

# COMMITTEE REPORT

## SENATE

5/30/83

FURTHER:

Date: 5/11/83

Mr. President:

The Committee on Finance has had HB 79 am(Crt rule fld)

Repealing peremptory disqualification of a judge and changing Rule 10(c) and Rule 25(d), Rules of Criminal Procedure and Rules 42(c), Rules of Civil Procedure; etc.

under consideration and (a majority of the committee) (the committee) reports it back with the following recommendations:

- do pass  do not pass
- do pass with attached amendments(s)
- replace with CS for \_\_\_\_\_  same title  
 new title
- and recommends \_\_\_\_\_
- AND attaches a "Letter of Intent"  New Fiscal Note
- reports it back without recommendation
- referred to the \_\_\_\_\_ Committee

MEMBERS SIGNING  
DO PASS

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

MEMBERS HAVING  
OTHER RECOMMENDATIONS:

V. Finley DO NOT PASS  
Rest. Criminal Justice  
James D. ...  
J. ...

E. ...  
CHAIRMAN

THE LEGISLATURE OF THE STATE OF ALASKA  
THIRTEENTH LEGISLATURE

FISCAL NOTE

I. REQUEST

Bill/Resolution No. HB 79  
 Title "An Act repealing peremptory disqualification of a judge...."  
 Requested by House Judiciary Committee Date 1/26/83

II. FISCAL DETAIL

Agency Affected Department of Law  
 Program Category Affected Administration of Justice  
 BRU, Program, Or Subprogram(s) Affected Prosecution  
 (Note: If more than one budget component is affected, separate line-item amounts and funding for each component in the analysis section.)

EXPENDITURES (Thousands of Dollars)

	FY 83	FY 84	FY 85	FY 86	FY 87	FY 88
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL						
400 COMMODITIES						
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS, ETC.						
TOTAL		X	X	X		

Costs that will occur cannot be determined at this time. See analysis below.

FUNDING (Thousands of Dollars)

General Funds costs that will occur cannot be determined at this time.  
 Please see analysis below.

GENERAL FUND		X	X	X		
FEDERAL FUNDS						
OTHER (Specify Source)						

III. ANALYSIS (See Fiscal Note Preparation Instruction, Section III)

Although not quantifiable at this time, this bill has the potential for causing a significant fiscal impact on the Department of Law, the Public Defender and the Court System. The department rarely uses peremptory disqualification and the department's Criminal Division probably does so only 10 or 12 times each year. The problem will arise from the private criminal defense bar which disqualifies some judges 30% or 40% of the time. If the private bar continues to seek this same level disqualification, based on cause, our prosecutors will then have to devote substantial portions of their time participating in a two-tier disqualification hearing process. Without any prior experience to guide us, the department is hesitant to speculate on the actual cost that this bill might cause. The department does believe that this bill will have the effect of hampering its overall ability to prosecute criminal offenses, by diverting already diminished resources from other matters currently being addressed.

IV. DATE January 28, 1983

PREPARED BY Richard I. Pezues, Dir. Adm. Svcs.  
 AGENCY Department of Law

*Richard I. Pezues*

STATE OF ALASKA  
THE LEGISLATURE  
LEGISLATIVE AFFAIRS AGENCY

*Answer memo  
MAY be coming  
from Dist. Court.  
LEG. Counsel says  
the bill must be  
brought to file 11/10/83*

STATE CAPITAL  
ALASKA 99511  
907-465-3800

MEMORANDUM

May 26, 1983

SUBJECT: Status of HB 79  
TO: Senator Robert H. Ziegler, Sr.  
FROM: Billy G. Berrier *BGB*  
Director  
Division of Legal Services

You have asked whether, in light of the procedural history of this bill, it is properly before the Senate Judiciary Committee.

In my opinion it is properly before the committee.

Changing a court rule is the only legislative procedure which has essentially been prescribed by our Supreme Court. In Leege v. Martin, 379 P.2d 447 (Alaska 1963), the Court held:

"Judicial power to make rules of practice and procedure is not absolute. The legislature may change rules initiated by the judiciary when the desirability of making a change is evident, such as in a case where a particular rule of procedure may involve considerations of public policy that are better left to the legislature. Legislative review is not without restrictions. The constitutional convention was careful to provide that court rules could not be changed as simply as other laws could be enacted. A supermajority of the members elected to each house, rather than a simple majority, is required in order to change rules of practice and procedure.

"The object of such a limitation is to prevent unintentional, rash, ill-considered and too easy intervention by the legislature which would ultimately frustrate the sound purpose in giving courts the primary authority and responsibility for regulating their own affairs.

Senator Robert H. Ziegler, Sr.

Page 2

May 26, 1983

But that object cannot be achieved unless the attention of the legislature is directed to the fact that it is employing, not just its general power of enacting laws, but its particular power of reviewing the exercise of an authority vested in the judicial branch of government. During every session since statehood the legislature has passed laws containing some procedure. Efforts are being made to more effectively screen all bills to eliminate procedure, but the danger that bills containing some procedure will escape notice and be enacted will always be present. Unless the specific intent of the legislature to change procedure is expressed in the bill itself, the courts, as a matter of practical necessity, will have to regard procedural changes as unintentional. While the procedure that may be contained in a given bill was included with the best of intentions and without realizing its possible effect on established court operations, it often is so basic as to require wholesale revision of as many as six sets of court rules. The only answer is cooperation between the legislative and judicial branches. Notification in the bill itself that the intent to change procedure seems to be a partial answer. Another partial answer is to advise the Supreme Court when such a bill is being considered and give it an opportunity to be heard so that the legislature will be advised on all ramifications of the proposed change.

"As a matter of reason and necessity and in order to give article IV, section 15 of the constitution a practical working interpretation, we must hold that a legislative enactment will not be effective to change court rules of practice and procedure unless the bill contains a statement of purpose to change the rules. Since chapter 112 does not contain such a statement of purpose, that portion of the statute which purports to forbid the granting of stays pending appeal is ineffective as to the court rules of practice and procedure made and promulgated by this court."

The legislature has prescribed in its Rules that a change in Court Rules must be noted in the title, must contain a section expressly citing the Court Rule and must note the change proposed. This satisfies the notice requirement in Leege.

However, the legislature has the power to make substantive law which involves court procedure without changing the rules. The statutes involved in HB 79 are basically substantive law but also contain procedural matters. In Channel Flying, Inc. v. Bernhardt, 451 P.2d 570 (Alaska 1969), the Court held:

"Respondents also contend that AS 22.20.022 is invalid as violating the rule-making power of this court. The Alaska Constitution vests in the supreme court the authority to 'make and promulgate rules governing practice and procedure in civil and criminal cases in all courts.' The legislature has no power to make rules, but only to change them by two-thirds vote. The question here is whether the disqualification statute constitutes a rule governing practice and procedure in the courts which the legislature had no constitutional authority to make. The answer to that question depends on whether the subject matter of the statute is substantive or procedural. If it is substantive in nature it is a matter within legislative prerogative; if it is procedural, it falls within the ambit of this court's rule-making power.

"This statute does not merely regulate procedure. With or without it the particular action in court takes the same course. The statute rather creates and defines a right -- the right to have a fair trial before an unbiased and impartial judge. This is something more than merely prescribing a method of enforcing a right. The main subject matter of the statute is substantive in nature and was within the province of the legislature. AS 22.20.022 is not a rule of the court insofar as it provides for a peremptory disqualification of a judge."

Based solely on that holding it would appear that the bill does not change the Court Rule. However, the holding was somewhat modified by Gieffels v. State, 552 P.2d 661 (Alaska 1976), where the Court held:

"AS 22.20.022 encompasses both procedural and substantive matters. In Channel Flying, Inc. v. Bernhardt, supra, 451 P.2d at 576, we held that:

"AS 22.20.022 is not invalid as an attempt to usurp the rule-making powers of this court insofar as it provides for a peremptory disqualification of a judge. (emphasis added)"

"The procedure to be followed in implementing the substantive right created by AS 22.20.022, however, is subject to the rule-making powers of the court.

In Roberts v. State, 458 P.2d 340, 346 n. 17 (Alaska 1969), we implied that perhaps not all of AS 22.20.022 was a valid exercise of legislative power:

"In certain respects AS 22.20.022 was sustained as a valid exercise of legislative power in Channel Flying, Inc. v. Bernhardt . . . (emphasis added)"

"Although the legislature has the power to create the right to a fair trial before an unbiased judge, and the right to pre-empt a judge without requiring actual proof of bias or interest, it has very limited power to provide for the means by which that pre-emption right may be exercised. Until the legislature validly changes Criminal Rule 25(d), that rule is the sole provision which may be consulted in determining whether the pre-emptive right was properly exercised and the effect of the pre-emption on the procedural and administrative functions of the court system. Therefore, insofar as Rule 25(d) regulates only the procedural aspects of the peremptory right created by AS 22.20.022, and to the extent that the rule does not infringe upon the substantive right created by statute, the rule is a valid exercise of legislative power. . . .  
enactment.

"Criminal Rule 25(d) regulates the means or method by which a party's right to a fair trial is exercised. The major changes found in Rule 25(d) provide for different time limitations, do away with the need for the filing of an affidavit alleging the inability to obtain a fair and impartial trial and specify the procedure to be followed when a presiding judge is challenged. These changes, for the most part, in no way impair the substantive right to a fair trial before an unbiased judge created by AS 22.20.022; in fact, Rule 25(d) generally

Senator Robert H. Ziegler, Sr.  
Page 5  
May 26, 1983

liberalizes the method by which a party may exercise a peremptory challenge."

Under both the case law and the Uniform Rules failure to adopt a change in Court Rules does not defeat the substantive provision in a bill.

The bill clearly has legal effect apart from whatever change it makes to the Court Rules. Peremptory challenges are made under AS 22.20.022 and questions, other than procedural questions, are decided under that law.

While the procedural history of the bill is complex it can be readily summarized. The House adopted the substantive language of the bill and failed the effective date and the change in Court Rules. The bill was sent to the Senate and then returned to the House. The House rescinded its actions and by amendments added the change in Court Rules and the effective date provisions back in the bill. The House then adopted the bill and adopted the effective date, but again failed to adopt the change in Court Rules. It again transmitted the bill to the Senate where it was referred to the Senate Judiciary Committee.

As I noted above the bill has substantive effect even without the change in Court Rules. Of course, without the change the Court Rules would prevail to the extent there is a conflict.

Rule 39(e) of the Uniform Rules provides that

If the section effecting a change in the court rule fails to receive the required two-thirds vote, the section shall be stricken from the bill.

In this instance both the substantive change and the procedural change are required for the section. Therefore, the section cannot be deleted. In light of the notice requirements in Leege, it would be very questionable to delete the Court Rules reference.

Although both the legal and procedural aspects are complex it is my opinion that the bill is properly before the committee.

BGB:ljb  
22/002

Introduced: 1/19/83  
Referred: Judiciary

1 IN THE HOUSE BY FRITZ AND LISKA

2 HOUSE BILL NO. 79 am(ct rule failed) re-engrossed

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 THIRTEENTH LEGISLATURE - FIRST SESSION

5 A BILL

6 For an Act entitled: "An Act repealing peremptory disqualification of a  
7 judge and changing Rule 10(c) and Rule 25(d), Rules  
8 of Criminal Procedure and Rule 42(c), Rules of Civil  
9 Procedure; and providing for an effective date."

10 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

11 \* Section 1. AS 22.20.022 is repealed.

12 \* Sec. 2. AS 22.20.022 repealed by sec. 1 of this Act has the effect of  
13 changing Rule 10(c) and Rule 25(d), Rules of Criminal Procedure, and Rule  
14 42(c), Rules of Civil Procedure, by eliminating peremptory disqualification  
15 of a judge.

16 \* Sec. 3. AS 22.20.020 is amended by adding a new subsection to read:

17 (d) A judicial officer may be disqualified only under this  
18 section or AS 22.30.070.

19 \* Sec. 4. This Act takes effect immediately in accordance with AS 01.-  
20 10.070(c).

C O R R E C T I O N

Discard H. B. 79 (C.T. Rule FAILED)  
and retain this corrected version.

Introduced: 1/19/83  
Referred: Judiciary

1 IN THE HOUSE

BY FRITZ AND LISKA

2

HOUSE BILL NO. 79 (ct rule failed)

3

IN THE LEGISLATURE OF THE STATE OF ALASKA

4

THIRTEENTH LEGISLATURE - FIRST SESSION

5

A BILL

6

For an Act entitled: "An Act repealing peremptory disqualification of a  
7 judge."

8

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

9

\* Section 1. AS 22.20.022 is repealed.

10

\* Sec. 2. AS 22.20.020 is amended by adding a new subsection to read:

11

(d) A judicial officer may be disqualified only under this

12

section or AS 22.30.070.

Introduced: 1/19/83  
Referred: Judiciary

or

1 IN THE HOUSE

BY FRITZ AND LISKA

2

HOUSE BILL NO. 79

3

IN THE LEGISLATURE OF THE STATE OF ALASKA

4

THIRTEENTH LEGISLATURE - FIRST SESSION

5

A BILL

6 For an Act entitled: "An Act repealing peremptory disqualification of a  
7 judge and changing Rule 10(c) and Rule 25(d), Rules  
8 of Criminal Procedure and Rule 42(c), Rules of Civil  
9 Procedure; and providing for an effective date."

10 BE. IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

11 \* Section 1. AS 22.20.022 is repealed.

12 \* Sec. 2. AS 22.20.022 repealed by sec. 1 of this Act has the effect of  
13 changing Rule 10(c) and Rule 25(d), Rules of Criminal Procedure, and Rule  
14 42(c), Rules of Civil Procedure, by eliminating peremptory disqualification  
15 of a judge.

16 \* Sec. 3. AS 22.20.020 is amended by adding a new subsection to read:

17 (d) A judicial officer may be disqualified only under this  
18 section or AS 22.30.070.

19 \* Sec. 4. This Act takes effect immediately in accordance with AS 01.-  
20 10.070(c).

COMMITTEE REPORT

SENATE

FURTHER:

FINANCE

5/17/83

Date:

5/27/83

Mr. President:

The Committee on JUDICIARY has had HB 79 am(Crt rule fld)

Repealing peremptory disqualification of a judge and changing Rule 10(c) and Rule 25(d), Rules of Criminal Procedure and Rule 42(c), Rules of Civil Procedure; eff. date.

under consideration and (a majority of the committee) (the committee) reports it back with the following recommendations:

- do pass  do not pass
- do pass with attached amendments(s)
- replace with CS for \_\_\_\_\_  same title  new title
- and recommends \_\_\_\_\_
- AND attaches a "Letter of Intent"  New Fiscal Note
- reports it back without recommendation
- referred to the \_\_\_\_\_ Committee

MEMBERS SIGNING  
DO PASS

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

MEMBERS HAVING  
OTHER RECOMMENDATIONS:

*Zink - Do Not Pass*

*Joe Jackson - Do NOT PASS*

*Allyson - do not pass*

\_\_\_\_\_

\_\_\_\_\_

*Bill Ray*

CHAIRMAN

DO NOT PASS