2025 SENATE JUDICIARY

SB 2102

2025 SENATE STANDING COMMITTEE MINUTES

Judiciary Committee
Peace Garden Room, State Capitol

SB 2102
1/15/2025

Relating to a written demand for change of judge; and to provide for application.

9:27 a.m. Vice Chairman Paulson opened the hearing.

Members present:
Chair Larson, Vice Chairman Paulson, Senators: Castaneda, Cory, Luick, Myrdal, Braunberger.

Discussion Topics:

- Attorney-client privilege
- Trial strategy
- Legal confidentiality
- Judicial fairness

9:28 a.m. Senator Diane Larson testified in favor.

9:34 a.m. Travis Finck, Executive Director, ND Commission on Legal Counsel for Indigents testified in opposition and submitted testimony #29117.

9:51 a.m. Jaclyn Hall, Executive Director of the ND Association for Justice, testified in opposition and submitted testimony #29142.

9:55 a.m. Senator Diane Larson testified neutral.

9:57 a.m. Carol Two Eagles testified neutral.

Additional written testimony:

Steven J. Leibel, Attorney, Knoll Leibel LLP submitted testimony in opposition #28423.

Debra L. Hoffarth, ND attorney submitted testimony in opposition #29034.

Mark V. Larson, Civil Trial Specialist Larson Law Firm, P.C. submitted testimony in opposition #29035.

10:01 a.m. Vice Chairman Paulson closed the hearing.

Kendra McCann, Committee Clerk

KNOLL LEIBEL LLP
ATTORNEYS AT LAW

January 10, 2024

Chairwoman Larson and members of the Judiciary Committee.

I am writing to express my opposition to SB 2102. I am a licensed North Dakota attorney who resides in Bismarck. I have been practicing in the area of civil litigation for 24 years and frequently represent North Dakotans before judges in courtrooms across the State.

In the United States, a fundamental underpinning of our system of government is the consent of the citizens. The overwhelming majority, even those charged with serious crimes, accept decisions from our judiciary because of the procedural safeguards intended to ensure the process is fair. One of these safeguards in North Dakota is the right to excuse a judge without justification.

I do not often exercise the excusal rights under N.D.C.C. § 29-15-21. In my experience, most attorneys rarely do so. However, I have had a client request to excuse a judge because he knew the judge in high school and vehemently disliked her. I have filed an excusal under § 29-15-21 because the client believed that a judge was involved in an intimate relationship with a relative of her opponent. I have filed an excusal because a client had been involved in a shouting match with the judge during a criminal proceeding while the client was a minor. I have filed an excusal because a client felt the judge was too chummy with the other attorney. I have filed an excusal because I told the client that I did not think the judge would be experienced enough to handle the facts of this particular case. In each of these cases, N.D.C.C. § 29-15-21 allowed my clients to exercise some control over the process. By exercising this right, these clients were also reassured that a decision would be made based upon the law and the facts, not on a petty or personal reason. Whether the legislature acknowledges it or not, this is what justice means to people. This is especially true because none of the reasons given, standing alone, would require excusal under any applicable ethical rules that govern judges.

Finally, I think it is important to point out that I do not recall ever seeing a litigant successfully challenge the fairness of a judge. At least part of the reason is because it is considered a fool's errand—as noted by Ralph Waldo Emerson, when you strike at a king, you best not miss. In this context, I believe the proposed amendment will have the effect of removing the excusal rights in all cases. I am not aware of any justification that justifies this result. Instead, removing this right will only serve to undermine the legitimacy of the process and unnecessarily encourage cynicism. This

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benefits neither the judiciary nor the public and would be an unforced error by the legislature.

For these reasons, I respectfully oppose SB 2102.

Respectfully yours,

KNOLL LEIBEL LLP

By: _____
Steven J. Leibel

SJL:rmo

WRITTEN TESTIMONY IN OPPOSITION TO SB 2102

Senate Judiciary Committee on Senate Bill 2102
Date of Hearing: January 15, 2025
Debra L. Hoffarth, 1320 11th Street SW, Minot, ND 58701

This written testimony is presented in opposition to SB2102, which will require litigants or attorneys to provide a reason for seeking a change of judge in a legal proceeding. I am a licensed North Dakota attorney who practices civil litigation.

The right to a fair and impartial trial is a lynch pin of the North Dakota Court System. Our system of justice presumes that a judge is impartial when applying the law. The right to request a change of judge once without a reason has been part of North Dakota Law since it was the Dakota Territory. (Laws of Dakota Territory 1874-1875, sec. 285, ch. 35; Code of Criminal Procedure, sec. 285 (1877)). To request a change of judge, without cause, the litigant or attorney must do so very early in the process - no later than 10 days from the date of assignment, date of trial notice, or date of service of any ex parte order (whichever is earliest). Any demand for a change of judge must be made in good faith and without purposes of delay. And, the judge must not have ruled on any matter in which the moving party had an opportunity to be heard.

North Dakota's Code of Judicial Conduct 2.7 explains reasons for judicial disqualification: Judges can be disqualified when it "is necessary to protect the rights of litigants and preserve public confidence in the independence, integrity, and impartiality of the judiciary…" The current right to demand a change of judge promptly at the start of the case furthers these very same purposes.

This right to request a change of judge, helps ensure a fair trial and preserves the public image of the judicial system by allowing the parties involved to remove a judge they perceive as biased or prejudiced. The current process to demand a change of judge does not delay cases.

Allowing the right to demand a change of judge, without reason is important for the following reasons:

1. **Preserving Judicial Independence, Integrity, and Impartiality.**

Judicial independence, integrity, and impartiality is not just about the absence of impartiality or bias but also the perception of fairness, impartiality, and bias. Litigants may have a variety of reasons that they may want a different judge, including judicial demeanor, judicial experience, past experiences with a particular judge, conflicts of interest, perceived or real bias, docket currency, or concerns about fairness. Requiring litigants to disclose their reasons for requesting a different judge risks creating an environment where perceptions of bias—real or imagined—are publicly scrutinized and potentially dismissed. By removing the requirement to state reasons, public confidence in the judiciary is upheld because that litigants feel secure in their ability to seek impartiality without fear of judgment or retaliation.

2. **Avoiding the Chilling Effect on Justice.**

We want a justice system that is fair for all. Requiring reasons for a change of judge may deter individuals from making such requests, even in situations where they have valid concerns. Many litigants fear that disclosing their reasons might:

- Offend or alienate the judge in question, leading to potential unintended consequences, including future cases where the Judge may preside.
- Subject them to scrutiny or questioning about their motives, compounding their stress during already difficult legal proceedings.

Allowing a judge to determine if a demand is reasonable has the potential to make the process adversarial between a party and the judge throughout the litigation process when the judge's role is to be impartial.

3. **Protecting Judicial Economy.**

As a practicing North Dakota attorney, who does litigation, I rarely request a change of judge under N.D.C.C. § 29-15-21. There is little delay when using the statute as currently written because there are multiple judges in each district and the Court is very efficient about reassignments. Delay is likely if the statute is changed to require including a reason for the requested change of judge because it will require a determination as to whether or not said request is reasonable. The current statute effectively prevents a delay in proceedings and promotes judicial economy.

I respectfully ask that you please OPPOSE Senate Bill No. 2102.

Debra L. Hoffarth

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January 10, 2025

Re: Testimony before the Senate Judiciary Committee re: Senate Bill 2102

Chairwoman Larson and the Members of the Senate Judiciary Committee:

Please accept this written testimony in response to Senate Bill SB2102 which amends N.D.C.C. § 29-15-21 which required justification in any demand for a change of judge.

Please note that this office represents injured persons and has for over 45 years.

A Demand for Change of Judge is not taken lightly in our office, but it is done in order to make sure we provide the best representation we can to the client. Sometimes this includes a determination that the Judge initially assigned to the case may not be the right fit for any variety of reasons. Among the fit issues can include situations in which the firm has noted some tendencies from the Judge which we do not believe would support our client's interest. In addition, it is also possible that Judges have had prior dealings with members of our firm before going on the bench, or have had dealings while they are on the bench, which we feel suggests some bias by the judge towards members of our firm. When we experience those issues, we carefully and prudently make the demand for change of judge. It is not common in our practice to do so, but it is done with great care and a respect for the judge upon whom the demand is being made. It is also done to make sure that we represent our clients in the best fashion possible.

Requiring the public display of reasons for a request to change a judge could result in unfavorable outcomes. Depending on the reasons given in such a demand, there could be press coverage or social media discussions regarding the issues presented in a request. The reasons could also bias the judge towards the requester and create issues with subsequent appearances before the judge.

I urge a DO NOT PASS on this bill.

Sincerely,

LARSON LAW FIRM, P.C.

Mark V. Larson

Mark V. Larson
Board Certified Civil Trial Specialist
By the National Board of Trial Advocacy

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Testimony in Opposition to SB 2102
69th Legislative Assembly
Senate Judiciary Committee
January 15, 2025
Testimony of Travis W. Finck, Executive Director, NDCLCI

Madam Chair Larson, members of the Senate Judiciary Committee, my name is Travis Finck and I am the Executive Director for the North Dakota Commission on Legal Counsel for Indigents. The Commission is the state agency responsible for the delivery of indigent defense services in North Dakota. I rise today on behalf of the Commission to provide testimony in opposition to Senate Bill 2102. Senate Bill 2102 requires a reason for a demand of judge be provided by the demanding party. In Section 1, page 2, line 15-16 and again on page 2 line 29, there is new language requiring "the reason the change of judge is sought" and then later on page 2 allows the presiding judge to deny the demand for change of judge if the "reason is not based on reasonable grounds". This would require an attorney to disclose trial strategy which is attorney client privileged information. An attorney would be forced with a Hobson's choice of complying with the statute and face potential of discipline, or simply not demanding on a judge and facing discipline if the client wanted the judge removed.

Rule 26 of the rules of civil procedure in North Dakota protects an attorney's "mental impressions". Further, rule 16 of the rules of criminal procedure in North Dakota generally protects the Defendant's rights to trial strategy. North Dakota Rule of Professional Conduct 1.6 protects attorney client confidentiality which could be breached by requiring attorneys to provide a reason their client is demanding a change of judge.

For the reasons states herein, the Commission is in opposition to SB 2102 and respectfully requests a do not pass recommendation.

Respectfully Submitted:

Travis W. Finck
Executive Director, NDCLCI

North Dakota Association for Justice
PO Box 365
Mandan, ND 58554
The Trial Lawyers of North Dakota

Jaclyn Hall, Executive Director
jaclyn@ndaj.org

Madam Chair Larson and members of the Senate Judiciary Committee, my name is Jaclyn Hall, and I am the Executive Director of the North Dakota Association for Justice. Today, I am here to testify in opposition to SB2102.

The ability to demand a judge is requested for a variety of reasons. However, it is not taken lightly by attorneys and is important for several reasons:

1. Protection from Implicit Bias

Even if there is no obvious conflict of interest, judges - like any individual - may have unconscious biases. The ability to demand helps safeguard against any subtle prejudices, biases, or personal opinions that could influence the proceedings. This ensures that individuals feel their case is being handled impartially and will not create a precedent for future cases.

2. Upholding the Right to a Fair Trial

The right to a fair trial is a cornerstone of the judicial process. Allowing parties to demand a new judge prevents parties from feeling coerced into accepting a judge they do not feel comfortable with, thus supporting the principle that justice should not only be done but should be seen to be done.

3. Practical Considerations of Court Dynamics

Judicial systems can be complex, with varying workloads and personalities among judges. The ability to request a change helps prevent delays or disruptions in the trial process due to such personal concerns, allowing the case to continue in a more neutral environment.

5. Safeguarding the Judicial System from Complaints and Challenges

Sometimes, there may be practical or procedural reasons why a party might prefer a different judge, even without the appearance of bias or prejudice. Allowing parties to request a new judge helps prevent potential delays or challenges to the court's rulings that could arise if parties feel

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they have been forced to accept a judge with whom they are uncomfortable.

6. Preventing Conflicts of Interest

In some cases, even minor relationships or prior interactions between a judge and one of the parties may create a perceived conflict of interest. The ability to request a different judge can prevent a situation where a party feels that the judge may have a connection, relationship, or interest that could affect their impartiality, even if that perception is not supported by evidence.

7. Demanding does not allow you to choose your next Judge

After a demand is made, the next judge is chosen by random order. So, this request does not guarantee you will receive a 'better' judge, just a different one.

8. Judge recusals are made without justification

When a judge chooses to recuse themselves, they do not provide a reason. This is done to safeguard their concerns. To only require an attorney to give justification creates a bias.

Conclusion

Overall, the ability to demand a judge without a specific reason is crucial for maintaining the credibility, fairness, and transparency of the judicial process. It helps ensure that all parties involved in legal proceedings feel that their cases will be heard impartially, and it strengthens public trust in the overall legal system.

This system is not broken and has worked for many years. Judges and attorneys in North Dakota work hard to try and create a work life balance. North Dakota is a small state and many of these judges preside over a variety of cases. We feel that removing the anonymity will impact how attorneys and judges work together in the future.

We ask for a Do Not Pass on SB 2102

2025 SENATE STANDING COMMITTEE MINUTES

Judiciary Committee
Peace Garden Room, State Capitol

SB 2102
1/20/2025

A written demand for change of judge; and to provide for application.

9:59 a.m. Chair Larson opened the meeting.

Members present:
Chair Larson, Vice Chairman Paulson, Senators: Castaneda, Cory, Luick, Myrdal, Braunberger.

Discussion Topics:

- Measurable guidelines
- Judge prejudice
- Potential conflicts
- Existing disqualification rules.

10:00 a.m. Jesse Walstad, Attorney with ND Association of Criminal Defense Lawyers testified in opposition and submitted testimony #30072.

10:13 a.m. Daniel Crothers, ND Lawyer testified in opposition and submitted testimony #29805.

10:24 a.m. Chair Larson closed the hearing.

10:24 a.m. Senator Myrdal moved a Do Not Pass.

10:24 a.m. Senator Braunberger seconded the motion.

Senators	Vote
Senator Diane Larson	N
Senator Bob Paulson	Y
Senator Ryan Braunberger	Y
Senator Jose L. Casteneda	Y
Senator Claire Cory	Y
Senator Larry Luick	Y
Senator Janne Myrdal	Y

Motion Passed 6-1-0.

10:24 a.m. Senator Myrdal will carry the bill.

10:25 a.m. Chair Larson closed the hearing.

Kendra McCann, Committee Clerk

REPORT OF STANDING COMMITTEE
SB 2102 (25.0360.01000)

Judiciary Committee (Sen. Larson, Chairman) recommends **DO NOT PASS** (6 YEAS, 1 NAY, 0 ABSENT AND NOT VOTING). SB 2102 was placed on the Eleventh order on the calendar. This bill does not affect workforce development.

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.

Page No. 1

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.

January 19, 2025
Testimony to the **Senate Judiciary Committee**
Submitted By: Jesse Walstad on behalf of the ND Association of Criminal Defense Lawyers
Testimony **in Opposition to S.B. 2102**

Chairwoman Larson and Members of the Senate Judiciary Committee:

My name is Jesse Walstad and I represent the ND Association of Criminal Defense Lawyers. The NDACDL is made up of lawyers throughout our state who dedicate a portion of their practice to criminal defense. The mission of the NDACDL is "to promote justice and due process" and to "promote the proper and fair administration of criminal justice within the State of North Dakota." With that mission in mind, the NDACDL **opposes S.B. 2102** and recommend a **DO NOT PASS** from the Senate Judiciary Committee.

Since 1971, N.D.C.C. § 29-15-21, has permitted any litigant one request for disqualification of any judge assigned to their case without any statement of reason or allegation of bias or prejudice if done within ten days of appointment and before the judge opines on a substantive issue in the case. The procedure is brilliant in its simplicity. It protects the interests of litigants by not requiring them to publicly accuse the assigned judge. It protects the court from public accusations of perceived bias, prejudice, and other derogatory claims, against which there is no procedure to defend. It ensures efficiency by swiftly and silently resolving perceived judicial concerns while each case is in its infancy, without any delay. Most importantly, it enhances the credibility of our Courts.

As proposed, S.B. 2102, would make two substantively harmful changes to Section 25-15-21.[1] First, Subsection 4, concerning the substance of a demand, would require the requesting litigant to disclose "the reason the change of judge is sought." Second, Subsection 6, concerning the required judicial actions, would permit denial of a demand when "the reason for the change was not based on reasonable grounds." These two changes would substantially harm judicial efficiency, reduce consistency across judicial districts, diminish litigants' perception of fairness and impartiality, and erode the credibility of our Courts.

There may be a misperception that Section 25-15-21 is used to bump judges defense attorneys' perceive to be "tough on crime" in order to get to judges who may be perceived as more lenient. This is simply untrue. Similarly, the suggestion that some North Dakota judges are soft on crime or fail to recognize and appropriately punish dangerous or repeat offenders, is categorically false. Demanding a change of judge simply does not correlate with lenient sentencing. Altering this statute will have no effect on violent or recidivist crime rates in North Dakota. Even if the proposed change could have some articulable effect depriving all litigants of this commonsense procedural safeguard is unjustified.

The reasons for requesting a change of judge are as varied as the litigants themselves. It may include the lawyer or the client's past personal contact with the judge, judicial demeanor, judicial experience, particular expertise in certain subject matter areas, conflicts of interest, perceived or actual bias or prejudice, docket currency, or perceptions of potential unfairness. The NDACDL opposes requiring disclosure of any reason in support of a demand for change of judge. Requiring litigants to disclose their reasons for requesting a different judge would create an environment where perceptions of bias—real and imagined—are publicly expressed, to the disadvantage of judges and litigants.

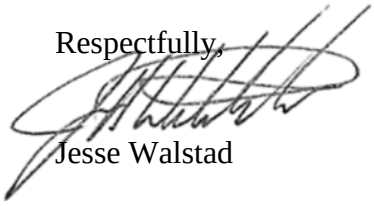
[1] The NDACDL takes no position on the non-substantive stylistic amendments to N.D.C.C. § 29-15-21 proposed in S.B. 2102.

Requiring disclosure of cause will silence many requests. That is a bad thing. Rather than efficiently eliminating perceptions of bias, unfairness, or unfitness at the beginning of each case, those perceptions would be carried forward, tainting litigation strategy, undermining the litigant's perception of the credibility of all substantive decisions made thereafter, and potentially manifesting late in the case to the disadvantage of all involved. Conversely, those who elect to disclose the reasoning for their request would hazard the risk of engaging in a public personal conflict with the sitting judge at the inception of the case. Our citizens should not face a Hobson's choice in the threshold question of each case.

S.B. 2102 also creates a "reasonable grounds" standard without providing our litigants and presiding judges any meaningful guidance. Because "for cause" disqualification is governed by North Dakota Code of Judicial Conduct Rule 2.11, it would be reasonable to interpret "reasonable grounds" for a change of judge under Section 29-15-12 as being something less than the strictures of Rule 2.11. However, that interpretation is not guaranteed. Another reasonable interpretation might be to import some or all of Rule 2.11. S.B. 2102 makes no distinction between the two. As a result, litigants and judges across eight judicial districts will be left to struggle with interpretive differences, further complicated by the absence of a hearing procedure to assess the veracity of allegations. This will result in case delays, expenditure of judicial and litigant resources, and ultimately result in appellate litigation. Said another way, S.B. 2102 will cause case delays, consume state resources, introduce substantial inconsistency, and erode the credibility of our Courts.

If passed S.B. 2102 will not have any measurable effect on future crime or criminal sentencing. It would cause delay, open the door to conflict between litigants and the judiciary, expend judicial resources, erode litigants' perceptions of fairness, increase judicial complaints, and diminish faith in the Courts. The NDACDL strongly urges a **DO NOT PASS** on S.B. 2102.

Respectfully,



Jesse Walstad