



alaska judicial council

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Peremptory Challenge Rates

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 peremptory challenge records for judges who are eligible to stand for retention in November 2012. 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 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, including Child in Need of Aid ("CINA") cases and juvenile delinquency cases. Children's delinquency cases are included among criminal cases in this analysis because that is how they are accounted for in the court's case management systems. Child in Need of Aid cases are included in the "civil" category.

Please note that in Child in Need of Aid cases, guardians ad litem and parents have the right to preempt the judge. These are noted as "other" on the following charts. Please also note that a CINA "case" that a judge may handle may include several consolidated cases, because each child in a family is assigned a different case number. So if a judge receives a peremptory challenge in a consolidated CINA case, challenges are recorded for each individual child's case, magnifying the effect of challenges in CINA cases.

Three different information systems were used for compiling peremptory challenge data. First, over the past ten years, the court has instituted a computerized case management system (CourtView) that has facilitated the collection and reporting of more detailed and accurate data for all court locations in the state. Second, the Kenai court instituted CourtView in 2009, so data previous to that was retrieved from the old case management system ("RUG") and added to the data from the new CourtView system. Last, in the First Judicial District (Southeast Alaska), information was compiled manually by clerical staff and sent to the area court administrator until CourtView was implemented in 2010. All of this data was then compiled and provided by the Alaska Court System to the Alaska Judicial Council. The judges listed here have been given the opportunity to review and confirm the accuracy of the data and how it has been reported here.

Care must be taken when comparing judges because they have different caseloads. Judges with higher-volume caseloads generally will have more peremptory challenges than those with lower-volume caseloads. 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, district court judges may have very different caseloads. Cases may be 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 a judge when one is newly assigned midstream, as if their case had been newly filed. Consequently, challenges often increase when a judge is assigned to a different caseload (e.g., from civil to criminal). 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. This may also occur in high-volume civil cases that involve only a few public attorneys, such as in Child in Need of Aid practice.

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 of 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. 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

	2006		2007		2008		2009		2010		2011		Average number challenges per year
Judge	Civ	Crim	Civ	Crim	Civ	Crim	Civ	Crim	Civ	Crim	Civ	Crim	
First Judicial District:													
Carey Ketchikan Appt. 12/7/08							14 8p 6d	8 2p 6d	1 0p 1d	1 0p 1d	0	2 0p 2d	9
Second Judicial District													
Jeffery, Michael I. Appt. 10/28/82 Reappt. 5/29/2008	3 1d 2p	0	1 1d	14 8p 6d	2 0p 2d	2 0p 2d	1 1p 0d	1 0p 1d	3 2p 1d 1t	2 0p 2d	0	1 1p 0d	5

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

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

"t" signifies "tribe" in child in need of aid cases.

"Oth" signifies "other."

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.

Judge	2006		2007		2008		2009		2010		2011		Average number challenges per year
	Civil	Crim	Civil	Crim	Civil	Crim	Civil	Crim	Civil	Crim	Civil	Crim	
Third Judicial District:													
Cole Kodiak Appt. 3/4/2009							7 0p 1d 7oth	11 1p 10d	1 0p 1d	10 0p 10d	8 0p 3d 5oth	4 0p 4d	14
Heath Palmer Appt. 7/9/2009									14 5p 5d 4oth	1 0p 1d	20 12p 7d 1oth	0	18
Huguelet Kenai Appt. 9/2/2003	22 15p 5d 2oth	111 105p 6d	4 1p 2d 1oth	11 1p 10d	4 0p 2d 2oth	2 0p 2d	0	4 1p 3d	4 2p 2d	2 2p 0d	6 6p 0d	0	28
Morse Anchorage Appt. 2/27/2002	47 26p 16d 5oth	0	44 21p 21d 2oth	0	41 22p 13d 6oth	1 0p 1d	45 13p 24d 8oth	0	44 21p 15d 8oth	1 0p 1d	38 11p 11d 16 oth	0	44
Pfiffner Anchorage Appt. 10/29/2009									39 23p 15d 1oth	0	96 13p 21d 52oth	0	68

Judge	2006		2007		2008		2009		2010		2011		Average number challenges per year
	Civ	Crim	Civ	Crim	Civ	Crim	Civ	Crim	Civ	Crim	Civ	Crim	
Third Judicial District (cont.)													
Smith, E. Palmer Appt. 4/18/1996	21 4p 17d	23 0p 23d	3p 5d 3oth	2 1p 1d	11 2p 6d 3oth	5 0p 5d	10 4p 6d	11 1p 10d	29 6p 9d 14oth	11 1p 10d	16 14p 2d	44 7p 37d	31
Suddock Anchorage Appt. 11/14/2002	2 0p 2d	176 3p 173d	0	106 48p 58d	54 15p 16d 23oth	3 2p 1d	31 14p 13d 4oth	5 4p 1d	58 22p 20d 16oth	11 7p 4d	54 27p 12d 15oth	6 3p 3d	84
Tan Anchorage Appt. 12/4/1996	13 6p 7d	0	13 7p 6d	0	7 5p 2d	0	4 3p 1d	0	17 12p 5d	0	14 6p 8d		11
Volland Anchorage Appt. 11/14/2002	1 0p 1d	6 1p 5d	0	0	0	2 0p 2d	0	3 0p 3d	0	12 0p 12d	0	3 0p 3d	5
Wolverton Anchorage Appt. 12/4/1996	0	20 17p 3d	0	4 2p 2d	1 1p 0d	1 0p 1d	0	5 5p 0d	0	10 10p 0d	0	7 7p 0d	8

Overall: The average number of peremptory challenges for the superior court judges on the ballot for 2012 was 31 per year. In 2010, it was 27 per year. The average number of peremptory challenges for the superior court judges on the ballot in both 2008 and 2006 was 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.

First Judicial District:

Judge Carey (Ketchikan): Judge Carey had an average of nine challenges per year, which was lower than the overall average of 31, and was among the lowest challenge rates of the 2012 retention judges.

Second Judicial District:

Judge Jeffery (Barrow): Judge Jeffery had an average of five challenges per year, which was much lower than the overall average of 31 and among the lowest challenge rates.

Third Judicial District:

Judge Cole (Kodiak): Judge Cole had an average of fourteen challenges per year, which was lower than the overall average of 31.

Judge Heath (Palmer): Judge Heath had an average of eighteen challenges per year, which was lower than the average of 31.

Judge Huguelet (Kenai): Judge Huguelet had an average of 28 challenges per year, which was slightly lower than the average of 31. In 2006, he experienced 111 challenges in criminal cases, almost all coming from the prosecutor. This pattern suggests a situation where he was challenged categorically by the district attorney's office. By 2007, however, the situation had been resolved and he experienced only one challenge from the prosecutor.

Judge Morse (Anchorage): Judge Morse had an average of 44 challenges per year, which was higher than the overall average of 31. He was assigned to the civil calendar the entire six years, so the challenges came almost entirely in civil cases. The civil challenges came slightly more frequently from plaintiffs (114) than from defendants (100).

Judge Pfiffner (Anchorage): Judge Pfiffner experienced a high number of challenges in his first two years as a superior court judge. His average of 68 per year was significantly higher than the overall average of 31. The number of challenges also rose steeply in his second year, from 39 to 96, which is unusual for a newly-appointed judge. Many challenges in his second year came in Child in Need of Aid cases.

In response to the opportunity to review the data, Judge Pfiffner noted that he received peremptory challenges in Child in Need of Aid (CINA) cases. He explained that in CINA cases, each child is assigned an individual case number but the cases are consolidated. In the court systems's case management system, however, a challenge in one consolidated case results in a challenge being recorded for each individual child's case. This tends to magnify the effect of challenges in CINA cases. As an example, Judge Pfiffner noted that a GAL exercised a peremptory challenge in a case on May 4, 2011. This one challenge resulted

in challenges being recorded in each of six children's cases. Judge Pfiffner's own records indicated that he received only 33 challenges from the Office of Children's Services and Guardians ad litem in CINA cases in 2011, and not 52 which the CourtView data provided to the Council indicated. When responding to the same issue regarding his own data, Judge Lyle noted that high rates of peremptory challenges may come from just one or two assistant attorneys general or public defenders who handle high volume civil cases, such as CINA cases, as is the case with public attorneys who handle criminal matters.

Judge Smith (Palmer): Judge Smith had an average of 31 challenges per year, which was the same as the overall average of 31. In 2011 he had 60 challenges, about twice the overall average.

Judge Suddock (Anchorage): Judge Suddock had an average of 84 challenges per year, significantly higher than the overall average of 31. When he was assigned to criminal cases in 2006 and 2007, he experienced 176 and 106 criminal case challenges. After he was reassigned to civil cases in 2008, the number of challenges he received dropped to 57 that year and to 36 in 2009. In 2010, the number of challenges rose to 69. In 2011 he received 60 challenges.

Judge Tan (Anchorage): Judge Tan received an average of eleven challenges per year, which was much lower than the overall average of 31, and among the lowest challenge rates.

Judge Volland (Anchorage): Judge Volland received an average of five challenges a year, which was much lower than the overall average of 31 and among the lowest challenge rates.

Judge Wolverton (Anchorage): Judge Wolverton received an average of eight challenges a year, which was much lower than the overall average of 31 and was among the lowest challenge rates.

Fourth Judicial District:

Judge Lyle (Fairbanks) : Judge Lyle received an average of 74 challenges per year, which was more than twice the overall average of 31. As is typical for newly-appointed judges, he received the most (156) in his first year and then the number of challenges decreased to 85 challenges in 2009, 25 challenges in 2010, and 31 challenges in 2011.

In response to the opportunity to review the data, Judge Lyle noted that he received many peremptory challenges in Child in Need of Aid (CINA) cases in his first and second years as a judge. He explained that in CINA cases, each child is assigned an individual case number but the cases are consolidated. In the court systems' case management system, however, a challenge in one consolidated case results in a challenge being recorded for each individual child's case. This tends to magnify the effect of challenges in CINA cases. Judge Lyle also noted that high rates of peremptory challenges may come from just one or two assistant attorneys general or public defenders who handle high volume civil cases, such as CINA cases, as is the case with public attorneys who handle criminal matters.

Judge McConahy (Fairbanks): Judge McConahy received an average of 44 challenges a year, which is higher than the overall average of 31. In his first full year as a judge, 2010, he received 29 challenges. He received 58 challenges in 2011, which is not typical for a newly-appointed judge. Many of these challenges came in Child in Need of Aid cases and from defendants in criminal cases.

B. District Court⁶

Judge	2008		2009		2010		2011		Average Number Challenges per year
	Civ	Crim	Civ	Crim	Civ	Crim	Civ	Crim	
First Judicial District									
Levy Juneau Appt. 1/24/05	Insuff. data	Insuff. data	4 2p 2d	4 0p 4d	0	1 0p 1d	1 1p 0d	5 0p 5d	5
Nave Juneau Appt. 9/24/10							0	1 1p 0d	<1
Third Judicial District									
Hanley Anchorage Appt. 1/14/05	0	0	1 1p 0d	1 1p 0d	0	7 7p 0d	1 0p 1d	1 0p 1d	3
Murphy Homer Appt. /20/05	2 1p 1d	28 0p 28d	0	37 2p 35d	0	20 0p 20d	0	13 0p 13d	25
Schally Valdez Appt. 1/17/05	0	0	3 3p 0d	1 0p 1d	5 4p 1d	1 0p 1d	1 0p 1d	0	3
Swiderski Anchorage Appt. 4/11/05	5 1p 4d	10 7p 3d	24 24p 0d	6 2p 4d	117 114p 3d	2 0p 2d	101 95p 6d	4 0p 4d	67
Wallace Anchorage Appt. 1/23/09			1 0p 1d	0	0	0	0	0	<1
Washington Anchorage Appt. 8/9/10							1 1p 0d	1 1p 0d	2

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.

	2008		2009		2010		2011		Average number challenges per year
Judge	Civ	Crim	Civ	Crim	Civ	Crim	Civ	Crim	
Third Judicial District, Cont.									
Zwink Palmer Appt. 1/29/10					1 0p 1d	0	1 1p 0d	2 0p 2d	2
Fourth Judicial District									
Hammers Fairbanks Appt. 7/10/09					1 0p 1d	19 4p 15d	3 1p 2d	21 3p 18d	22
Average number of challenges for district court judges on 2012 ballot									13

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 2012 was thirteen. In 2010 the average was fourteen.⁷ The average number of challenges for a district court judge in 2008 was sixteen. The 2006 average 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.

First Judicial District:

Judge Levy (Juneau): Judge Levy experienced an average of five challenges per year, which was lower than the overall average of thirteen.

Judge Nave (Juneau): Judge Nave received only one peremptory challenge in his first year.

Third Judicial District:

Judge Hanley (Anchorage): Judge Hanley received an average of three challenges per year, lower than the overall average of 13.

Judge Murphy (Homer): Judge Murphy received 30 challenges in 2008, 37 challenges in 2009, 20 challenges in 2010, and 13 challenges in 2011, giving her an average of 25, which was higher than the

⁷ The 2010 average excluded one judge who had an unprecedented average number (278) of peremptory challenges during her term. If that judge's average had been included, the average would have been 40.

overall average of thirteen. Although this was higher than average, the number appears to be declining. Most of the challenges came from criminal defendants.

Judge Schally (Valdez): Judge Schally received an average of three peremptory challenges per year, which was lower than the average of thirteen.

Judge Swiderski (Anchorage): Judge Swiderski received an average of 67 challenges per year, which was much higher than the district court average of thirteen. Many of the challenges came in civil cases from plaintiffs.

In response to the opportunity to review the data, Judge Swiderski explained that most of the peremptory challenges came from one attorney in credit card debt collections cases, who was responding to Judge Swiderski's direction that the attorney must provide documentation of the debtor's credit card agreement before Judge Swiderski would issue default judgments against the debtors.

Judge Wallace (Anchorage): Judge Wallace received only one challenge in his first three years as a judge, giving him a yearly average of less than one.

Judge Washington (Anchorage): Judge Washington's average of two peremptory challenges a year is much lower than the overall average of thirteen, but was based on only one year of service.

Judge Zwink (Palmer): Judge Zwink received an average of two peremptory challenges a year, which was much lower than the overall average of thirteen. That average was based on two years of service.

Fourth Judicial District:

Judge Hammers (Fairbanks): Judge Hammers received an average of 22 peremptory challenges a year, which was higher than the overall average of thirteen. Higher peremptory challenge rates tend to occur in Fairbanks.