

1981 Senate Bill 163

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CHAPTER 137 , Laws of 1981

AN ACT to amend 801.58 (7); and to repeal and recreate 801.58 (2) and 971.20 of the statutes, relating to the procedures by which criminal defendants and parties to civil actions exercise the right to substitution of judge.

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

SECTION 1. 801.58 (2) of the statutes is repealed and recreated to read:

801.58 (2) When the clerk receives a request for substitution, the clerk shall immediately contact the judge whose substitution has been requested for a determination of whether the request was made timely and in proper form. If the request is found to be timely and in proper form, the judge named in the request has no further jurisdiction and

the clerk shall request the assignment of another judge under s. 751.03. If no determination is made within 7 days, the clerk shall refer the matter to the chief judge of the judicial administrative district for determination of whether the request was made timely and in proper form and reassignment as necessary. The newly assigned judge shall proceed under s. 802.10 (1).

NOTE: Subsection (2) has been revised to allow the clerk to refer the substitution request to the chief judge of the judicial administrative district when the judge whose substitution has been requested fails to determine within 7 days whether the request is timely made and in proper form.

SECTION 2. 801.58 (7) of the statutes is amended to read:

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

NOTE: Subsection (7) has been amended to clarify that the 20-day time period for filing a substitution request after an appellate remand commences upon the filing of the remittitur in the trial court. *Rohl v. State*, 97 Wis. 2d 514 (1980).

SECTION 3. 971.20 of the statutes is repealed and recreated to read:

971.20 Substitution of judge. (1) DEFINITION. In this section, "action" means all proceedings before a court from the filing of a complaint to final disposition at the trial level.

(2) ONE SUBSTITUTION. In any criminal action, the defendant has a right to only one substitution of a judge, except under sub. (7). The right of substitution shall be exercised as provided in this section.

(3) SUBSTITUTION OF JUDGE ASSIGNED TO PRELIMINARY EXAMINATION. A written request for the substitution of a different judge for the judge assigned to preside at the preliminary examination may be filed with the clerk, or with the court at the initial appearance. If filed with the clerk, the request must be filed at least 5 days before the preliminary examination unless the court otherwise permits. Substitution of a judge assigned to a preliminary examination under this subsection exhausts the right to substitution for the duration of the action, except under sub. (7).

(4) SUBSTITUTION OF TRIAL JUDGE ORIGINALLY ASSIGNED. A written request for the substitution of a different judge for the judge originally assigned to the trial of the action may be filed with the clerk before making any motions to the trial court and before arraignment.

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

(6) SUBSTITUTION OF JUDGE IN MULTIPLE DEFENDANT ACTIONS. In actions involving more than one defendant, the request for substitution shall be made jointly by all defendants. If severance has been granted and the right to substitute has not been exercised prior

to the granting of severance, the defendant or defendants in each action may request a substitution under this section.

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

(8) **PROCEDURES FOR CLERK.** Upon receiving a request for substitution, the clerk shall immediately contact the judge whose substitution has been requested for a determination of whether the request was made timely and in proper form. If no determination is made within 7 days, the clerk shall refer the matter to the chief judge for the determination and reassignment of the action as necessary. If the request is determined to be proper, the clerk shall request the assignment of another judge under s. 751.03.

(9) **JUDGE'S AUTHORITY TO ACT.** Upon the filing of a request for substitution in proper form and within the proper time, the judge whose substitution has been requested has no authority to act further in the action except to conduct the initial appearance, accept pleas and set bail.

(10) **FORM OF REQUEST.** A request for substitution of a judge may be made in the following form:

STATE OF WISCONSIN
CIRCUIT COURT

.... COUNTY

State of Wisconsin

vs.

.... (Defendant)

Pursuant to s. 971.20 the defendant (or defendants) request(s) a substitution for the Hon. as judge in the above entitled action.

Dated, 19...

....(Signature of defendant or defendant's attorney)

(11) **RETURN OF ACTION TO SUBSTITUTED JUDGE.** Upon the filing of an agreement signed by the defendant or defendant's attorney and by the prosecuting attorney, the substituted judge and the substituting judge, the criminal action and all pertinent records shall be transferred back to the substituted judge.

NOTE: Section 971.20 has been revised to clarify its objective of allowing defendants in criminal trials one substitution of the assigned judge upon making a timely request. The statute is not to be used for delay nor for "judge shopping," but is to ensure a fair and impartial trial for the defendants. The statute does not govern removal for cause of the assigned judge through an affidavit of prejudice.

Subsection (2) clarifies that the defendant has a right to only one substitution of judge in a criminal action, unless an appellate court orders a new trial. Prior sub. (2) so provided, but the effect of this provision was unclear in light of the introductory phrase of prior sub. (3).

Subsection (3) allows the defendant's right of substitution to be used against the judge assigned to the preliminary examination and specifies the timing of these requests.

Subsection (4) allows the defendant's right of substitution to be used against the judge originally assigned to preside at trial, specifying the timing of these requests.

Subsection (5) allows the defendant's right of substitution to be used against a judge assigned to preside at trial in place of the judge originally assigned, specifying the timing of these requests.

Subsection (6) clarifies that all defendants in a single action must join in a substitution request.

Subsection (7) allows a substitution request to be made upon appellate remand for a new trial, irrespective of whether a substitution of judge was requested prior to the appeal. It is the only exception to the rule of one substitution per action. The time limit for the request is tied to filing of the remittitur, in accordance with *Rohl v. State*, 97 Wis. 2d 514 (1980). [LRB NOTE: Senate Amendment 1 revised this subsection to also allow the substitution request to be made upon appellate remand for new sentencing proceedings.]

Subsection (8) provides for the determination of the timeliness and propriety of the substitution request to be made by the chief judge if the trial judge fails to do so within 7 days.

Subsection (9) is prior sub. (2), amended to allow the judge whose substitution has been requested to accept any plea. The prior statute allowed the judge to accept only pleas of not guilty. This revision promotes judicial economy by allowing the judge whose substitution has been requested to accept a guilty or no contest plea tendered by the defendant before the action is reassigned. Defendants preferring to have guilty or no contest pleas accepted by the substituting judge may obtain that result by standing mute or pleading not guilty until after the action has been reassigned.

Subsection (10) is prior sub. (5).

Subsection (11) is prior sub. (6).

SECTION 4. Initial applicability. This act applies to all civil actions and proceedings commenced on or after the effective date of this act and to criminal actions in which the initial appearance occurs on or after the effective date of this act.

SECTION 5. Effective date. This act takes effect on the first day of the 2nd month commencing after its publication.
