



alaska judicial council

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MEMORANDUM

TO: Judicial Council
FROM: Staff
DATE: July 19, 2018
RE: Peremptory Challenges of Judges Eligible for Retention in 2018

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 2018. 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.

One system was used for compiling the disqualification data. Over the past fourteen 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 superior court 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.

A. Superior Court

| Peremptory Challenges of Judges - Superior Court | | | | | | | | | | | | | | | | | | | |
|--|----------------------|-----------|-------|----------|-------|----------|-------|----------|-------|----------|-------|----------|-------|----------|------------------|------|--------|--|---|
| Judicial District | Judge | Party | 2012 | | 2013 | | 2014 | | 2015 | | 2016 | | 2017 | | Judge Statistics | | | Summary Statistics | |
| | | | Total | | Total | | Total | | Total | | Total | | Total | | Total | Mean | Median | District | All |
| | | | Civil | Criminal | Civil | Criminal | Civil | Criminal | Civil | Criminal | Civil | Criminal | Civil | Criminal | | | | | |
| First | Carey, William B | Defendant | 1 | 0 | 1 | 2 | 0 | 2 | 0 | 0 | 0 | 2 | 0 | 1 | 14 | 2.3 | 1.5 | See Judge Statistics | |
| | | Plaintiff | 0 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 1 | 0 | 0 | 0 | | | | | |
| | | Other | 0 | 0 | 0 | 0 | 0 | 0 | 1 | 0 | 2 | 0 | 0 | 0 | | | | | |
| Third | Corey, Michael D | Defendant | | | | | 2 | 0 | 4 | 1 | 0 | 8 | 0 | 26 | 53 | 13.3 | 10.0 | Mean 8.7 Median 8.0 Min/Max 0/29 | Mean 14.4 Median 9.0 Min/Max 0/83 |
| | | Plaintiff | | | | | 2 | 0 | 6 | 0 | 1 | 0 | 1 | 2 | | | | | |
| | | Other | | | | | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | | | | | |
| | Morse, William F | Defendant | 9 | 0 | 16 | 0 | 10 | 0 | 6 | 0 | 6 | 0 | 7 | 0 | 63 | 10.5 | 9.5 | | |
| | | Plaintiff | 3 | 0 | 6 | 0 | 8 | 0 | 4 | 0 | 3 | 0 | 7 | 0 | | | | | |
| | | Other | 5 | 0 | 10 | 0 | 2 | 0 | 2 | 0 | 2 | 1 | 6 | 3 | | | | | |
| | Walker, Herman G | Defendant | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 38 | 9.5 | 11.5 | | |
| | | Plaintiff | | | | | 0 | 0 | 5 | 0 | 7 | 0 | 6 | 0 | | | | | |
| | | Other | | | | | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | | | | | |
| | Wolverton, Michael L | Defendant | 1 | 0 | 2 | 0 | 5 | 0 | 2 | 0 | 7 | 0 | 2 | 0 | 19 | 3.2 | 2.0 | | |
| | | Plaintiff | 0 | 1 | 1 | 1 | 0 | 4 | 0 | 0 | 0 | 7 | 0 | 2 | | | | | |
| | | Other | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | | | | | |
| Fourth | Lyle, Paul R | Defendant | 83 | 1 | 13 | 1 | 11 | 1 | 9 | 2 | 2 | 3 | 0 | 1 | 143 | 23.8 | 12.0 | Mean 31.3 Median 22.0 Min/Max 7/83 | |
| | | Plaintiff | 2 | 74 | 4 | 5 | 3 | 0 | 4 | 0 | 7 | 1 | 5 | 0 | | | | | |
| | | Other | 3 | 0 | 0 | 0 | 2 | 0 | 1 | 0 | 9 | 0 | 1 | 0 | | | | | |
| | McConahy, Michael P | Defendant | 65 | 0 | 22 | 0 | 40 | 0 | 56 | 0 | 22 | 0 | 28 | 0 | 233 | 38.8 | 34.0 | | |
| | | Plaintiff | 5 | 40 | 2 | 10 | 4 | 30 | 5 | 29 | 4 | 7 | 5 | 10 | | | | | |
| | | Other | 8 | 0 | 8 | 0 | 2 | 0 | 9 | 0 | 8 | 0 | 12 | 0 | | | | | |
| | | 12 | 0 | 2 | 0 | 4 | 0 | 13 | 0 | 3 | 0 | 1 | 0 | | | | | | |

No value

Defendant = defendant in both criminal and civil cases

Plaintiff = plaintiff in civil cases and prosecutor in criminal cases

Other = Judge Disqualified for Cause; Peremptory Disqualification by Father/Mother GAL/State

Overall: The average number of peremptory challenges for the superior court judges on the ballot for 2018 was 14.4 per year. The average number of peremptory challenges for the superior court judges on the ballot for other recent years has ranged from a low of 27 (2010) to a high of 36 (2006 and 2008). Peremptory challenges were unusually low for 2018, but only seven superior court judges are eligible for retention so the sample size is also lower than normal.

First Judicial District: The judge standing for retention in the First Judicial District, Judge William B. Carey, 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 2018.

Third Judicial District: None of the superior court judges in the Third Judicial District received unusually high numbers of peremptory challenges.

Fourth Judicial District: Peremptory challenge rates tend to be higher in the Fourth Judicial District. Although the statewide average was 14.4 per year, the Fourth Judicial District mean for superior court judges standing for retention in 2018 was 31.3 per year. Although much higher than the statewide average, this was much lower than the Fourth Judicial District mean of 59 challenges per year for judges on the 2016 ballot.

Judge Paul Lyle - Judge Lyle received an average of 23 peremptory challenges per year during the 2012-2017 evaluation period. He received 83 in 2012, with most coming from the state in criminal cases. He received many fewer in the years between 2013 and 2017, the highest coming in 2016 with 20. Those came from a variety of types of parties, mostly in civil cases.

Judge Michael McConahy – Judge McConahy received an average of 38.8 peremptory challenges during the 2012-2017 evaluation period. He received 40 of 65 challenges from defendants in criminal cases in 2012. His second highest year was in 2014, with 29 of 56 coming from defendants in criminal cases. His challenges, however, are increasingly evenly spread out between the types of parties, except he received no challenges from the state in criminal cases during this period.

B. District Court

| Peremptory Challenges of Judges - District Court | | | | | | | | | | | | | | | | | | |
|--|----------------------|----------------|-----------|----------|-------|----------|-------|----------|-------|----------|------------------|-------|--------|---|-----|------|----------------------|--|
| Judicial District | Judge | Party | 2012 | | 2015 | | 2016 | | 2017 | | Judge Statistics | | | Summary Statistics | | | | |
| | | | Total | | Total | | Total | | Total | | Total | Mean | Median | District | All | | | |
| | | | Civil | Criminal | Civil | Criminal | Civil | Criminal | Civil | Criminal | | | | | | | | |
| First | Miller, Kevin G | Defendant | 1 | 2 | 1 | 2 | 1 | 0 | 1 | 0 | 10 | 2.5 | 3.0 | Mean 2.0 Median 3.0 Min/Max 0/3 | | | | |
| | | Plaintiff | 0 | 0 | 0 | 0 | 1 | 1 | 0 | 0 | | | | | | | | |
| | | Other | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | | | | | | | | |
| | Swanson, Kirsten L | Defendant | | | | | | | 0 | 0 | 0 | 0 | 0 | | | | | |
| | | Plaintiff | | | | | | | 0 | 0 | | | | | | | | |
| | | Other | | | | | | | 0 | 0 | | | | | | | | |
| Third | Chung, Jo-Ann M | Defendant | 1 | 7 | 1 | 3 | 0 | 0 | 1 | 5 | 20 | 5.0 | 5.5 | Mean 34.9 Median 6.0 Min/Max 0/621 | | | | |
| | | Plaintiff | 0 | 0 | 0 | 1 | 1 | 0 | 0 | 0 | | | | | | | | |
| | | Other | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | | | | | | | | |
| | Clark, Brian K | Defendant | 0 | 0 | 0 | 0 | 0 | 1 | 0 | 0 | 7 | 1.8 | 2.0 | | | | | |
| | | Plaintiff | 2 | 0 | 2 | 0 | 0 | 0 | 2 | 0 | | | | | | | | |
| | | Other | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | | | | | | | | |
| | Estelle, William L | Defendant | 2 | 26 | 2 | 12 | 0 | 10 | 4 | 2 | 143 | 35.8 | 29.5 | | | | | |
| | | Plaintiff | 29 | 7 | 22 | 1 | 10 | 2 | 14 | 0 | | | | | | | | |
| | | Other | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | | | | | | | | |
| | Illsley, Sharon A.S. | Defendant | 1 | 13 | 2 | 14 | 1 | 2 | 0 | 1 | 45 | 11.3 | 10.5 | | | | | |
| | | Plaintiff | 0 | 4 | 5 | 0 | 0 | 0 | 2 | 0 | | | | | | | | |
| | | Other | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | | | | | | | | |
| | Wolfe, John W | Defendant | 1 | 25 | 1 | 27 | 3 | 51 | 0 | 618 | 736 | 184.0 | 43.5 | | | | | |
| | | Plaintiff | 0 | 2 | 1 | 2 | 0 | 2 | 3 | 0 | | | | | | | | |
| | | Other | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | | | | | | | | |
| | Fourth | Seekins, Ben A | Defendant | 1 | 0 | 1 | 5 | 0 | 16 | 3 | 13 | 52 | 13.0 | | | 14.0 | See Judge Statistics | |
| | | | Plaintiff | 0 | 5 | 1 | 5 | 0 | 0 | 1 | 1 | | | | | | | |
| | | | Other | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | | | | | | | |
| Total | | | 6 | 5 | 12 | 15 | 16 | 18 | 18 | 18 | | | | | | | | |

No value
Defendant - defendant in both criminal and civil cases
Plaintiff - plaintiff in civil cases and prosecutor in criminal cases
Other - Judge Disqualified for Cause; Peremptory Disqualification by Father/Mother/GAL/State

Overall: The mean number of peremptory challenges for a district court judge appearing on the ballot in 2018 was 34.9. This mean was skewed drastically upward largely due to one judge, Judge John Wolfe, receiving 621 challenges in 2017, almost all coming from defendants in criminal cases.

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 47.6 peremptory challenges per year.

Judge John Wolfe - Judge Wolfe received a mean of 184 challenges per year. As mentioned above, Judge Wolfe received 621 peremptory challenges in 2017 alone, which

skewed his mean and the Third Judicial District mean very high. This number of peremptory challenges is unprecedented since the Alaska Judicial Council began keeping records. After investigation, the council staff determined that the challenges came predominately from the Public Defender Agency.

Judge William Estelle – Judge Estelle received a mean of 35.8 challenges per year during the evaluation period of 2014-2017. He received the most in 2014 (64). The number of challenges declined every year and he received only 20 in 2017. The challenges in the high years came mostly from plaintiffs in civil cases and defendants in criminal cases.

Fourth Judicial District:

Only one district court judge is on the 2018 ballot, Judge Ben Seekins. He received a mean of 13 challenges per year, which was significantly below the statewide mean for District Court judges in 2018. A better comparison may be with the Fourth Judicial District district court judges who were on the ballot in 2016. Their mean was 41.6 peremptory challenges per year.