



alaska judicial council

510 L Street, Suite 450, Anchorage, Alaska 99501-1295 (907) 279-2526 FAX (907) 276-5046
http://www.ajc.state.ak.us E-mail: postmaster@ajc.state.ak.us

Final Draft MEMORANDUM

TO: Judicial Council
FROM: Staff
DATE: April 25, 2014
RE: Peremptory Challenges of Judges Eligible for Retention in 2014

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 2014. 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. Judge-initiated disqualifications are discussed in a separate memorandum. 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 system. 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.

For the first time, one system was used for compiling the disqualification data. Over the past twelve 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. All of the CourtView data were compiled and reported by the Alaska Court System to the Alaska Judicial Council.

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, and domestic violence protective order 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.

In the following tables:

- “d” signifies “defendant” in both criminal and civil cases;
- “p” signifies “plaintiff” in civil cases and “prosecutor” in criminal 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 tables represent years that preceded the judge’s appointment to his or her current position.

A. Superior Court

	2008		2009		2010		2011		2012		2013		Average number challenges per year
Judge	Civ	Crim	Civ	Crim	Civ	Crim	Civ	Crim	Civ	Crim	Civ	Crim	
First Judicial District:													
Menendez, Louis							1 0d 1p	0	7 3d 4p	0	12 2d 10p	1 1d 0p	10
Second Judicial District													
Roetman, Paul					2 0d 0p 2oth	2 2d 0p	1 1d 0p	6 6d 0p	0	10 10d 0p	3 3d 0p	3 3d 0p	8
Third Judicial District:													
Guidi, Andrew					19 10d 9p	0	19 6d 12p 3oth	0	13 5d 8p	0	7 3d 4p	0	13
Miller, Gregory							2 2d 0p	54 46d 8p	0	120 7d 113p	12 9d 3p	99 1d 98p	96
Fourth Judicial District:													
(None)													
Average number of challenges for superior court judges on 2014 ballot													32

Overall: The average number of peremptory challenges for the superior court judges on the ballot for 2014 was 32 per year. In 2012 it 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 Menendez (Juneau): Judge Menendez had an average of ten challenges per year, which was lower than the overall average of 32.

Second Judicial District:

Judge Roetman (Kotzebue): Judge Roetman had an average of eight challenges per year, which was much less than the overall average of 32.

Third Judicial District:

Judge Guidi (Anchorage): Judge Guidi had an average of thirteen challenges per year, which was lower than the overall average of 32.

Judge Miller (Anchorage): Judge Miller had an average of 96 challenges per year, which was significantly higher than the overall average of 32. The challenges came almost entirely from prosecutors in the Anchorage District Attorney's office. Judge Miller was transferred administratively to the civil calendar in 2013 and subsequently experienced very few peremptory challenges.

B. District Court

Judge	2010		2011		2012		2013		Average Number Challenges per year
	Civ	Crim	Civ	Crim	Civ	Crim	Civ	Crim	
First Judicial District									
Miller, Kevin	0	0	1 0d 1p	2 2d 0p	1 0d 1p	0	0	0	1
Third Judicial District									
Chung, Jo-Ann M.			2 0d 2p	0	2 1d 1p	0	0	3 3d 0p	2
Clark, Brian K.	2 0d 2p	2 0d 2p	1 0d 1p	0	12 7d 5p	0	5 1d 4p	0	6
Estelle, William L.	196 1d 195p	29 27d 2p	222 0d 222p	108 9d 99p	140 2d 138p	256 17d 239p	79 1d 78p	48 44d 4p	270
Illsley, Sharon A.S.	2 1d 1p	53 52d 1p	3 3d 0p	58 58d 0p	0	60 59d 1p	1 1d 0p	18 16d 2p	49
Motyka, Gregory	0	1 1d 0p	1 0d 1p	2 0d 2p	2 0d 2p	2 1d 1p	0	4 4d 0p	3
Rhoades, Stephanie	9 5d 4p	8 8d 0p	5 4d 1p	8 7d 1p	10 2d 8p	8 8d 0p	4 1d 3p	7 7d 0p	15

	2010		2011		2012		2013		Average number challenges per year
Judge	Civ	Crim	Civ	Crim	Civ	Crim	Civ	Crim	
Third Judicial District, Cont.									
Wolfe, John W.	2	150	1	93	2	381	2	14	161
	2d 0p	150d 0p	1d 0p	93d 0p	0d 2p	379d 2p	2d 0p	13d 1p	
Fourth Judicial District									
Seekins, Ben					1	92	0	61	77
					1d 0p	85d 7p		61d 0p	
Average number of challenges for district court judges on 2012 ballot									13
Average number of challenges for district court judges on 2014 ballot									64

Overall: This retention period saw a sharp increase in the “average” peremptory challenges for district court judges. This was due in part to the two Palmer District Court experiencing “dueling” blanket peremptory challenges from public defenders (Judge Wolfe) and prosecutors (Judge Estelle). Judge Estelle also receive high numbers of challenges in civil cases. Judge Seekins and Judge Illsley also received high numbers of peremptory challenges. In contrast, the average number of peremptory challenges for district court judges in 2012 was thirteen. In 2010 the average was fourteen.⁵ The average number of challenges for a district court judge in 2008 was sixteen. The 2006 average was seventeen. Because the averages in 2014 were so uncharacteristic, it may be more useful to compare district court judges’ peremptory challenge rates to recent years’ averages (a range of 13-17) instead of to the 2014 average.

First Judicial District:

Judge Miller (Ketchikan): Judge Miller experienced an average of one challenge per year, which was much lower than recent averages.

⁵ 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.

Third Judicial District:

Judge Chung (Anchorage): Judge Chung received an average of two challenges per year, lower than the recent averages.

Judge Clark (Anchorage): Judge Clark received an average of six challenges a year, which is lower than recent averages.

Judge Estelle (Palmer): Judge Estelle received extremely high numbers of challenges in 2010, 2011, and 2012. He received fewer challenges in 2013 but the number that year was still about ten times as high as the recent averages. Most of the challenges came from plaintiffs in civil cases (all four years) and prosecutors in criminal cases (in 2011 and 2012). Both the high numbers and the pattern of challenges in civil cases are unusual for a district court judge.

When contacted, Judge Estelle explained that the high number of challenges in civil cases was due to a single law firm challenging him in debt-collection cases. He stated, “This pattern in their debt-collection cases began years ago when I began declining to accept a longstanding practice which circumvented the confession of judgment rule. That firm’s standing decision to perempt me has been in effect ever since.” He also explained that the challenges in criminal cases was due to a “dueling perempt” situation between the Palmer District Attorney’s Office and the Palmer Public Defender Agency, where the district attorney’s office would challenge Judge Estelle and the public defender’s office would challenge Judge Wolfe, requiring the case to be heard by the third Palmer District Court judge, or a judge from Anchorage. The situation was apparently resolved by the agencies and the number of challenges against Judge Estelle by the district attorney’s office dropped from a high of 239 in 2012 to four in 2013. That year the public defenders began to challenge Judge Estelle more often and he received 44 from that office in 2013.

Judge Illsley (Kenai): Judge Illsley received an average of 49 challenges a year. This number is high but much lower than the average number of challenges reported when she was eligible for retention in 2010 (278).

Judge Motyka (Anchorage): Judge Motyka received three challenges per year, which was lower than recent averages.

Judge Rhoades (Anchorage): Judge Rhoades received an average of 15 challenges per year, which was about the same as recent averages.

Judge Wolfe (Palmer): Judge Wolfe received a high number of peremptory challenges, averaging 161 in his most recent term. These came almost entirely in criminal cases from defendants. When contacted, Judge Wolfe hypothesized that in 2010 and 2011, defendants in criminal cases were perempting him based on his interpretation of the law regarding *Nygren* credit (credit against jail time for substance abuse treatment). The issue was settled (consistent with Judge Wolfe’s interpretation) by the supreme court and further clarified by a statutory change in 2012. He further explained that prosecutors exercising a blanket peremptory challenge of Judge Estelle in 2012, which caused the Public Defender Agency to retaliate by challenging Judge Wolfe. According to Judge Wolfe, the agencies called a truce in 2013, which is borne out by the numbers. He received only 16 challenges in 2013, which is typical for a district court judge.

Fourth Judicial District:

Judge Seekins: Judge Seekins received an average of 77 challenges per year, almost entirely from defendants in criminal cases. He received 92 challenges his first year and 61 challenges his second. It is typical for a new judge to receive many challenges at first and then fewer as time goes on. It is also typical for Fairbanks judges to receive higher numbers of peremptory challenges than judges in other locations.