Senate Bill 2102

Testimony of Daniel J. Crothers

Introduction

SB 2102 seeks to amend N.D.C.C. § 29-15-21 relating to a written demand for change of judge. I appear today at the request of the Chair, in my individual capacity, and not as a Justice or representative of the North Dakota Supreme Court or the North Dakota judicial branch.

As background, I have been a licensed lawyer in North Dakota for more than 40 years. The first half of my career was as a litigation lawyer, and the second half as a Justice on the North Dakota Supreme Court. Over the last two decades, I have presented dozens of seminars to judges and lawyers about recusal and disqualification of judges in cases when a judge may have conflicts requiring that the judge not continue presiding over a case.

My Positions on SB 2102

I have no objection to the non-substantive grammatical and stylistic changes on page 1, lines 18 and 19; page 2, lines 5, 6, 10, 13, 14, 16, 19, 24, 27 and 29; and page 3, lines 1, 13, 14, and 15.

I do not favor or support the two proposed substantive amendments on page 2:

Line 15: ", the reason the change of judge is sought" and

Line 29-30: "the reason for the change was not based on reasonable grounds".

I oppose the proposed amendments because they take us back to a practice this Legislative Assembly ended in 1971, the proposed amendments provide no guidelines or yardstick to measure what are "reasonable grounds," and requiring determination of "reasonable grounds" likely will either duplicate or conflict with judicial disqualification under Rule 2.11 of the North Dakota Code of Judicial Conduct. Along with these problems, I respectfully suggest the amendments will not accomplish anything to help courts provide the people of North Dakota prompt and fair judicial proceedings.

The Law Before and After 1971

Starting with Section 285 of the Code of Criminal Procedure, Revised Codes of the Territory of Dakota (1877) and continuing until August 1, 1971, our law required that any demand for change of judge be accompanied by an affidavit of prejudice. *See Traynor v. Leclerc*, 1997 ND 47, ¶ 9, 561 N.W.2d 644. Before the law was replaced in 1971, it was codified in chapter 29-15 of the North Dakota Century Code

and covered only criminal cases. The chapter was titled "Removal of Cause and Change of Judge." The first portion of N.D.C.C. ch. 29-15 covered moving a criminal case to another county when a defendant believed a fair and impartial trial could not be obtained in the county where the defendant was charged with committing a crime. See N.D.C.C. § 29-15-01 (1960). The sections of law in the first portion of chapter 29-15 have been superseded and replaced by Rules 21 and 22 of the North Dakota Rules of Criminal Procedure regarding changing trial venue in criminal cases.

CHAPTER 29-15
REMOVAL OF CAUSE AND CHANGE OF JUDGE

29-15-01. Causes for removal of action.
Superseded by N.D.R.Crim.P., Rule 21.

29-15-02. Petition - Notice - Time to prepare.
Superseded by N.D.R.Crim.P., Rules 21, 22.

29-15-03. Court must order only one change.
Superseded by N.D.R.Crim.P., Rule 21.

29-15-04. Duty of clerk.
Superseded by N.D.R.Crim.P., Rule 21.

29-15-05. Disposition of defendant upon removal.
Superseded by N.D.R.Crim.P., Rule 21.

29-15-06. Court may require bail.
Superseded by N.D.R.Crim.P., Rule 21.

29-15-07. Witnesses upon removal - Undertaking - Notice - Subpoena.
Superseded by N.D.R.Crim.P., Rule 21.

29-15-08. Trial upon removal - Original pleadings - Copies.
Superseded by N.D.R.Crim.P., Rule 21.

29-15-09. Clerk, neglect upon removal - Damages.
Superseded by N.D.R.Crim.P., Rule 21.

29-15-10. Several defendants, removal by one.
Superseded by N.D.R.Crim.P., Rule 21.

29-15-11. Removal by state - Procedure.
Superseded by N.D.R.Crim.P., Rule 21.

29-15-12. Prosecution by officers of county where action was commenced - Jurisdiction of court.
Superseded by N.D.R.Crim.P., Rule 21.

https://ndlegis.gov/cencode/t29c15.pdf#nameddest=29-15-01

The second portion of chapter 29-15 (1960) governed removing a judge. One of its provisions, N.D.C.C. § 29-15-13 (1960), titled "Prejudice of bias of judge—Affidavit—Filing," provided in relevant part:

> When either party to a criminal action pending in any of the district courts of this state shall file an affidavit stating that he has reason to believe and does believe that he cannot have a fair and impartial trial or hearing before the judge presiding at the term of court at which such action is to be tried, by reason of the bias and prejudice of such judge, the judge shall proceed no further in this action and thereupon shall be disqualified to do any further act in the cause.

N.D.C.C. § 29-15-13 (1960).

The pre-1971 version of the statute required a sworn statement from the criminal defendant or his or her lawyer that they believed a fair and impartial trial was not available due to bias or prejudice of the judge. Under the plain language of N.D.C.C. § 29-15-21 (1960), the removal of a judge was set in motion by the timely filing of an affidavit. No procedure existed under the former law for a hearing on the accuracy or truthfulness of the reasons for the demand. No ruling was made on the actual content on the claims of bias or prejudice were made before a judge was removed from a case. As noted immediately below, any claim the judge was biased or prejudiced therefore required no substantiation.

The 1971 legislation removed requiring an affidavit of prejudice. The reasons for the 1971 changes were discussed in a 1997 North Dakota Supreme Court decision:

> One district judge testifying in favor of Senate Bill 2383 (1971 N.D. Laws, ch. 316), described it as a "housecleaning law." He testified that a judge may have a conflict of interest and that "[s]ome clients do not feel they want to say it is due to prejudice." He added: This bill is designed to simplify the procedure for obtaining a change of judge in district court. Under the proposal a litigant may obtain a change of judge simply by filing a statement entitled "Demand for a change of judge," without having to specify any grounds for the change. An attorney in favor of the bill testified: "Affidavit of prejudice words are derogatory." In *State v. Holmes*, 106 Wis.2d 31, 315 N.W.2d 703, 716-17 (1982), the Wisconsin Supreme Court explained one of the main reasons for enactment of a statute like ours:
>
> > "The legislative purpose in adopting [the statute] was to remedy the ills caused by the affidavit of prejudice statute. Because the Wisconsin affidavit of prejudice statutes required no substantiation of or determination of the

> allegation of prejudice, many thought the procedure unjustly impugned the integrity of the judges to whom the affidavits were addressed and that the unchallenged and undetermined charges of judicial prejudice spread on the court records gave the public a distorted picture of judicial impartiality."

Traynor, 1997 ND 47, ¶¶ 11-12.

The 1971 Session Laws show the law enacted in 1971 repealed the former provisions for demand of change of judge.

29-15-13. Prejudice or bias of judge - Affidavit - Filing.
Repealed by S.L. 1971, ch. 316, § 2.

29-15-14. Affidavit of prejudice to be filed.
Repealed by S.L. 1971, ch. 316, § 2.

29-15-15. The supreme court to designate trial judge.
Repealed by S.L. 1971, ch. 316, § 2.

29-15-16. Judge designated to conduct trial forthwith - Notice to parties.
Repealed by S.L. 1971, ch. 316, § 2.

29-15-17. Expenses of judge designated.
Repealed by S.L. 1971, ch. 316, § 2.

29-15-18. Jurors not to be excused by disqualified judge.
Repealed by S.L. 1951, ch. 203, § 1.

29-15-19. Only one change of judges allowable.
Repealed by S.L. 1971, ch. 316, § 2.

29-15-20. Procedure when affidavit of prejudice and for change of venue is filed in criminal action.
Repealed by S.L. 1971, ch. 316, § 2.

https://ndlegis.gov/cencode/t29c15.pdf#nameddest=29-15-01

The new procedure for demanding a change of judge significantly expanded the scope of and procedure for demanding a different judge. *See* 1971 N.D. Sess. Laws, ch. 316. Senate Bill 2383 from that year changed the law to apply to both civil and criminal actions, and eliminated the former requirement of an affidavit of prejudice. N.D.C.C. § 29-15-21 (1971). The new law created the present procedure allowing a

party to file a writing stating only that the demand was filed in good faith and not for the purpose of delay. *Id*. *See also State v. Zueger*, 459 N.W.2d 235, 236 (N.D. 1990) (Explaining that, under N.D.C.C. § 29-15-21, "a party is entitled to a peremptory challenge of an assigned judge, without alleging bias or prejudice."). Notwithstanding amendments of N.D.C.C. § 29-15-21 for other reasons, the procedure and grounds for demanding a change of judge have remained unchanged from August 1, 1971 to today. *See* N.D.C.C. § 29-15-21 ("The demand for change of judge must state that it is filed in good faith and not for the purposes of delay.").

Problems with Current SB 2102

Senate Bill 2102 would amend N.D.C.C. § 29-15-21 to require that the party demanding a new judge indicate "the reason the change of judge is sought." SB 2102, page 2, lines 15-16. I believe requiring the moving party to state "the reason" will take us back more than 50 years to the disfavored practice of requiring a statement of judicial bias or prejudice. For the same reasons that were explained to the Legislate Assembly in 1971, I do not support North Dakota reversing course and requiring a statement of cause for demanding a change of judge.

The second substantive requirement proposed under SB 2102 also is problematic. Now, and under the proposed amendments, a demand for change of judge is forwarded to the judicial district's presiding judge. Now, the presiding judge must assign a new judge to the case unless the presiding judge determines the demand was untimely or fails for other procedural reasons such as if more than one demand for change has been filed by the same party. Senate Bill 2102 would amend N.D.C.C. § 29-15-21 to require that when a party demands a change of judge, the presiding judge must decide whether "the reason for the change was not based on reasonable grounds." SB 2102, page 2, lines 29-30.

SB 2102 does not define "reasonable grounds" The result will be that lawyers, clients, and the courts will be left to interpret the phrase without guidance about what is intended by using the phrase. As a result, "reasonable grounds" either can mean anything except what the presiding judge subjectively thinks is not "unreasonable grounds." Or the phrase will mean some recognizable concern about the judge's ability to fairly adjudicate the case.

If the intended test is the former—meaning "anything that is not unreasonable"—I respectfully suggest the statute will have no standard at all. Rather, it will be up to the 8 presiding judges across the state to decide on a case by case basis whether the reason for demanding a change of judge is *good enough*. I further suggest that such an ad hoc approach will lead to inconsistent outcomes because what is good enough for one presiding judge may not be adequate for the presiding judge in a neighboring judicial district. Such an ad hoc approach also is unlikely to achieve the

stated goal of amending the statute—which I understand is to reduce a perceived excessive use of the demand for change of judge statute.

If the intended test is the latter—meaning "reasonable grounds" are limited to recognized legal standards, we already have that. Remedies including reassignment of cases due to judicial bias or prejudice is provided for in the Code of Judicial Conduct. Rule 2.11 of the Code covers disqualification and provides in pertinent part relating to bias and prejudice:

> RULE 2.11 Disqualification
>
> A. A judge shall disqualify in any proceeding in which the judge's impartiality* might reasonably be questioned, including the following circumstances:
>
> > (1) The judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge* of facts that are in dispute in the proceeding.

Under Rule 2.11, bias and prejudice require examination of the judge's "impartiality." That term is defined in the Code as meaning the "absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintenance of an open mind in considering issues that may come before a judge." Under the Code of Judicial Conduct, a judge who is biased or prejudiced for or against a party or a party's lawyer must recuse (step down from the case) or can be subject to a motion to be disqualified (removed) from sitting on the case. Therefore, the removal of a judge whom a party claims is biased or prejudiced can be accomplished under the Code of Judicial Conduct. Enacting the proposed changes through SB 2102 will duplicate, but not change, that method of removing a judge assigned to sit on a particular case.

Recent Demand For Change of Judge Statistics

Year	Demands	Total Cases	Percent Demands
2021	585	174,632	0.33%
2022	421	156,623	0.27%
2023	383	166,661	0.23%
2024	444	176,729	0.25%

The table above shows by year the total number of cases in which demands were filed. While at first blush the number of demands might seem significant, that significance fades with comparison to the total number of district court cases filed

and re-opened each year. The total numbers show that demands are made in less than one third of one percent of the cases. Equally important, the demands for change of judge do not present presiding judges with an appreciable administrative burden. This is because, on average, each of the 8 presiding judges see only 4 to 6 demands per month.

Conclusion

I do not favor the substantive changes to N.D.C.C. § 29-15-21 as proposed in SB 2102. My opposition is based on the history and background of N.D.C.C. ch. 29-15, the substance and reasons for the 1971 amendments to N.D.C.C. ch. 29-15, and the existing rules and procedures developed under the North Dakota Code of Judicial Conduct for removing a judge from a case due to bias or prejudice. I also think the total number of demands filed each year is comparatively insignificant and does not warrant a change in the law. Thank you for this opportunity to explain my position on why I think SB 2102 should receive a do not pass recommendation from this Committee.