

## MEMORANDUM

**TO:** Alaska Judicial Council

**FROM:** Staff

**DATE:** May 26, 2004

**RE:** Peremptory Challenge Rates for Judges Eligible for Retention in 2004

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### 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.<sup>1</sup> Two different authorities govern the challenge right. The legislature created the substantive right and defines its scope by statute.<sup>2</sup> The court regulates peremptory challenge procedures by court rules.<sup>3</sup> In general, each side in a case gets one peremptory challenge.<sup>4</sup>

This memo examines retention judges' peremptory challenge records for judges who are eligible to stand for retention in November 2004. 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. No appellate judges are standing for retention in 2004 and in any case, parties have no right to peremptorily challenge an appellate judge, so those judges are not discussed.

### 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

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

<sup>2</sup> See id.; AS 22.20.020.

<sup>3</sup> See Alaska R. Crim. P. 25(d); Alaska R. Civ. P. 42(c).

<sup>4</sup> See id.

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.

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. Presumably, when a judge records a disqualification by an attorney it is by peremptory challenge, and when a judge records a disqualification by the judge it is by recusal.

Each judge collects the data and provides it to the court system analyst for compilation quarterly. According to the court system analyst, until 2002 the data collection was uneven and unreliable for some judges. The court’s new collection methods using its new case management system should have increased the accuracy of this data. Because the current evaluation includes data from before 2002 (the current evaluation period for superior court judges is 1998-2003), some data may still be questionable.

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. The caseload tables 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 does not reflect when a judge regularly travels to another community to hear cases, such as when Judge Thompson travels to Petersburg to hear cases for one week out of each month, or when Judge Miller travels to Craig 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

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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 challenge rate of an Anchorage Superior Court judge 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 a judge's recusal rate, these rates should only be used as a signal of a potential issue with a judge. Once a high challenge rate is identified from the table, please refer to the explanatory text on the following pages which gives context for the judges caseloads and potential factors which may have affected his or her challenge rates.

A. Superior Court<sup>5</sup>

Year	1998		1999		2000		2001		2002		2003		Average Number Challenges per year	Average Caseload 1998-2003	Rate
Judge	Civ	Crim	Civ	Crim	Civ	Crim	Civ	Crim	Civ	Crim	Civ	Crim			
Christen (Anchorage)							19 14D 5P	0	28 20D 8P	0	18 13D 5P	0	22	706	.03
Cutler (Palmer)	30 16D 14P	21 21D 0P	23 9D 14P	50 49D 1P	36 17D 19P	42 41D 1P	45 17D 28P	60 60D 0P	31 12D 19P	17 16D 1P	77 23D 54P	10 10D 0P	74	700	.11
Gleason (Anchorage)							31 19D 12P	0	20 11D 9P	0	27 18D 9P	0	26	706	.04
Jeffery (Barrow)	1 0D 1P	0	0	0	0	0	11 9D 2P	1 1D 0P	2 1D 1P	0	0	5 5D 0p	3	267	.01
Joannides (Anchorage)	13 8D 5P	6 1D 5P	25 14D 11P	1 0D 1P	35 17D 18P	3 0D 3P	31 20D 11P	1 0D 1P	22 18D 4P	2 1D 1P	1 1D 0P	2 0D 2P	20	706	.03
Rindner (Anchorage)							22 11D 11P	0	14 6D 7P	0	14 7D 7P	0	17	706	.02
Steinkruger (Fairbanks)	36 17D 19	68 64D 2P	35 12D 23P	49 46D 3P	18 6D 12P	30 29D 1P	23 6D 17P	17 14D 3P	23 12D 11P	23 20D 3P	32 19D 13P	36 26D 10P	65	535	.12
Stephens (Ketchikan)					0	3 3D 0P	9 6D 3P	11 11D 0P	7 3D 4P	15 14D 1P	4 1D 3P	12 12D 0P	10	341	.03

<sup>5</sup>

"D" signifies "defendant" in both criminal and civil cases.  
 "P" signifies "plaintiff" in civil cases and "prosecutor" in criminal cases.

**Overall:** Overall, most superior court judges received challenge rates in the range of 2-4% of their caseloads. The two notable exceptions were Judge Cutler and Judge Steinkruger who were challenged in 11% and 12% of their cases. These rates are consistent with challenge rates of superior court judges who stood for retention in 2002, with most judges receiving challenge rates between 2% and 4%, with one judge (a Fairbanks judge) who received a challenge rate of 7%.

**Judge Christen (Anchorage):** Judge Christen received an average of 22 challenges a year in the three years since her appointment. This is a challenge rate of 3%. She was challenged most frequently by civil defense attorneys.

**Judge Cutler (Palmer):** Judge Cutler received an average of 74 challenges a year, resulting in a challenge rate of 11% of her assigned cases over the past six years. This was the second highest challenge rate of the superior court judges standing for retention in 2004 and higher than any superior court judge standing for retention in 2002 (7% was the highest that year). Nothing in her case assignment indicates an obvious reason for her high rate of disqualification.

**Judge Gleason (Anchorage):** Judge Gleason received an average of 26 challenges a year since her appointment. This is a challenge rate of 4%. Her challenges come mostly from civil defense attorneys.

**Judge Jeffery (Barrow):** The data on Judge Jeffery are insufficient which prevents comparison with other judges.

**Judge Joannides (Anchorage):** Judge Joannides received an average of 20 challenges a year. This is a challenge rate of 3%. She received very few challenges in 2003, likely due to her assignment to the therapeutic court.

**Judge Rindner (Anchorage):** Judge Rindner received an average of 17 challenges a year since his appointment. This is a challenge rate of 2%. His challenges come almost equally from civil defense and plaintiff attorneys.

**Judge Steinkruger (Fairbanks):** Judge Steinkruger received an average of 65 challenges a year. This is a challenge rate of 12%. She received the highest challenge rate of any judge standing for retention in 2004 or of any judge who stood for retention in 2002. The data show that she is challenged across the board in criminal and civil cases, and by defense and plaintiff/prosecuting attorneys. Her highest number of challenges came in 1998 when she was challenged 104 times. The fewest challenges came in 2001 when she was challenged 40 times. Nothing in her caseload assignment indicates an obvious reason for her high rate of disqualification.

**Judge Stephens (Ketchikan):** Judge Stephens received an average of 10 challenges a year since 2001 (his first full year on the bench). His challenge rate is 3%. He is challenged most often by defense attorneys in criminal cases.

B. District Court<sup>6</sup>

Year	2000		2001		2002		2003		Average challenges per year	Average caseload	Rate
Judge	Civ	Crim	Civ	Crim	Civ	Crim	Civ	Crim			
Nolan					1 1D 0P	0	0	2 2D 0P	1.5	5,892	.0003
Funk	5 1D 4P	120 57D 63P	7 2D 5P	113 56D 57P	2 0D 2P	53 41D 12P	14 5D 9P	72 66D 6P	84	5,732	.01

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

The district court figures for peremptory challenges are much lower than superior court challenges when adjusted for caseload. There are several reasons for the lower figures. First, district court cases are not assigned until trial call. According to Wendy Lyford, Area Court Administrator for the Third Judicial District, only 1.3% of district court criminal cases, and 40% of district court civil cases are ever assigned to a judge in advance of a court proceeding. Thus, attorneys in district court cases have relatively fewer opportunities to bring a peremptory challenge than those in superior court cases. Moreover, before 2000, the district court judges reported criminal case disqualification and recusal data on manual forms and not did not enter the data into the case management system. Due to the manual tracking, not all the data were reliably captured.

**Overall:** Overall, these two district court judges standing for retention in 2004 present too few judges for a reasonable comparison. Most district court judges in 2002 received challenge rates between .1% and .5%. Compared with the district court judges who stood for retention in 2002, Judge Nolan's challenge rate is notably smaller at .03%, and Judge Funk's is notably larger, at 1%.

**Judge Nolan:** Judge Nolan received remarkably few challenges since 2002 - her first full year on the bench. Her disqualification rate is .03%.

**Judge Funk:** Judge Funk received a remarkably large number of challenges since 2000. His disqualification rate is 1%. Judge Kauvar, also of the Fairbanks district court, stood for retention in 2002 and was found to have a disqualification rate of 1.1%. Judge Funk's high rate therefore may be due to something unique in the Fairbanks legal culture. Also, Judge Funk reported in his judge's questionnaire that he often volunteers to take superior court cases and has sat on a number of felony trials as well a couple of major civil trials in that capacity. Attorneys may have reticence about having a district court judge sit on a superior court case, which may also be a reason for his high rate of disqualification.

**Appendix A - Comparative challenge rates of district court judges who stood for retention in 2002**

**1. Anchorage District Court 2002**

Year	1998		1999		2000		2001		Average challenges per year	Average caseload	Rate
Judge	Civ	Crim	Civ	Crim	Civ	Crim	Civ	Crim			
Adams					1 0D 1P	7 4D 3P	1 1D 0P	2 2D 0P	6	6,385	.1%
Lohff	2 2D 0P	3 3D 0P	2 2D 0P	6 6D 0P	3 2D 1P	88 88D 0P	13 6D 7P	9 9D 0P	32	6,385	.5% .2%
Motyka	0	8 8D 0P	1 1D 0P	3 3D 0P	1 0D 1P	3 3D 0P	1 0D 1P	3 3D 0P	5	6,385	.1%
Murphy	1 1D 13P	3 2D 1P	4 0D 4P	6 3D 3P	3 3D 0P	28 25D 3P	2 1D 1P	5 4D 1P	13	6,385	.2%
Rhoades	11 1D 10P	12 12D 0P	16 6D 10P	14 14D 0P	5 2D 3P	7 6D 1P	8 2D 6P	1 0D 1P	19	6,385	.3%



**2. District Court Judges - Ketchikan, Homer, Fairbanks, Juneau 2002:**

Year	1998		1999		2000		2001		Average challenges per year	Average caseload	Rate
Judge	Civ	Crim	Civ	Crim	Civ	Crim	Civ	Crim			
Neville (Homer)	4 4D 0P	6 6D 0P	4 3D 1P	8 8D 0P	2 1D 1P	9 9D 0P	7 6D 1P	8 6D 2P	12	2,620	.5%
Miller (Ketchikan)			7 7D 0P	5 4D 1P	0	2 2D 0P	0	3 3D 0P	6	3,263	.2%
Kauvar (Juneau)	48 40D 8P	71 70D 1P	24 11D 13P	58 57D 1P	17 6D 11P	33 32D 1P	2 2D 0P	8 8D 0P	65	5,835	1.1%
Froehlich (Juneau)	6 5D 1P	56 55D 1P	6 6D 0P	63 58D 5P	5 5D 0P	62 58D 4P	2 2D 0P	91 89D 2P	72	8,067	.9%

**Appendix B  
 Comparative Caseloads - Alaska Superior Court**

Locale	Case Filings by Year	1998	1999	2000	2001	2002	2003	Average filings/ judge
Barrow (1 Judge)		302	301	286	259	263	191	<b>267</b>
Juneau (2 Judges)		960	952	871	990	1,065	1,018	<b>488</b>
Ketchikan (2 Judges)		708	679	718	640	662	690	<b>341</b>
Palmer (2 Judges)		1,630	1,208	1,245	1,400	1,430	1,495	<b>700</b>
Anchorage (12-13 Judges)		11,328	8,343	8,490	8,214	8,209	8411	<b>706</b>
Fairbanks (5 Judges)		2,833	2,787	2,546	2,556	2,658	2,679	<b>535</b>

**Comparative Caseloads - Alaska District Court:**

Locale	Case Filings by Fiscal Year	2000	2001	2002	2003	Average filings/ judge
Juneau (1 Judge)		7,119	7,764	7,288	7,640	<b>7,453</b>
Ketchikan (1 Judge)		3,179	3,569	3,883	4,590	<b>3,805</b>
Anchorage (9 Judges)		56,649	58,089	46,130	51,256	<b>5,892</b>
Fairbanks (3 Judges)		21,100	17,677	14,734	15,273	<b>5,732</b>