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536 FOURTH AVENUE
FAIRBANKS, ALASKA 99701

TELEPHONE
(907) 456-4070

March 10, 1983

Representative Anthony Vaska
Capitol Office Building
Pouch V
Juneau, Alaska 99811

Dear Representative Vaska:

I am writing regarding House Bill 79 which has apparently been introduced in the First Session of the 13th Legislature. This bill provides that the current Alaska Statute 22.20.022 providing for peremptory disqualification of judges be repealed. I wish to express my most sincere opinion that the passage of this bill would constitute a giant leap backward in the struggle for a fair and impartial judiciary in Alaska.

I take a particular interest in this bill because my father, Robert A. Parrish, strongly supported it when it was originally passed. I have paid special attention to the effect which it has had upon the judiciary and justice in individual cases. I have consulted with numerous other lawyers whose opinions I respect. Among those, the near unanimous consensus is that the peremptory disqualification procedure has been of great benefit to the state and should not be abandoned.

The peremptory disqualification procedure operates on two independent levels. Each is basic to fair adjudication of both civil and criminal controversies in this state.

On the first level, the disqualification procedure helps insure that a party or his counsel will not be required to participate in litigation before a judge who is consciously or unconsciously biased against him. Despite its rapid growth and large size, Alaska is a small state in terms of its citizens inter-relationships and their relationship with the judiciary. Lawyers especially have the occasion to go before the same judge time and time again during the course of the average year. Trial judges wield substantial power well beyond that which can be controlled by appellate review. The potential is always present that a judge will for non-judicial reasons act in a biased manner against a given attorney or party. The availability of a peremptory challenge effectively precludes a judge from at least repeatedly acting in a biased manner against a lawyer or party.

Representative Vaska
March 10, 1983
Page 2

Additionally, despite the high quality of the Alaskan judiciary, lawyers are often correct in the belief that a certain judge may not be properly suited to the trial of a certain type of case. Again, the peremptory challenge procedure helps insure that such a lawyer or his client will not be bound to accept a given judge to try any given type of case.

At the second level, the peremptory challenge procedure promotes and assures that the judiciary will in general operate in a completely unbiased manner and will strive to provide justice uniformly.

It is easy to say at this stage of the judiciary's development that we do not need a peremptory challenge law because there is no evidence that any judge has been acting in a biased manner toward any particular attorneys or any particular type of cases. But, this has not always been the case. There have in the past been strong inter-personal conflicts between lawyers and judges which have resulted in biased decisions. Likewise, before the peremptory challenge law there was much less uniformity in judicial application of the law. It is my strong belief that the peremptory challenge law has contributed substantially to the improved judicial situation in this state.

The exercise of a peremptory challenge in any given case is of little significance to a judge. However, if a pattern develops whereby a certain attorney is repeatedly challenging the same judge, it becomes apparent to the bar in general that that attorney does not believe he can get a fair trial in front of that judge. No judge wishes to be subject to such public opinion and therefore each strives to avoid bias in his attitude towards attorneys and/or parties and their cases. This office has not had occasion to peremptorily challenge a judge for many years. Nevertheless, we consider the right to a peremptory challenge a fundamental guarantee of the high quality and unbiased judiciary that we have.

Likewise, if any judge develops a pattern of bias in a given type of case, that pattern will soon become evident through the use of peremptory challenges. Again, since such a pattern is indicative of bias, no judge would want it to continue. Therefore, he will be spurred to closely evaluate his rulings in light of those of other judges and conform to them. In this way, the judiciary acts in a more uniform manner. Uniform application of laws is desirable. Aside from equality of treatment, it speeds the revision process if the people or the lawmakers disagree with the manner of application.

Representative Vaska
March 10, 1983
Page 3

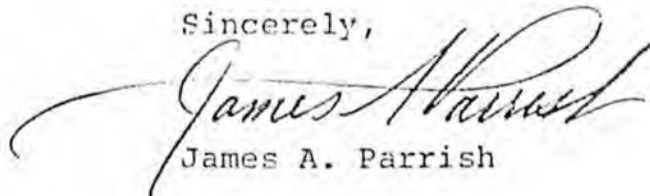
Perhaps the most important attribute of the peremptory challenge procedure is that it allows attorneys to represent their clients to the fullest extent without fear of subsequent judicial reprisal in other cases. In the absence of a peremptory challenge rule, judges can develop the attitude that they are always right and that any attorney who challenges their judgment by openly disagreeing with it or appealing it is wrong. In the absence of a peremptory challenge, a challenge to the authority of such a judge will be met with conscious or unconscious retaliatory measures in a subsequent case.

I am pleased to say that in Fairbanks, at least, there is no evidence of such attitudes. However, as they did exist before the peremptory challenge law and do exist in other states without such a law, I am constrained to believe that there is a cause and effect relationship.

I have not had any experience with political controversies in the courts. However, I would assume that the risk of a biased judge is as great there as it is in other types of cases. As a lawmaker, I would think that you would be especially attuned to the importance that an unbiased judge makes in a legal controversy. I am sure you can see as well as I that there is always the potential for the selection of a judge who simply should not be chosen to hear a given case. I also hope you can understand that judges, as human beings, are sensitive to their reputation as to fairness. Since the peremptory challenge rule may be the single most important means by which judicial reputations can be developed and communicated, their continued existence is critical.

I understand that there are concerns of expediency which would militate in favor of repealing the peremptory challenge rule. I, for one, favor taking measures which increase the efficiency and reduce the cost of the legal system. Nevertheless, the importance of the peremptory challenge procedure in terms of judicial quality and fairness offsets by far its cost in terms of efficiency and expense. Therefore, I hope that you will oppose passage of House Bill 79.

Sincerely,



James A. Parrish

JAP:mgs

AN ACT 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;
 AND PROVIDING FOR AN EFFECTIVE DATE

PRIME SPONSOR: FRITZ.

CO-SPONSORS: LISKA.

CURRENT STATUS: 5/17/83 IN (2) JUDICIARY REFERRAL: FINANCE

DATE	SEQ	PAGE	LEGISLATIVE ACTION
01/19/83	01	0053	FIRST READING -- COMMITTEE REPORTS
02/11/83	02	0223	JUD -- DP04, DNP02, OTHER01
02/11/83	03	0223	JUD CODE FLD BY HSC SUPPL 17
02/23/83	04	0329	3RD READING
02/23/83	05	0329	AM01 ADOPTED BY DIV 27-12-01
02/23/83	06	0330	ADVANCED TO 3RD READING BY UNAN CONSENT
05/16/83	18	1372	AM01 ADOPTED BY DIV 27-12-01
05/16/83	19	1372	AM02 ADOPTED BY UNAN CONSENT
05/16/83	20	0000	ADVANCED TO 3RD READING BY UNAN CONSENT
02/23/83	07	0330	THIRD READING
02/23/83	08	0330	PASSED BY DIV 24-13-03
02/23/83	09	0331	SEC 2 FAILED BY DIV 25-12-03
02/23/83	10	0331	EFFECTIVE DATE FLD BY DIV 25-12-03
02/23/83	11	0331	NOTICE OF RECONSIDERATION GIVEN
02/25/83	12	0352	RECONSIDERATION NOT TAKEN UP
05/16/83	16	1375	ACTION NO 068 RESCINDED BY UNAN CONSENT
05/16/83	17	1371	RETURNED TO 2ND READING BY UNAN CONSENT
05/16/83	21	1373	PASSED BY DIV 24-15-01
05/16/83	22	1373	COURT RULE FLD BY DIV 24-15-01
05/16/83	23	1374	EFFECTIVE DATE PASSED BY DIV 27-12-01

05/12/83	01	0000	FIRST READING -- COMMITTEE REPORTS
02/28/83	13	0279	FIRST READING -- COMMITTEE REPORTS
04/15/83	14	0715	MOVED FROM S A TO JUD BY UNAN CONSENT
05/12/83	15	0967	RETURNED TO HOUSE
			JUDICIARY
			FINANCE
			RULES

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May 11, 1983

Speaker Joe Hayes
House of Representatives
Pouch V
Juneau, Alaska 99811

Dear Speaker Hayes:

On advise from Richard Folta, Legal Counsel for the Legislative Affairs Agency, I am respectfully returning, for your attention, House Bill No. 79(ct rule failed) (repealing peremptory disqualification of a judge), which has been in the Senate Judiciary Committee.

Attached you will find a copy of Mr. Folta's memo along with the original and committee copies of the bill.

Sincerely,

Senator Bill Ray, Chairman
Senate Judiciary Committee

Attachments: 3

STATE OF ALASKA
THE LEGISLATURE


FOUCHY STATE CAP TO
JUNEAU ALASKA 99801
707 455 3810

LEGISLATIVE AFFAIRS AGENCY

MEMORANDUM

May 11, 1983

SUBJECT: HB 79 -- effect on court rules

TO: Senator Bill Ray
Chairman, Senate Judiciary Committee 

FROM: Richard C. Folta
Legislative Counsel

Section 2 of the above referenced bill as passed by the House reads:

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

It is our opinion that Sec. 2 has the effect of changing Rule 10(c) and Rule 25(d), Rules of Criminal Procedure, and Rule 42(c), Rules of Civil Procedure and to be effective the bill must be approved by an affirmative vote of two-thirds of the full membership of each house under Rule 39(e) of the Uniform Rules. The House bill title should also note the change in the court rules; however that can only be accomplished in the House.

RCF:ljb
19/014

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. Pegues, Dir. Adm. Svcs.
 AGENCY Department of Law

Schaible, Staley, DeLisio & Cook, Inc.

A Professional Legal Corporation

Fairbanks Office

Grace Berg Schaible
Howard Staley
Dennis E. Cook
Barbara L. Schulmann
Robert H. Grusecose
Charles D. Silvey, Jr.
Gerard R. LaParle
Gregory W. Lesmeier

March 29, 1983

Representative Anthony N. Vaska
Pouch V
Juneau, Alaska 99811

Re: House Bill 79,
Repealing Peremptory Disqualification of Judges

Anchorage Office

Stephen S. DeLisio
Alan Sherry
Joseph M. Moran
Michael C. Geraghty
Patricia L. Zobel
Walter J. Szudlo
Lynn L. Cassel

Dear Representative Vaska:

House Bill 79 would eliminate the peremptory challenge of judges. It would thus only allow challenges of judges for cause under A.S. 22.20.020. If only challenges for cause are allowed, then challenges for cause will increase. Under the present system, I do not hesitate to appear before judges that I have challenged peremptorily. There are many reasons for changing a judge.

Of Counsel:

William V. Boggess

However, if you challenge a judge for cause, it is a very serious accusation. You must state, by affidavit, that you feel the judge cannot be fair and impartial. In a way, you are stating the judge has not followed the judicial canons of ethics. S/he has failed to recuse himself or herself when that is what should have happened. If I ever had to challenge a judge for cause, I would never want to appear before that judge again. I would continue to challenge that judge for cause, particularly if that is what my client wanted or insisted upon.

Using this method of disqualification will cause an increase in legal costs and expenses for clients, and will increase the work of judges. Attorneys will have to file motions to disqualify for cause, accompanied by affidavits and memoranda. There will be hearings on the motion. If the motion is first denied, then it is assigned to another judge for hearing under A.S. 22.20.020(c). If the motion is still denied, the question can go up on appeal, or at least a petition for review can be filed. The peremptory challenge system is so much more efficient, that it should be retained.

If there are problems because there are single judge districts, those are problems should be solved by ingenious

300 Barnette Street
(907) 452-1855

Post Office Box 810
Cable Address - MERFAIR

Fairbanks, Alaska 99707
Telex No. 35-416

March 29, 1983

Page -2-

use of telephone hearings, and, if necessary, assignment of a judge from a different district to handle motions and the trial. Eliminating the peremptory challenge of judges will not solve the problem.

Alaska is still a small enough state that many people know judges that they come before. If they are not comfortable, for whatever reason, they should have the right to one peremptory challenge. The times when this has become a problem for the court system are times when a judge has announced publically the sentence s/he intends to give in all drunk driving cases, for example, or cases where lawyers and litigants have consistently felt that the judge's demeanor or decisions were unacceptable.

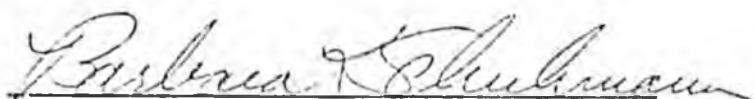
The peremptory system works very efficiently. If a judge is challenged, another judge is very simply assigned to the case. One piece of paper needs to be filed by the attorney, and another is filed by the courts. (See Civil Rule 42.)

The peremptory challenge of judges should be retained. I urge you to defeat House Bill 79.

Sincerely,

SCHAIBLE, STALEY, DeLISIO & COOK, Inc.

By:


Barbara L. Schuhmann

BLS:skb

5th Legislature FIRST Session

HOUSE BILL NO. 79

By FRITZ, LISKA

An Act 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; and providing for an effective date.

Peremptory disqual. Judge

Read in the House 1/19, 19.83

May 13 *Reported back with*
 May 16 *Unfinished Business*
 May 16 *Read second time and*
 May 11 *Read third time and*
 May 16 *PASS Effective Date*
 Yea 24 Nays 12 Absent 0 Excused 1
 May 16 *Reconsideration*
 PASS Effective Date
 Yea 24 Nays 15 Absent 0 Excused 1
 Reported correctly engrossed
 Signed by Speaker
 Sent to Senate
James P. ...
 CHIEF CLERK OF THE HOUSE

1983
 2 28
 4 15
 5 12
 5 17
 Read first time and referred to Committee on S. A. - Judiciary
J.P. ... returned to House for action
 Reported back with recommendation that
 Read second time and
 Read third time and
 PASS Effective Date
 Yea Nays Absent Excused
 Reconsideration
 PASS Effective Date
 Yea Nays Absent Excused
 Reported correctly engrossed
 Signed by President
 Returned to House
 SECRETARY OF THE SENATE

19
 Received from Sen:
 Concurred in Senat thus adopting: VOTE
 Failed to concur in ment; asked Senate VOTE
 Senate receded from VOTE
 Senate failed to rec amendment VOTE
 CC appointed by H
 CC appointed by S
 CC adopted by Hon VOTE
 CC adopted by Sen VOTE
 To enrolling Reported correctly Sent to Governor
 Filed with Lt. Gov
 Chapter No.

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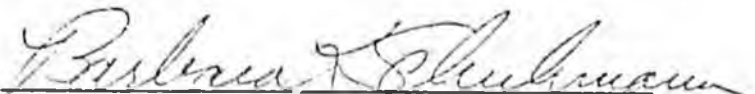
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The peremptory challenge of judges should be retained. I urge you to defeat House Bill 79.

Sincerely,

SCHAIBLE, STALEY, DeLISIO & COOK, Inc.

By: 
Barbara L. Schuhmann

BLS:skb



Alaska Judicial Council

NON-ATTORNEY MEMBERS
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JOHN E. LONGWORTH
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1031 W. Fourth Avenue, Suite 301
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CHAIRMAN, EX OFFICIO
EDMOND W. BURKE
CHIEF JUSTICE
SUPREME COURT

February 28, 1983

Senator Bill Ray
Chairman, Senate Judiciary Committee
Pouch 7
Juneau, AK 99811

Dear Senator Ray:

At the request of Judicial Council members, the Council's staff undertook a review of potential solutions to problems created by peremptory challenges to judges. Our work focused on solutions which permit the continued existence of the right to such challenges while alleviating the administrative problems created by their frequent use. Because your committee will be considering both SB 100 and HB 79, we are providing our preliminary memorandum for your information.

The enclosed memo describes our research completed prior to the Council's meeting on February 15 - 16, 1983. Our final report will be presented to the Joint Judiciary Committee on April 6. If you would like to have further information beforehand, please let me know.

Sincerely,

Francis L. Bremson
Executive Director

FB/pd

Enclosure

May 20, 1983
SR #20997-A
Fairbanks, Alaska 99701

Senator Bill Ray
Chairman, Senate Judiciary Committee
State Capitol
Pouch V
Juneau, Alaska 99811

Re: House Bill No. 79am

Dear Senator Ray:

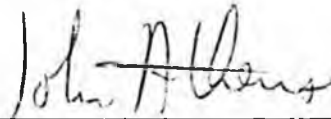
Please do not pass the bill that would repeal the peremptory disqualification of a judge. I am an attorney and have been practicing law in both the public and private sector in Fairbanks for almost twelve years. I consider the right to peremptorily disqualify a judge one of the most important rights afforded a litigant under the court rules. Not only is it important to defendants in criminal cases, but it is at least equally important to plaintiffs and defendants (including the State) in civil cases and to the prosecution in criminal cases.

Although there are many reasons why a litigant might choose to disqualify a judge, the chief value of the right to disqualify a judge is that it gives the litigants a feeling of being treated fairly by the court system. If litigants feel that a judge may be biased or predisposed to rule in a certain way, the credibility and effectiveness of the justice system is severely curtailed.

Also, there needs to be a way for parties to keep a bad judge from hearing their case. Disqualification of a judge for cause under AS 22.20.020 is difficult and only applies in very limited circumstances. A peremptory disqualification is a very efficient way for a party to free himself from the control of a judge who the party thinks (rightly or wrongly) will treat him unfairly.

Please listen to the lawyers (both private and public) and judges that are involved in the justice system and have direct experience with peremptory disqualifications. Please don't base your decision on whether to pass the bill on budgetary reasons. I know of exceedingly few lawyers who believe that this valuable right to peremptorily disqualify a judge should be done away with. Whatever good might be accomplished by the repeal will be vastly overshadowed by the resulting erosion of public confidence in the court system.

Very sincerely,

A handwritten signature in cursive script, appearing to read "John Athens", written over a horizontal line.

E. John Athens, Jr.

TAKEN FROM THE SENATE JUDICIARY COMMITTEE MEETING MINUTES OF
MAY 11, 1983:

The third order of business was House Bill 79--Repealing peremptory disqualifications of judges, as to which Senator Ray announced that he is sending the bill back to the House with a letter to Speaker Hayes, (letter attached) stating that, based on information recently received, it is the Judiciary Committee's belief that the bill was either improperly passed or the title is wrong and that these problems must be resolved by the House. There were no objections to this course of action and it was so ordered.

TESTIMONY OF JUDGE JAMES D. HORNADAY, HOMER
February 2, 1983

1962

Mr. Chairman and ladies and gentlemen of the Committee, thank you for holding this hearing and inviting me to address the Committee. I hope I am not the monster judge that everyone has been talking about. My name is James D. Hornaday and from a perspective of nearly 20 years in Alaska I am speaking to you today as a judge. The judicial cannons permit and even require that judges speak out for the improvement of the administration of justice. And with all of the comments by many of my lawyer friends I feel a little like David when he went up against Goliath. The men and women of good will can and do differ in their opinions, and it does remind a little of the old Alaska adage that if the lawyers are against something it must be worthwhile. I wish it were someone else who was on the line rather than me, frankly I would rather be playing basketball or working on a legal history project. But the question of the peremptory challenge is involved with the independence of the judiciary and the decreasing respect for the judiciary. First of all, the peremptory challenge is not a fundamental constitutional right; it does not even exist anywhere in the Federal system, and there are Federal judges in every state and territory. Apparently it does not even exist in the vast majority, about two-thirds of the states. Alaska is in the extreme minority. It did not exist in Alaska until a few years ago when some lawyers pushed it through the Legislature. The Federal system and the majority of states get along just fine without it. Now as one example, drunk driving cases are the most serious problem facing the Alaska Court System. Over half of all the jury trials in the entire Court System are drunk driving cases. Drinking was involved in over 80% of the traffic fatalities; over 200 thousand are killed or injured annually on our nation's highways. Let's make clear what the Legislature has already done; the Legislature has passed legislation providing for up to one year in jail and \$5,000 fine, revocation of licenses and community work. Now the statutes specifically states that for the first offense a defendant is to receive not less than 72 consecutive hours. It is too serious a problem to leave in the hands of the attorneys and that is the none-effect of the peremptory challenge without cause. Judges are concerned about the peremptory challenge; it is affecting sentences. The Chief Justice has stated publicly that the peremptory challenge moderates sentences and that a judge has to walk a fine line and if they get too far over they will be removed by the peremption. I was told by the presiding judge that I had to take peremptions into consideration when I sentence. It is the most frequent topic of conversation at the Annual Judicial Conference. The leading authority on court delay called the Alaska peremptory challenge an absolute abomination, those were his words. Representatives of the National Center of State Courts were amazed at the existence of the removal without cause. I have heard judges tell the Chief Justice they are concerned about the peremption. It is a problem state-wide, not just in Homer. You have heard the lawyer in Bethel and the problems there. You've heard the judges in Fairbanks. It exists in Kodiak, Ketchikan, Juneau and all over the state, even in multi-judge areas. Now we announced a pattern of sentencing in drunk driving cases in Homer about a year ago which was effective, but sentences were clearly within the sentences permitted by the Legislature. Fifteen days is less than 5% of the maximum penalty. Although the announced pattern is no longer in effect and was rescinded when the higher court ruled that it could not be applied. There are sentencing patterns in Alaska, attorneys keep records of the sentences of judges. So there are patterns but known only to the judges and the lawyers. The public, including the potential defenders, do not know the patterns. It is time to open up the System and bring it out from behind the closed doors of the

legal profession. Now I was a lawyer for 10 years and you are never going to satisfy the lawyers on sentencing. About 6 years ago we initiated the first work program, alternate work program, for drunk drivers in Alaska. Some lawyers supported, but other complained that work was a cruel and unusual punishment. Now the program has been reinstated pursuant to the community work which the Legislature has made a sentencing tool. Now the lawyers are complaining that we are giving too much community work. Also the argument that the System would be flooded with time consuming challenges for cause is questionable, as several attorneys have indicated that they would not use challenges for cause. Further the presiding judge denied a challenge because against me on hearing a DWI case after the announced policy was rescinded. The hearing took all of 10 minutes. The Court System and the people of Alaska should not be held held hostage by attorneys threatening to plug the System with challenges for cause. Further judges will disqualify themselves if for some reason they should not hear a case. There is already a procedure for this approach that is in effect. However, again note that a judge has to give a reason why they are disqualifying themselves. Related to the peremptory challenge is another deep concern which I have as a 20 year Alaskan and as a lawyer and a judge and a citizen, and that is the growing lack of respect for the Alaska Judiciary among the members of the public. Reportedly, concern over the Justice System trailed only the capitol move and subsistence in intensity in the recent election. Almost half of the voters in the Third District voted not to retain the trial judges last November. This negative vote is up nearly 10% in only 4 years. How many years will it be before all judges are defeated? Some of the longer serving judges remember when they received 85% approval ratings. For the first time in nearly 20 years in the legal profession, so many people told me they were voting against all of the judges that I lost count. And note that, at least to-date, that most of the people, most of the lay people, testifying to you are against the peremption, only the lawyers are testifying before you in favor of it. That should tell you something. We pride ourselves in Alaska on the merit selection appointment procedure for judges. The Judicial Council recommends the Governor appoints and the people vote, and yet the present situation with the peremptory challenge is worse than the most partisan political election of judges, and that a very few attorneys can remove a judge and hold the System hostage. The cost to the public and the wasted expense and time is high. The selection process of which we are so proud and the public vote means absolutely nothing. Just as an example, I was required to move to Homer to take the judgeship in Homer. The Judicial Council recommended me for Homer and the Governor specifically appointed me to Homer. The family moved here and has put down deep roots; we have children in school of all ages. I received good ratings from the lawyers and the highest rating from the Alaska Peace Officers and was retained overwhelming by the voters in the November election in my home area by a 2 to 1 margin. And although I appreciate Mrs. Barnes' invitation to Anchorage, I would prefer frankly to remain in Homer. I did live in Anchorage for a couple years and I have, we have, a lot of friends up there, however we are pretty deeply rooted in Homer at the present time. Two weeks after the election I was asked to transfer to Anchorage because of the peremptions. I have been assured that there is no other reasons for my transfer, only the peremptions. None of my sentences have ever been reversed as excessive. Now there are checks and balances that are far more appropriate than peremptions without cause and they are numerous. If a judge is doing something improper turn them over to the Judicial Qualifications Commission, or challenge the judge for cause, or test the judge in the retention elections, or appeal the judge's decision, or ask the judge to voluntarily disqualify himself. The message is going out loud and clear to the judges in Alaska, to the attorneys and to the public that inspite of the vote of thousands that vote means nothing, and a handful of attorneys can accomplish the transfer

of a judge, and threaten other judges through peremptions for which they do not even have to give a reason. All the attorneys have talked about before you are the rights of their clients, and these are important rights, no one would say that they are not. But what about the rights of the victims? What about the rights of society? The Constitution clearly requires a judge to sentence to protect society and reformation. No where in the Constitution, in the statutes or in the case law is there any indication that a judge is to sentence in order to avoid peremptions. And yet the Chief Justice of the Alaska Supreme Court has stated publicly that this is happening, and any judge who will level with you will tell you the same. The tail is wagging the dog at the present time as the attorneys are in effect controlling sentencing, and are now even controlling the transfer of judges. Thank you.



Superior Court

State of Alaska

FOURTH JUDICIAL DISTRICT

P.O. BOX 130

BETHEL, ALASKA

99559

CHAMBERS OF
CHRISTOPHER R. COOKE, PRESIDING JUDGE

PHONE: (907) 543-2298

January 19, 1983

Mr. Gerald L. Wilkerson, CPA
Legislative Auditor
Division of Legislative Audit
Pouch W
Juneau, Alaska 99811

Dear Mr. Wilkerson:

Enclosed is my response to your questionnaire of January 10, 1983. I am glad the Legislature has taken the time and effort to gather information from those involved in the criminal justice system regarding problems and recommendations for change.

As judge in a single-judge court in a rural region, many of my responses reflect perceptions from this vantage point. I am not fully informed as to the operation of all components of our system throughout the state.

I would like to underscore several matters raised in the questionnaire. First, I believe we are facing a crisis in our correctional system. Additional facilities must be built at once, and in particular the long-promised but never-built jail facility in Bethel should be constructed without further delay.

It also appears to me that a large number of the people being committed to jail from this region are young, unsophisticated, uneducated, and lacking in basic employment skills. This situation may grow more acute with the trend toward presumptive sentences for first offenders and a possible easing of waiver standards for juvenile offenders. I think special consideration should be given to establishing a correctional institution aimed at youthful offenders where they could receive an opportunity for education and vocational training without being co-mingled with more experienced convicts.

The peremptory challenge problem is a difficult one for a single-judge location. However, I am not convinced that the proposed elimination of the challenge would be an improvement. It would produce more challenges for cause which would be time consuming to resolve and might tarnish the

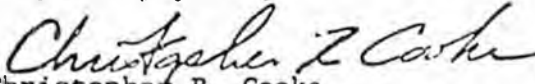
Letter to Mr. Gerald L. Wilkerson, CPA
Page 2
January 19, 1983

image of the judge system. However, I think that the court system could do a better job of responding to change of judge situations.

I am pleased with your interest in examining the use of peremptory challenges in jury selection. I think that a reduction in the number of challenges would speed up the trial process greatly particularly in rural locations where convening juries is expensive and time-consuming. Often it takes us longer to select a jury for a felony trial than it does to present the evidence. I would suggest a reduction of peremptory challenges to three on each side, the number used in civil and misdemeanor cases, for all trials. This will also greatly reduce the possibility that peremptory challenges can be used to manipulate the jury to exclude, for example, members of a particular racial group, or women in sexual assault cases, etc.

Thank you again for your interest in these matters.

Very truly yours,


Christopher R. Cooke
Superior Court Judge

CRC:fs

cc: Senator John Sacket
: Representative Tony Vaska

STATE OF ALASKA
THE LEGISLATURE
LEGISLATIVE AFFAIRS AGENCY

Answer memo
MAY be coming
from Dist. Fulton,
LEG. Counsel sitting
the bill must be
brought to FILE HERE

ALASKA STATE CAPITOL
FAU, 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 to pass upon. But this power of 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 two-thirds vote 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.

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 13 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 specifically states that its purpose is to effect such a change. 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 and does not change 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 579 (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 to deal with. 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."

Based solely on that holding it would appear that the bill does not change the Court Rules. 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 provisions of Rule 25(d) supersede the legislative enactment.

"Criminal Rule 25(d) regulates the means or method by which a party's peremptory challenge takes effect. 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.

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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 is void and without effect and is deleted from the bill.

In this instance both the substantive change and the procedural change are inherent in the same 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



Alaska Judicial Council

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CHAIRMAN, EX OFFICIO
EDMOND W. BURKE
CHIEF JUSTICE,
SUPREME COURT

February 2, 1983

M E M O R A N D U M

TO: Judicial Council Members

FROM: Francis L. Bremson

RE: Peremptory Challenges of Judges

The Judicial Council voted on December 3, 1982 to examine the use of peremptory challenges to judges in other states. The purpose of this review was to determine whether there were tested solutions to the administrative problems which can arise with the frequent use of challenges in single-judge courts. Ms. Teri Carns was assigned responsibility for taking a preliminary look at available literature, contacting court personnel in other states, and using other means as needed to outline potential avenues for further exploration. Ms. Carns will be available to discuss this subject at our meeting on February 15. The following memorandum summarizes her research to date.

1) States Allowing Peremptory Disqualification of Judges

All of the following states have some procedure, whether statutory or embodied in court rules, which is similar to Alaska's peremptory challenge of judges.

Arizona	Minnesota	North Dakota
California	Missouri	Oregon
Idaho	Montana	South Dakota
Illinois	Nevada (civil only)	Washington
Indiana	New Mexico	Wisconsin
		Wyoming

The list is taken from an article in the Oregon Law Review (Disqualification of Judges for Prejudice or Bias, 48 Ore. L. Rev. 311 (1969)). Because the article is fourteen years old, more states may have adopted peremptory challenge provisions during the intervening years. The article notes that some states require affidavits supporting the allegation of bias or prejudice, while the most restrictive states do not allow prejudice or bias of the judge as the sole ground for his disqualification.

2) Studies Available on Peremptory Challenges

We have received reports or studies from California, Idaho, Illinois, the National Center for State Courts, and the American Bar Association. Much of the material received has focused on legal rather than administrative aspects of challenges. Only two studies involving data collection have been received. The California Judicial Council prepared a study in 1962, five years after legislation authorizing peremptory challenges had been passed. The Council found no significant problems at that time. An Idaho study completed in December 1982 noted that three (of 21) judges in the state had been challenged frequently, but most of the challenges were in multi-judge courts. Neither study appears to be particularly relevant to the present situation in Alaska.

The other reports which have been sent to us include copies of statutes and court rules from several states, a report from the National Center for State Courts which describes various grounds for disqualifying judges, recommendations and commentary from the American Bar Association, and an Illinois judicial discipline case centering on the use of peremptory challenges by an Illinois law firm. All of these reports provide useful background information about the range of possibilities in the legal interpretation of peremptory challenges. They would certainly be helpful in drafting legislation or changes in court rules, but none of them address the administrative issues which the Council staff's work was to emphasize.

3) Administrative Solutions

Telephone conversations with court administrators in several states proved to be the most efficient way of discovering answers to the questions raised by Judicial Council members. Three of the states contacted thus far had developed procedures to be used when a judge was disqualified. These are described below.

A. Washington. Pro-tem judges are used in single-judge courts when the regular judge is disqualified in civil cases. An attorney is chosen from a pool of local "experienced" (at least ten to fifteen years of legal practice) lawyers. Parties to the action must stipulate that the attorney is acceptable to them as a judge for the case; if not, another attorney is chosen. In criminal cases, the disqualified judge is apparently responsible for obtaining another judge, although the procedure for this was not discussed.

B. California. Judges in single-judge courts are matched, at the time of their appointment, with another judge in a nearby court in a reciprocal arrangement. If either judge is disqualified, the reciprocating judge automatically takes his place. If both are disqualified, the central administrative office becomes involved in assigning a third (or additional) judge(s). The court's administrative office said that this reciprocal arrangement was effective enough that peremptory challenges did not create serious administrative problems. Pro-tem judges (attorneys appointed on a case-by-case basis, as in Washington) had been employed at one time, but the office said that California's experience with them was not positive enough to continue their use.

C. Wyoming. A judge challenged in Wyoming is allowed to select his own replacement from among all the judges of the state. The effect of this policy is that peremptory challenges are rarely used. If the judge is being disqualified because of his sentencing policies, he can replace himself with a judge who has similar philosophies. It may be noted that some states prohibit the disqualified judge from naming another judge to hear the case, precisely for the reason that he could frustrate the intent of peremptory challenges by choosing a judge with similar philosophies or biases. Countering that, the former Wyoming court administrator contends that allowing the judge this option prevents "judge-shopping".

One other solution which has been suggested for use in Alaska is teleconferencing. The Council staff has not had the opportunity to thoroughly research this possibility. It is presently used by the court on occasion, and may be significantly less costly than transporting a judge to outlying communities.

Judicial Council Members
February 2, 1983
Page Four

Further Work

The Judicial Council staff will continue to contact states which allow peremptory challenges to determine what other administrative solutions or legal alternatives may be available.

FLB/jrm

STATE OF ALASKA
THE LEGISLATURE

POUCH Y - STATE CAPITOL
JUNEAU ALASKA 99811
907 465 3800

LEGISLATIVE AFFAIRS AGENCY

MEMORANDUM

May 11, 1983

SUBJECT: HB 79 -- effect on court rules

TO: Senator Bill Ray
Chairman, Senate Judiciary Committee

FROM: Richard C. Folta
Legislative Counsel



Section 2 of the above referenced bill as passed by the House reads:

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

It is our opinion that Sec. 2 has the effect of changing Rule 10(c) and Rule 25(d), Rules of Criminal Procedure, and Rule 42(c), Rules of Civil Procedure and to be effective the bill must be approved by an affirmative vote of two-thirds of the full membership of each house under Rule 39(e) of the Uniform Rules. The House bill title should also note the change in the court rules; however that can only be accomplished in the House.

RCF:ljb
19/014

file 11

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.

	FY 83	FY 84	FY 85	FY 86	FY 87	FY 88
GENERAL FUND		X	X	X		
FEDERAL FUNDS						
OTHER (Specify Source)						

POSITIONS

	FY 83	FY 84	FY 85	FY 86	FY 87	FY 88
FULL TIME						
PART TIME						
TEMPORARY						

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

Richard L. Pegues

IV. DATE January 28, 1983 PREPARED BY Richard L. Pegues, Dir. Adm. Svcs.

AGENCY Department of Law
 PHONE 465-3672

Original: Legislative Finance
 cc: Budget and Management
 Prime Sponsor (First Legislator Named)

33-001 (Rev. 12/82)

OMB review by Guy Bell

Fiscal Note
HB 79
Page 2

overall ability to prosecute criminal offenses, by diverting already diminished resources from other matters currently being addressed.