



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

MEMORANDUM

TO: Judicial Council
FROM: Staff
DATE: August 3, 2016
RE: Peremptory Challenges of Judges Eligible for Retention in 2016

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 2016. 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”.

Blank spaces in the tables represent years that preceded the judge’s appointment to his or her current position.

Peremptory Challenge Memorandum

August 3, 2016

Page 4

A. Superior Court

Judicial District	Judge	2010		2011		2012		2013		2014		2015		Judge Statistics			Summary Statistics								
		Total		Total		Total		Total		Total		Total		Total	Mean	Median	District	All							
		Civ	Crim	Civ	Crim	Civ	Crim	Civ	Crim	Civ	Crim	Civ	Crim												
First	George, David V	2		4		5		4		6		11		32	5.3	4.5	Mean 4.1 Median 4 Min/Max 0/11								
	Pallenberg, Philip M	0	2d	1d 3p	0	1d 1p 2oth	1d	3d 1p	0	2p	4d	2d 3p	6d	--	--	--									
	Stephens, Trevor N	4		5		3		5		11		7		35	5.8	5.0									
Third	Aarseth, Eric A	40		16		20		9		14		7		106	17.7	15.0	Mean 31.8 Median 18 Min/ Max 1/189	Mean 34.8 Median 18 Min/ Max 0/189							
	Easter, Catherine M	14d 18p 7oth	1p	2d 11p 3oth	0	4d 12p 2oth	1d 1p	1d 5p 1oth	2d	5d 5p	4d	7p	0	--	--	--									
	Kristiansen, Kari C	--	--	--	--	11d 8p	0	5d 5p	0	7d 4p	0	9d 9p	0	--	--	--									
	Marston, Erin B	189		88		51		116		93		82		619	103.2	90.5									
	Moran, Anna M	9d 14p 6oth	6d 154p	4d 8p 4oth	72p	8d 24p 15oth	4d	11d 43p 21oth	32d 9p	6d 51p 5oth	10d 21p	9d 44p 4oth	2d 23p	--	--	--									
	Rindner, Mark	--	--	--	--	--	--	1d 3p 3oth	0	1d 2p	0	4d 3p	0	--	--	--									
	Saxby, Kevin M	51		46		29		20		16		24		186	31.0	26.5									
	Smith, Jack W	2d 4p	44d 1p	4d 11p 4oth	26d 1p	14d 1p 9oth	3d 2p	4d 7p 6oth	3p	4d 2p	8d 4p	2d 8p 7oth	7d	--	--	--									
	White, Vanessa H	24		20		22		18		17		17		118	19.7	19.0									
	Fourth	Blankenship, Douglas L	12d 11p 1oth	0	7d 12p 1oth	0	7d 14p 1oth	0	3d 13p 2oth	0	7d 10p	0	5d 8p 4oth	0	--	--			--						
Harbison, Bethany		--	--	--	--	4d 5p 1oth	0	1d 7p	20d	1p	4d	1p	34d	--	--	--									
Kauvar, Jane F		1	6	14	9	3	4	37	6.2	5.0	14		20		11		12		110		107		274	45.7	17.0
MacDonald, Michael A		1d 20p 19oth	17d 7p	1d 64p 9oth	5d 11p	1d 35p 7oth	28d 10p	5d 24p 11oth	16d 3p	9d 27p	32d 7p	6d 74p 23oth	17d 23p	--	--	--									
McConnell, Dwayne W		--	--	--	--	2d 4p 2oth	17d	2d 12p 21oth	106d	5d 14p 19oth	141d 2p	4d 6p 9oth	62d	--	--	--									

Civ = Civil
Crim = Criminal
-- = No value or statistic not applicable

d = defendant in both criminal and civil cases
p = plaintiff in civil cases and prosecutor in criminal cases
oth = other

Overall: The average number of peremptory challenges for the superior court judges on the ballot for 2016 was 35 per year. The average number of peremptory challenges for the superior court judges on the ballot for recent years has ranged from a low of 27 (2010) to a high of 36 (2006 and 2008).

First Judicial District:

The judges standing for retention in the First Judicial District all had lower than average peremptory challenges. This is typical for First Judicial District Judges.

Second Judicial District:

No judges are standing for retention in the Second Judicial District in 2016.

Third Judicial District:

Only two Superior Court judges standing for retention in the Third Judicial District experienced unusually high peremptory challenges: Judge Kari Kristiansen and Judge Vanessa White. Both are judges on the Palmer Superior Court. In both cases, peremptory challenge practices of local attorneys played a significant role in the reasons they were challenged. These practices suggest that attorneys in Palmer may use peremptory challenges for strategic reasons that may not necessarily reflect on the judges' performance.

Judge Kari Kristiansen: Judge Kristiansen received frequent peremptory challenges. Her mean was 103 per year and her median was 91 per year. In some years she received many challenges from the state in criminal cases. In 2010 she received 160 criminal challenges; 154 were from the state. In 2011 she received 72 challenges in criminal cases and 72 were from the state. But in 2013 she received 41 challenges in criminal cases, and only 9 were from the state. In civil cases, the challenges were well distributed across all party types until 2014 and 2015, when she began receiving more challenges from the state in CINA cases (42 of 62 civil challenges in 2014, and 37 of 57 in 2015). Staff review indicated that in 2010-2011 the state prosecutors had implemented a "blanket preempt" policy against Judge Kristiansen but the state rescinded the policy in 2012.

Judge Vanessa White: Judge White's peremptory challenges were lower than average for 2010, 2011, 2012, and 2013. They were extremely high in 2014 and 2015, largely due to challenges from criminal defense attorneys and from non-state parties (parents and *guardians ad litem*) in child in need of aid cases.

Fourth Judicial District:

Peremptory challenge rates tend to be higher in the Fourth Judicial District. Although the statewide average is typically 27-36 per year, the Fourth Judicial District mean for superior court judges standing for retention was 63 per year. By this measure, two judges experienced high peremptory challenges: Judge Blankenship in Fairbanks and Judge McConnell in Bethel.

Judge Douglas L. Blankenship: Judge Blankenship received an average of 85 peremptory challenges per year; the mean for the Fourth Judicial District was 63. He received many peremptory challenges in civil cases from the state in CINA cases, although that pattern has fluctuated from a low of 9 in 2013 to a high of 67 in 2015. He tends to receive more challenges from defense in criminal cases than from prosecutors.

Judge Dwayne McConnell: Judge McConnell received a mean of 107 challenges per year since his appointment. In his first full year he had 141, in his second he had 181. In 2016 he had only 81. The mean for superior court judges in the Fourth Judicial District was 63. The majority of the Judge McConnell’s challenges come from defendants in criminal cases. These likely come because he was formerly a prosecutor, and perhaps because the criminal defense bar perceived that the other Bethel Superior Court Judge or another Fourth District judge would be more favorable.

B. District Court

District Court														
Judicial District	Judge	2012		2013		2014		2015		Judge Statistics			Summary Statistics	
		Total		Total		Total		Total		Total	Mean	Median	District	All
		Civ	Crim	Civ	Crim	Civ	Crim	Civ	Crim					
First	Nave, Thomas G	1		1		5		1		8	2.0	1.0	See Judge Statistics	
		1d	0	0	1p	1d 2p	2d	1d	0	--	--	--		
Third	Dickson, Leslie N	--		9		6		10		25	8.3	9.0	Mean 24.5 Median 7.5 Min/Max 0/186	Mean 25.5 Median 8.0 Min/Max 0/186
		--	--	2d 3p	1d 3p	2d 2p	2d	2d 3p	5p	--	--	--		
	0		0		1		4		5	1.3	0.5			
	0	0	0	0	1p	0	1p	3p	--	--	--			
	--		16		8		12		36	12.0	12.0			
	--	--	1d	15d	1d	7d	2p	10d	--	--	--			
	7		7		10		38		62	15.5	8.5			
	0	7d	0	7d	1d 3p	6d	24p 4oth	9d 1p	--	--	--			
	1		1		0		0		2	0.5	0.5			
	1d	0	1d	0	0	0	0	0	--	--	--			
Swiderski, Alex M	53		6		33		47		139	34.8	40.0			
	4d 49p	0	2p	3d 1p	2d 27p	2d 2p	42p	3d 2p	--	--	--			
1		1		4		5		11	2.8	2.5				
0	1d	0	1p	2p	1d 1p	2p	3p	--	--	--				
36		73		11		31		151	37.8	33.5				
1d 33p	2d	6d 66p	1d	2d 3p	4d 2p	12d 10p	7d 2p	--	--	--				
7		54		154		186		401	100.3	104.0				
1d	3d 3p	1p	53p	0	154p	1p	1d 184p	--	--	--				
Fourth	Christian, Matthew C	--		--		39		42		81	40.5	40.5	Mean 41.6 Median 40.5 Min/Max 3/107	
		--	--	--	--	1p	3d 35p	0	42p	--	--	--		
	48		63		107		23		241	60.3	55.5			
	1d	46d 1p	2d 1p	60d	1d 3p	101d 2p	2d 3p	18d	--	--	--			
--		--		8		3		11	5.5	5.5				
--	--	--	--	0	7d 1p	0	3d	--	--	--				

Civ = Civil
Crim = Criminal
-- = No value or statistic not applicable

d = defendant in both criminal and civil cases
p = plaintiff in civil cases and prosecutor in criminal cases
oth other

Overall: The average number of peremptory challenge for a district court judge appearing on the ballot in 2016 was 29. From 2006 to 2012 the average ranged from 13-17. In 2014 the average was 64, which was very atypical.

First Judicial District:

District Court judges in the First Judicial District received very few peremptory challenges.

Second Judicial District:

The Second Judicial District has no district court judges.

Third Judicial District:

District Court Judges in the Third Judicial District received an average of 25 peremptory challenges per year, slightly less than the average of 29 per year statewide. Three judges had high average peremptory challenges:

Judge Alex Swiderski (Anchorage): Judge Swiderski received an average of 35 challenges per year. These came mostly from plaintiffs in civil cases. Judge Swiderski explained that the challenges came almost entirely from one law firm, which represented landlords in eviction cases.

Judge Pamela Washington (Anchorage): Judge Washington received an average of 38 challenges per year. These came mainly in 2012 and 2013 from plaintiffs in civil cases.

Judge David Zwink (Palmer): Judge Zwink had only seven challenges in 2012, but he had 54 in 2013, 154 in 2014, and 186 in 2015. The challenges in the last three years of review came almost entirely from prosecutors in criminal cases. Judge Zwink explained that the Palmer District Attorney's office had started blanket preempting him in DUI cases.

Fourth Judicial District:

As was the case for superior court, district court judges in the Fourth Judicial District received a higher average than judges statewide - 42 challenges per year compared to statewide average of 29 per year.

Judge Patrick Hammers: Judge Hammers received 60 challenges per year. These came mostly in 2012 - 2014 from defendants in criminal cases. In 2015 he received only 23 peremptory challenges.