



alaska judicial council

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MEMORANDUM

TO: Alaska Judicial Council

FROM: Staff

DATE: May 6, 2008

RE: Peremptory Challenge Rates for Judges Eligible for Retention in 2008

I. Introduction

In Alaska, a defendant has a right to a fair trial before an unbiased judge and the right to preempt a judge without proving bias or interest.¹ Two different authorities govern the challenge right. The legislature created the substantive right and defines its scope by statute.² The court regulates peremptory challenge procedures by court rules.³ In general, each side in a case gets one peremptory challenge.⁴

This memo examines retention judges' peremptory challenge records for judges who are eligible to stand for retention in November 2008. The tables display civil and criminal case challenges for each judge, by year. Because superior court judges' terms are six years, a six year period is examined for them. Because district court judges' terms are four years, a four year period is examined for them. Parties have no right to peremptorily challenge an appellate judge, so those judges are not discussed.

¹See Gieffels v. State, 552 P.2d 661 (Alaska 1976).

²See id.; AS 22.20.020.

³See Alaska R. Crim. P. 25(d); Alaska R. Civ. P. 42(c).

⁴See id.

II. Context for evaluating peremptory challenge data

Although the peremptory challenge provisions were designed to ensure each litigant's right to a hearing by a fair and impartial judge, in practice many factors prompt litigants or attorneys to challenge judges. Some parties might challenge a judge because they perceive the judge to be unfair in a certain type of case, while others might challenge a judge because they perceive the judge to be "too fair," and hope their case will be reassigned to a judge who they perceive as being more favorable to their case. Such a scenario can be especially relevant in smaller judicial districts and communities, where attorneys often can predict which other judge will receive the reassigned case. Other reasons parties might challenge judges include unfamiliarity with a new judge or seeking to avoid the demands of a judge who insists on high standards of practice or timeliness. Sometimes an attorney will use a peremptory challenge with the hope that a change of judge will result in additional time to prepare the case.

The Alaska Court System provides the Council with data regarding "disqualifications." The data are categorized into disqualifications brought in criminal cases by defense attorneys or prosecutors, those brought in civil cases by plaintiffs or defendants, and those initiated by the judges themselves. Most courts also track peremptory challenges in children's cases. These cases include Child in Need of Aid ("CINA") cases and juvenile delinquency cases. Children's cases are included among civil cases in this analysis even though delinquency cases are more like criminal cases than civil cases. This is because some of the available data did not distinguish between delinquency and CINA cases in children's proceedings.

Three different systems were used for compiling peremptory challenge data. In some cases, information was compiled manually by clerical staff and sent to the area court administrator. In other cases, clerical staff entered the information into the court system's older (RUG) case management system. In recent years, the court has instituted a new computerized case management system (CourtView) that has facilitated the collection and reporting of more detailed and accurate data for some locations, such as Anchorage, Palmer and Fairbanks. Data collection under the old systems was uneven and less precise. Because of this, the Council is forwarding its analysis of the data to judges and court administrators to confirm the accuracy of the data.

Care must be taken when comparing judges with different caseloads. Judges with higher-volume caseloads generally will have more peremptory challenges than those with lower-volume caseloads. Appendices A and B provide comparative caseload information for superior and district court judges. For example, Appendix A reveals that average superior court caseloads range from about 228 cases per judge in Sitka to about 616 cases per judge in Anchorage. These appendices should only be used as a rough guide, however. Presiding judges sometimes ease one court's heavy caseload by assigning cases to judges from other venues within their judicial district, and to *pro tem* judges. Moreover, superior courts with heavy caseloads may ease their burden somewhat by assigning the bulk of a case to masters and/or magistrates. Similarly, statistics in the district court caseload tables may reflect cases handled by magistrates as well as by district court judges. The

court system's caseload data do not reflect when a judge regularly travels to another community to hear cases. Finally, consideration must be taken of judges who handle predominately criminal or predominately civil caseloads, as judges in Anchorage do, versus those judges who handle all cases.

Parties who have not previously exercised their right of peremptory challenge may challenge newly assigned judges, as if their case had been newly filed. Consequently, challenges often increase when a judge is assigned to a different caseload. Challenges also often occur when a new judge is appointed because those judges are newly assigned to existing cases and because that judge is "unknown" and thus less predictable. Another factor to consider is that some communities have only one or two assistant district attorneys or assistant public defenders. If an assistant DA or PD perceives a reason to categorically challenge a particular judge, that judge's criminal peremptory challenge rate will be high, even though just one or two attorneys might be responsible for virtually all of that judge's challenges.

Care must also be taken when comparing judges across judicial districts. In 1995, the Anchorage Superior Court consolidated into civil and criminal divisions. Since then, all civil cases (including domestic relations, child in need of aid cases and domestic violence cases) have been assigned equally to each of the Anchorage Superior Court judges in the civil division. Criminal division judges handle criminal and child delinquency cases, but do not routinely handle domestic cases. For this reason, it may be misleading to compare the peremptory challenges a superior court judge in Anchorage with the rate of a superior court judge in another judicial district. Also, some judges in some judicial districts currently handle the therapeutic courts, such as Wellness Court, or felony DWI court. The impact of those caseloads on a judge's challenge rate is unknown.

Because so many factors may potentially affect the number of peremptory challenges filed, these numbers should only be used as a signal of a potential issue with a judge. Once a high number of challenges is identified from the table, please refer to the explanatory text on the following pages which gives context for the judge's caseload and potential factors which may have affected his or her challenge rates.

A. Superior Court⁵

	2002		2003		2004		2005		2006		2007		Average Number Challenges per year
Judge	Civ	Crim	Civ	Crim	Civ	Crim	Civ	Crim	Civ	Crim	Civ	Crim	
Collins (Juneau)	-Data unavailable from Alaska Court System-				15 11D 4P	3 3D 0P	19 9D 10P	5 1D 4P	14 6D 8P	8 1D 7P	7 4D 3P	3 2D 1P	19
Downes (Fairbanks) (Appointed 4/20/05)							14 7D 7P	30 7D 23P	64 55D 9P	68 7D 61P	36 15D 9P 12GAL	13 3D 10P	75
Stowers (Anchorage) (Appointed 9/21/04)					13 6D 7P	0	4 2D 2P	0	14 5D 9P	0	23 9D 13P 1GAL	0	14
Average number of challenges for judges on 2008 ballot													36

⁵"D" signifies "defendant" in both criminal and civil cases.

"P" signifies "plaintiff" in civil cases and "prosecutor" in criminal cases.

"U" signifies unknown whether challenge raised by plaintiff or defendant.

If a judge was appointed in the last six months of a year, the number of challenges in that year was not used to calculate the average number of annual challenges for that judge. Blank spaces in the table represent years that preceded the judge's appointment to the current position.

Overall: The average number of peremptory challenges for the superior court judges on the ballot for 2008 was 36 per year. The average number of peremptory challenges for the superior court judges on the ballot in 2006 was also 36 per year. As discussed above, caution should be used when comparing a particular judge's annual average with the average for all judges. The location of the judgeship, the size of a judge's caseload, the type of cases heard by the judge, and the local legal culture can and do affect peremptory challenge rates. Peremptory challenge rates must be considered in the context of other available information about a judge's performance.

Judge Collins (Juneau): Judge Collins averaged a lower number of challenges than average. When challenges were filed, they were most often filed in civil cases, but they were filed by both plaintiff and defense attorneys. The court system did not report any data for the number of peremptory challenges for Judge Collins in 2002 or 2003.

Judges Downes (Fairbanks): Judge Downes had a considerably higher number of challenges than average. These came from all groups, but more came from defendants in civil cases and from prosecutors in criminal cases.

Judge Stowers (Anchorage): Judge Stowers received a fewer number of challenges than average. Because he had a predominately civil caseload, these all came in civil cases. He received challenges slightly more often from plaintiffs than from defendants.

B. District Court⁶

Judge	2004		2005		2006		2007		Average Number Challenges per year
	Civ	Crim	Civ	Crim	Civ	Crim	Civ	Crim	
Cummings (Bethel; appointed 11/30/2005)					0	6	0	42	24
Funk (Fairbanks)	2 0D 2P	19 17D 2P	2 0D 2P	66 60D 6P	12 3D 9P	52 49D 3P	14 6D 8P	49 45D 4P	54
Hanley (Anchorage; appointed 1/14/2005)			2 0D 2P	0	0	3 1D 2P	0	3 1D 2P	3
Levy (Juneau; appointed 1/24/2005)			0	8 4D 4P	1 0D 1P	9 4D 5P	4 4D 0P	14 2D 11P 1unk	12
Murphy, M. Homer; appointed 4/20/2005)			8 0D 8P	0	5 0D 5P	0	1 1D 0P	11 11D 0P	8
Schally (Valdez; appointed 1/17/2005)			2 2D 0P	0	0	0	0	0	>1
Swiderski (Anchorage; appointed 4/11/2005)			2 0D 2P	0	3 3D 0P	5 5D 0P	3 2D 1P	11 10D 1P	8
Average number of challenges for district court judges on 2008 ballot									16

⁶"D" signifies "defendant" in both criminal and civil cases.

"P" signifies "plaintiff" in civil cases and "prosecutor" in criminal cases.

"U" signifies unknown whether challenge raised by plaintiff or defendant.

If a judge was appointed in the last six months of his or her first year, the number of challenges in that year was not used to calculate the average number of annual challenges for that judge. Blank spaces in the table represent years that preceded the judge's appointment to the current position.

Overall: Many fewer peremptory challenges were reported for district court judges than for superior court judges, particularly considering the substantially higher caseloads in district court. The average number of peremptory challenges for a district court judge in 2008 was sixteen. The average number of challenges for a district court judge in 2006 was seventeen. In district court, criminal cases are not assigned until trial call, which means that attorneys in district court cases have relatively fewer opportunities to bring a peremptory challenge than those in superior court cases. It is also possible that the disqualifications are under-reported in district court criminal cases, in part due to the higher caseloads.

Judge Cummings (Bethel): In his first year as a judge, Judge Cummings received only six peremptory challenges, which was below average. In his second year, however, he received forty-two, forty of which came from prosecutors in criminal cases.

Judge Funk (Fairbanks): Judge Funk experienced more challenges than other district court judges. This may be attributed to Judge Funk's caseload, which is predominately felony driving while intoxicated cases, which other district court judges do not routinely hear. This may also be attributed to local legal culture in Fairbanks, where judges tend to receive more peremptory challenges, especially in criminal cases, than in other locations.

Judge Hanley (Anchorage): Since his appointment to the bench in 2005, Judge Hanley has experienced very few peremptory challenges.

Judge Levy (Juneau): Judge Levy, appointed to the bench in 2005, experienced a low number of peremptory challenges. Most were filed in criminal cases and were about evenly split in 2005 and 2006 between defense and prosecuting attorneys. In 2007 a higher percentage were filed by prosecutors.

Judge Murphy (Homer): The number of peremptory challenges filed in Judge Murphy's cases was below average for a district court judge. When filed, these came from plaintiffs in civil cases in 2005 and mostly from defense attorneys in criminal cases in 2006 and 2007.

Judge Schally (Valdez): Judge Schally was appointed to the bench in early 2005. He has received only two peremptory challenges since his appointment.

Judge Swiderski (Anchorage): Judge Swiderski experienced a low number of peremptory challenges. When filed these came mostly, and increasingly, by defense attorneys in criminal cases.

Appendix A - Comparative Caseloads - Alaska Superior Court

Location	Fiscal year⁷	Authorized number of superior court judicial positions⁸	Average annual case filings per superior court judicial position⁸
Anchorage	2002-2006	13	679
	2007	15	616
Barrow	2002-2007	1	239
Bethel	2002-2007	2	480
Dillingham	2002-2007	1	265
Fairbanks	2002-2006	5	542
	2007	6	479
Juneau	2002-2007	2	526
Kenai	2002-2006	2	576
	2007	3	447
Ketchikan	2002-2007	2	338
Kodiak	2002-2007	1	440
Kotzebue	2002-2007	1	384
Nome	2002-2007	1	349
Palmer	2002-2006	2	801
	2007	4	582
Sitka	2002-2007	1	228

⁷ Court system fiscal years run from July 1 of the previous year to June 31 of the year noted. For example, FY 2007 ran from July 1, 2006 to June 30, 2007.

⁸ Data taken from Alaska Court System Annual Reports from 2002, 2003, 2004, 2005, 2006, and 2007. Average case filings per judicial position were computed by Council staff.

Appendix B - Comparative Caseloads - Alaska District Court:

Location	Fiscal year⁹	Authorized number of district court judicial positions¹⁰	Average annual case filings per district court judge position⁹
Anchorage	2004-2007	9	5,797
Bethel	2004-2005	0	2,336
	2006-2007	1	
Fairbanks	2004-2007	3	4,770
Homer	2004-2007	1	1,993
Juneau	2004-2007	1	5,427
Kenai	2004-2005	2	9,949
	2006-2007	3	4,757
Ketchikan	2004-2007	2	3,430
Palmer	2004	2	8,279
	2005-2007	3	6,733
Valdez	2004-2007	1	737

⁹ Court system fiscal years run from July 1 of the previous year to June 31 of the year noted. For example, FY 2007 ran from July 1, 2006 to June 30, 2007.

¹⁰ Data taken from Alaska Court System Annual Reports from 2002, 2003, 2004, 2005, 2006, and 2007. Average case filings per judicial position were computed by Council staff.