is required to disqualify himself or herself in a case if the judge is related to a party or an attorney or any of their spouses, is a party or material witness, has previously been involved with the case as counsel or a drafter of a legal instrument, has a significant financial or personal interest in the outcome or determines that he or she cannot act impartially in the case. The disqualification may be waived if the relevant factors are disclosed and all parties and the judge agree to the waiver.

Substitution is the method by which parties in the case may have a judge who is scheduled to handle a case taken off the case without having to give a reason. Each party in a civil case and the defendant in a criminal case generally has a right to one substitution, except that additional substitution rights occur in certain cases if there is a successful appeal or if the judge who handles a preliminary hearing is assigned to handle the trial.

This bill retains the disqualification of judge provisions, but changes substitution in civil and criminal cases, including juvenile cases and municipal court cases. Under the bill, the party requesting substitution must submit an affidavit

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with the request stating that the affiant believes that the judge has a personal bias or prejudice against the party. The affidavit must include facts and reasons for that belief. If a judge fails to act on the substitution request within 7 days of the request or finds that the request was not timely and in proper form, the chief judge shall determine if the request was timely and in proper form.

For further information see the *state and local* fiscal estimate, which will be printed as an appendix to this bill.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

1 **SECTION 1.** 48.29 (1) of the statutes is amended to read:

2 48.29 (1) The child, or the child's parent, guardian or legal custodian, either
3 before or during the plea hearing, may file a written request and affidavit with the
4 clerk of the court or other person acting as the clerk for a substitution of the judge
5 assigned to the proceeding. The affidavit shall state that the affiant believes that the
6 judge has a personal bias or prejudice against the child or in favor of any adverse
7 party and shall state the facts and reasons for that belief. Upon filing the written
8 request and affidavit, the filing party shall immediately mail or deliver a copy of the
9 request and affidavit to the judge named therein. Whenever any person has the right
10 to request a substitution of judge, that person's counsel or guardian ad litem may file
11 the request and affidavit. Not more than one such written request may be filed in
12 any one proceeding, nor may any single request name more than one judge. This
13 section shall not apply to proceedings under s. 48.21.

14 **SECTION 2.** 48.29 (1m) of the statutes is amended to read:

15 48.29 (1m) When the clerk receives a request for substitution and affidavit, the
16 clerk shall immediately contact the judge whose substitution has been requested for
17 a determination of whether the request was and affidavit were made timely and in
18 proper form. If the request is and affidavit are found to be timely and in proper form,

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1 the judge named in the request has no further jurisdiction and the clerk shall request
2 the assignment of another judge under s. 751.03. If no determination is made within
3 7 days or if the judge named in the substitution request finds that the request or
4 affidavit was not timely and in proper form, the clerk shall refer the matter to the
5 chief judge of the judicial administrative district, or to the chief judge of an adjoining
6 judicial administrative district if the judge named in the request is the chief judge,
7 for determination of whether the request was and affidavit were made timely and in
8 proper form and reassignment as necessary.

9 **SECTION 3.** 345.315 (1), (1m) and (5) of the statutes are amended to read:

10 345.315 (1) In traffic regulation and nonmoving traffic violation cases a person
11 charged with a violation may file a written request and affidavit for a substitution
12 of a different judge for the judge originally assigned to the trial of that case. The
13 affidavit shall state that the affiant believes that the judge has a personal bias or
14 prejudice against the person or in favor of any adverse party and shall state the facts
15 and reasons for that belief. The written request and affidavit shall be filed not later
16 than 7 days after the initial appearance in person or by an attorney. If a new judge
17 is assigned to the trial of a case and the defendant has not exercised the right to
18 substitute an assigned judge, a written request and affidavit for the substitution of
19 the new judge may be filed within 10 days of the giving of actual notice or sending
20 of the notice of assignment to the defendant or the defendant's attorney. If the
21 notification occurs within 10 days of the date set for trial, the request and affidavit
22 shall be filed within 48 hours of the giving of actual notice or sending of the notice
23 of assignment to the defendant or the defendant's attorney. If the notification occurs
24 within 48 hours of the trial or if there has been no notification, the defendant may
25 ~~make an oral or~~ submit a written request for substitution and affidavit prior to the

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1 commencement of the proceedings. The judge against whom a request has been filed
2 may set initial bail and accept a plea.

3 (1m) When the clerk of court receives a request for substitution and affidavit,
4 the clerk shall immediately contact the judge whose substitution has been requested
5 for a determination of whether the request was and affidavit were made timely and
6 in proper form. If the request is and affidavit are found to be timely and in proper
7 form, the judge named in the request has no further jurisdiction and the clerk shall
8 request the assignment of another judge under s. 751.03. If no determination is made
9 within 7 days or if the judge named in the substitution request finds that the request
10 or affidavit was not timely and in proper form, the clerk shall refer the matter to the
11 chief judge of the judicial administrative district, or to the chief judge of an adjoining
12 judicial administrative district if the judge named in the request is the chief judge,
13 for determination of whether the request was and affidavit were made timely and in
14 proper form and reassignment as necessary.

15 (5) If upon an appeal from a judgment or order or upon a writ of error the
16 appellate court orders a new trial or reverses or modifies the judgment or order in
17 a manner such that further proceedings in the trial court are necessary, the person
18 charged with a violation may file a request and affidavit under sub. (1) within 20 days
19 after the entry of the judgment or decision of the appellate court whether or not
20 another request was filed prior to the time the appeal or writ of error was taken.

21 **SECTION 4.** 799.205 of the statutes is amended to read:

22 **799.205 Substitution of judge.** (1) Any party to a small claims action or
23 proceeding may file a written request and affidavit with the clerk of courts for a
24 substitution of a new judge for the judge assigned to the case. The affidavit shall
25 state that the affiant believes that the judge has a personal bias or prejudice against

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1 the party or in favor of any adverse party and shall state the facts and reasons for
2 that belief. The written request and affidavit shall be filed on the return date of the
3 summons or within 10 days after the case is scheduled for trial. If a new judge is
4 assigned to the trial of a case, a request for substitution and affidavit must be made
5 within 10 days of receipt of notice of assignment, provided that if the notice of
6 assignment is received less than 10 days prior to trial, the request for substitution
7 and affidavit must be made within 24 hours of receipt of the notice and provided that
8 if notification is received less than 24 hours prior to trial, the action shall proceed to
9 trial only upon stipulation of the parties that the assigned judge may preside at the
10 trial of the action. Upon filing the written request and affidavit, the filing party shall
11 forthwith mail a copy thereof to all parties to the action and to the original judge.

12 (2) After the written request ~~has~~ and affidavit have been filed, the original
13 judge shall have no further jurisdiction in the action or proceeding except to
14 determine if the request is and affidavit are correct as to form and timely filed. If no
15 determination is made within 7 days or if the judge named in the substitution
16 request finds that the request or affidavit was not timely and in proper form, the
17 clerk shall refer the matter to the chief judge, or to the chief judge of an adjoining
18 judicial administrative district if the judge named in the request is the chief judge,
19 for the determination and reassignment of the action as necessary. If the request is
20 and affidavit are correct as to form and timely filed, the named judge shall be
21 disqualified and shall promptly request assignment of another judge under s. 751.03.

22 (3) Except as provided in sub. (4), no party is entitled to file more than one ~~such~~
23 ~~written~~ request in any one action, and any single ~~such~~ request shall not name more
24 than one judge. For purposes of this subsection, parties united in interest and

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1 pleading together shall be considered as a single party, but the consent of all such
2 parties is not needed for the filing by one such party of a written request.

3 (4) If upon an appeal from a judgment or order or upon a writ of error the
4 appellate court orders a new trial or reverses or modifies the judgment or order as
5 to any or all of the parties in a manner such that further proceedings in the trial court
6 are necessary, any party may file a request and affidavit under sub. (1) within 20 days
7 after the entry of the judgment or decision of the appellate court whether or not
8 another request was filed prior to the time the appeal or writ of error was taken.

9 **SECTION 5.** 800.05 of the statutes is amended to read:

10 **800.05 Substitution of municipal judge.** (1) In cases specified in s. 800.02
11 (1), a person charged with a violation may file a written request and affidavit for a
12 substitution of a new judge for the municipal judge assigned to the trial of that case.
13 The affidavit shall state that the affiant believes that the judge has a personal bias
14 or prejudice against the defendant or in favor of any adverse party and shall state
15 the facts and reasons for that belief. The written request and affidavit shall be filed
16 not later than 7 days after the initial appearance in person or by an attorney. The
17 municipal judge against whom a request has been filed may set initial bail and accept
18 a plea of not guilty.

19 (2) Except as provided in sub. (4), no person may file more than one ~~such~~
20 ~~written~~ request in any one action.

21 (3) In municipal court, upon receipt of the written request and affidavit, the
22 original judge shall have no further jurisdiction in the case except as provided in sub.
23 (1) and except to determine if the request was and affidavit were made timely and
24 in proper form. If no determination is made within 7 days, or if the judge named in
25 the substitution request finds that the request or affidavit was not timely and in

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1 proper form, the clerk shall refer the matter to the chief judge, or to the chief judge
2 of an adjoining judicial administrative district if the judge named in the request is
3 the chief judge, for the determination and reassignment of the action as necessary.
4 If the request is and affidavit are determined to be proper, the case shall be
5 transferred as provided in s. 751.03 (2). Upon transfer, the municipal judge shall
6 transmit to the appropriate court all the papers in the action and the action shall
7 proceed as if it had been commenced in that court.

8 (4) If upon an appeal from a judgment or order or upon a writ of error the
9 appellate court orders a new trial or reverses or modifies the judgment or order in
10 a manner such that further proceedings in the municipal court are necessary, the
11 person charged with a violation may file a request and affidavit under sub. (1) within
12 20 days after the entry of the judgment or decision of the appellate court whether or
13 not another request was filed prior to the time the appeal or writ of error was taken.

14 **SECTION 6.** 801.56 of the statutes is amended to read:

15 **801.56 Change of venue if judge disqualified by interest.** When the judge
16 is a party or interested in any action in the judge's court or is related to or has been
17 of counsel for either party, the court or the presiding judge thereof shall, ~~upon~~
18 ~~application of either party, and may without such application, change the place of~~
19 ~~trial or call in another judge as provided in s. 801.58~~ proceed under s. 757.19. The
20 fact that the judge is a taxpayer does not disqualify the judge.

21 **SECTION 7.** 801.58 (1), (2), (3) and (7) of the statutes are amended to read:

22 801.58 (1) Any party to a civil action or proceeding may file a written request
23 and affidavit, signed personally or by his or her attorney, with the clerk of courts for
24 a substitution of a new judge for the judge assigned to the case. The affidavit shall
25 state that the affiant believes that the judge has a personal bias or prejudice against

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1 the party or in favor of any adverse party and shall state the facts and reasons for
2 that belief. The written request and affidavit shall be filed preceding the hearing of
3 any preliminary contested matters and, if by the plaintiff, not later than 60 days after
4 the summons and complaint are filed or, if by any other party, not later than 60 days
5 after service of a summons and complaint upon that party. If a new judge is assigned
6 to the trial of a case, a request for substitution and affidavit must be made within 10
7 days of receipt of notice of assignment, provided that if the notice of assignment is
8 received less than 10 days prior to trial, the request for substitution and affidavit
9 must be made within 24 hours of receipt of the notice and provided that if notification
10 is received less than 24 hours prior to trial, the action shall proceed to trial only upon
11 stipulation of the parties that the assigned judge may preside at the trial of the
12 action. Upon filing the written request and affidavit, the filing party shall forthwith
13 mail a copy thereof to all parties to the action and to the named judge.

14 (2) When the clerk receives a request for substitution and affidavit, the clerk
15 shall immediately contact the judge whose substitution has been requested for a
16 determination of whether the request was and affidavit were made timely and in
17 proper form. If the request is and affidavit are found to be timely and in proper form,
18 the judge named in the request has no further jurisdiction and the clerk shall request
19 the assignment of another judge under s. 751.03. If the judge named in the
20 substitution request finds that the request or affidavit was not timely and in proper
21 form, that determination may shall be reviewed by the chief judge of the judicial
22 administrative district, or by the chief judge of an adjoining judicial administrative
23 district if the judge named in the request is the chief judge, if the party who made
24 the substitution request files a written request for review with the clerk no later than
25 10 days after the determination by the judge named in the request. If no

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1 determination is made by the judge named in the request within 7 days, the clerk
2 shall refer the matter to the chief judge of the judicial administrative district or to
3 the chief judge of an adjoining judicial administrative district, if the judge named in
4 the request is the chief judge, for determination of whether the request was and
5 affidavit were made timely and in proper form and reassignment as necessary. The
6 newly assigned judge shall proceed under s. 802.10 (1).

7 (3) Except as provided in sub. (7), no party may file more than one ~~such written~~
8 request in any one action, nor may any single ~~such~~ request name more than one
9 judge. For purposes of this subsection parties united in interest and pleading
10 together shall be considered as a single party, but the consent of all such parties is
11 not needed for the filing by one of such party of a written request.

12 (7) If upon an appeal from a judgment or order or upon a writ of error the
13 appellate court orders a new trial or reverses or modifies the judgment or order as
14 to any or all of the parties in a manner such that further proceedings in the trial court
15 are necessary, any party may file a request and affidavit under sub. (1) within 20 days
16 after the filing of the remittitur in the trial court whether or not another request was
17 filed prior to the time the appeal or writ of error was taken.

18 **SECTION 8.** 801.59 of the statutes is amended to read:

19 **801.59 Assigned judge.** In any case where another judge has been assigned
20 under s. 751.03 to hear a particular action or proceeding, the clerk of circuit court
21 shall forthwith notify all parties to the action or proceeding, by mail or telephone,
22 noting in the case file the time notice was sent or given and, if notice is given by
23 telephone, the person with whom he or she spoke. If a written request and affidavit
24 for a substitution of a new judge is filed with regard to an assigned judge, it shall be
25 filed within 7 days after notice of the assignment has been received. A copy of the

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1 written request and affidavit shall be mailed forthwith to all parties and to the
2 named judge.

3 **SECTION 9.** 938.29 (1) of the statutes is amended to read:

4 938.29 (1) Except as provided in sub. (1g), the juvenile, either before or during
5 the plea hearing, may file a written request and affidavit with the clerk of the court
6 or other person acting as the clerk for a substitution of the judge assigned to the
7 proceeding. The affidavit shall state that the affiant believes that the judge has a
8 personal bias or prejudice against the juvenile or in favor of any adverse party and
9 shall state the facts and reasons for that belief. Upon filing the written request and
10 affidavit, the juvenile shall immediately mail or deliver a copy of the request and
11 affidavit to the judge named therein. In a proceeding under s. 938.12 or 938.13 (12),
12 only the juvenile may request a substitution of the judge. Whenever the juvenile has
13 the right to request a substitution of judge, the juvenile's counsel or guardian ad
14 litem may file the request and affidavit. Not more than one ~~such written~~ request may
15 be filed in any one proceeding, nor may any single request name more than one judge.
16 This section shall not apply to proceedings under s. 938.21.

17 **SECTION 10.** 938.29 (1m) of the statutes is amended to read:

18 938.29 (1m) When the clerk receives a request for substitution and affidavit,
19 the clerk shall immediately contact the judge whose substitution has been requested
20 for a determination of whether the request was and affidavit were made timely and
21 in proper form. Except as provided in sub. (2), if the request is and affidavit are found
22 to be timely and in proper form, the judge named in the request has no further
23 jurisdiction and the clerk shall request the assignment of another judge under s.
24 751.03. If no determination is made within 7 days or if the judge named in the
25 substitution request finds that the request or affidavit was not timely and in proper

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1 form, the clerk shall refer the matter to the chief judge, or to the chief judge of an
2 adjoining judicial administrative district if the judge named in the request is the
3 chief judge, for determination of whether the request was and affidavit were made
4 timely and in proper form and reassignment as necessary.

5 **SECTION 11.** 938.29 (2) of the statutes is amended to read:

6 938.29 (2) If the request and affidavit for substitution of a judge is are made
7 for the judge scheduled to conduct a waiver hearing under s. 938.18, the request and
8 affidavit shall be filed before the close of the working day preceding the day that the
9 waiver hearing is scheduled. The affidavit shall state that the affiant believes that
10 the judge has a personal bias or prejudice against the juvenile or in favor of any
11 adverse party and shall state the facts and reasons for that belief. Except as provided
12 in sub. (1g), the judge may allow an authorized party to make a request for
13 substitution and affidavit on the day of the waiver hearing. If the request for
14 substitution is and affidavit are made subsequent to the waiver hearing, the judge
15 who conducted the waiver hearing may also conduct the plea hearing.

16 **SECTION 12.** 938.30 (2) of the statutes is amended to read:

17 938.30 (2) At or before the commencement of the hearing under this section the
18 juvenile and the parent, guardian or legal custodian shall be advised of their rights
19 as specified in s. 938.243 and shall be informed that the hearing shall be to the court
20 and that a request and affidavit for a substitution of judge under s. 938.29 must be
21 made before the end of the plea hearing or be waived. Nonpetitioning parties,
22 including the juvenile, shall be granted a continuance of the plea hearing if they wish
23 to consult with an attorney on the request for a substitution of a judge.

24 **SECTION 13.** 971.20 (3) (b), (4), (5), (6), (7), (8) and (9) of the statutes are
25 amended to read:

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1 971.20 (3) (b) A written request and affidavit for the substitution of a different
2 judge for the judge assigned to preside at the preliminary examination may be filed
3 with the clerk, or with the court at the initial appearance. The affidavit shall state
4 that the affiant believes that the judge has a personal bias or prejudice against the
5 defendant or in favor of any adverse party and shall state the facts and reasons for
6 that belief. If filed with the clerk, the request and affidavit must be filed at least 5
7 days before the preliminary examination unless the court otherwise permits.
8 Substitution of a judge assigned to a preliminary examination under this subsection
9 exhausts the right to substitution for the duration of the action, except under sub.
10 (7).

11 (4) SUBSTITUTION OF TRIAL JUDGE ORIGINALLY ASSIGNED. A written request and
12 affidavit for the substitution of a different judge for the judge originally assigned to
13 the trial of the action may be filed with the clerk before making any motions to the
14 trial court and before arraignment. The affidavit shall state that the affiant believes
15 that the judge has a personal bias or prejudice against the defendant or in favor of
16 any adverse party and shall state the facts and reasons for that belief.

17 (5) SUBSTITUTION OF TRIAL JUDGE SUBSEQUENTLY ASSIGNED. If a new judge is
18 assigned to the trial of an action and the defendant has not exercised the right to
19 substitute an assigned judge, a written request and affidavit for the substitution of
20 the new judge may be filed with the clerk within 15 days of the clerk's giving actual
21 notice or sending notice of the assignment to the defendant or the defendant's
22 attorney. If the notification occurs within 20 days of the date set for trial, the request
23 and affidavit shall be filed within 48 hours of the clerk's giving actual notice or
24 sending notice of the assignment. If the notification occurs within 48 hours of the
25 trial or if there has been no notification, the defendant may ~~make an oral or~~ submit

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1 a written request and affidavit for substitution prior to the commencement of the
2 proceedings.

3 (6) SUBSTITUTION OF JUDGE IN MULTIPLE DEFENDANT ACTIONS. In actions involving
4 more than one defendant, the request for substitution shall be made jointly by all
5 defendants, but the affidavit need only be completed by one defendant. If severance
6 has been granted and the right to substitute has not been exercised prior to the
7 granting of severance, the defendant or defendants in each action may request a
8 substitution under this section.

9 (7) SUBSTITUTION OF JUDGE FOLLOWING APPEAL. If an appellate court orders a new
10 trial or sentencing proceeding, a request and affidavit under this section may be filed
11 within 20 days after the filing of the remittitur by the appellate court, whether or not
12 a request for substitution was made prior to the time the appeal was taken.

13 (8) PROCEDURES FOR CLERK. Upon receiving a request for substitution and
14 affidavit, the clerk shall immediately contact the judge whose substitution has been
15 requested for a determination of whether the request was and affidavit were made
16 timely and in proper form. If no determination is made within 7 days or if the judge
17 named in the substitution request finds that the request or affidavit was not timely
18 and in proper form, the clerk shall refer the matter to the chief judge, or to the chief
19 judge of an adjoining judicial administrative district if the judge named in the
20 request is the chief judge, for the determination and reassignment of the action as
21 necessary. If the request is and affidavit are determined to be proper, the clerk shall
22 request the assignment of another judge under s. 751.03.

23 (9) JUDGE'S AUTHORITY TO ACT. Upon the filing of a request for substitution and
24 affidavit in proper form and within the proper time, the judge whose substitution has

