HB

139

STATE OF ALASKA
THE LEGISLATURE

POUCH Y - STATE CAPITOL
JUNEAU, ALASKA 99811
907-465-3800

LEGISLATIVE AFFAIRS AGENCY

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May, 1988

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Mary Van Nimwegen

H. JUD. 3-6-87 1:30 p.m.

H. JUD. 3-5-87 1:30 p.m.

(7)

HOUSE COMMITTEE REPORT

Date referred: 2/18/87

FURTHER REFERRALS: Finance

DATE: 3-6-87

The Judiciary Committee has considered HB 139

'An Act relating to the jurisdiction of the superior and district courts, judicial disqualification and impeachment, the procedure for judicial retirement due to incapacity or disability, and proceedings before magistrates."

RECOMMENDS:

[ ] replace with (S HB 139 (Judiciary)) [ ] the same title

[ ] attached amendment(s) [✓] a new title

[✓] do pass

[ ] do not pass

[ ] no recommendation

[ ] individual recommendations

[ ] additional referral to the _____ Committee

ADOPTS: [ ] _____ letter of intent

ATTACHES NEW FISCAL NOTE(s):

[ ] fiscal impact

[✓] zero fiscal note

[ ] zero with analysis

[ ] same as previous fiscal note published _____

[ ] same as previous zero fiscal note published _____

SIGNING DO PASS:

SIGNING OTHER RECOMMENDATIONS:

San Cat - No Rec

Chairman's signature

Introduced: 2/18/87
Referred: Judiciary and
Finance

5-0116A

BY GRUENBERG, SUND, PETTYJOHN, DONLEY, NAVARRE, PHILLIPS, TAYLOR, ULMER AND MARTIN

IN THE HOUSE

HOUSE BILL NO. 139

IN THE LEGISLATURE OF THE STATE OF ALASKA

FIFTEENTH LEGISLATURE - FIRST SESSION

A BILL

For an Act entitled: "An Act relating to the jurisdiction of the superior and district courts, judicial disqualification and impeachment, the procedure for judicial retirement due to incapacity or disability, and proceedings before magistrates."

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

* Section 1. AS 09.30.200 is amended to read:

Sec. 09.30.200. FILING AND STATUS OF FOREIGN JUDGMENTS. A copy of a foreign judgment authenticated in accordance with the Act of Congress or the laws of this state may be filed in the office of the clerk of the [SUPERIOR] court with jurisdiction in [OF] this state. The clerk shall treat the foreign judgment in the same manner as a domestic judgment [OF THE SUPERIOR COURT]. A judgment so filed has the same effect and is subject to the same procedures, defenses, and proceedings for reopening, vacating, or staying as a domestic judgment [OF THE SUPERIOR COURT] and may be enforced or satisfied in like manner.

* Sec. 2. AS 09.30.220 is amended to read:

Sec. 09.30.220. STAY. (a) If the judgment debtor shows the [SUPERIOR] court that an appeal from the foreign judgment is pending or will be taken, or that a stay of execution has been granted, the court shall stay enforcement of the foreign judgment until the appeal is concluded, the time for appeal expires, or the stay of execution expires or is vacated, upon proof that the judgment debtor has

furnished the security for the satisfaction of the judgment required by the state in which it was rendered.

(b) If the judgment debtor shows the [SUPERIOR] court any ground upon which enforcement of a judgment of the [SUPERIOR] court of this state would be stayed, the court shall stay enforcement of the foreign judgment for an appropriate period, upon requiring the same security for satisfaction of the judgment that [WHICH] is required in this state.

* Sec. 3. AS 09.30.230 is amended to read:

Sec. 09.30.230. FEES. A person filing a foreign judgment shall pay to the clerk of court the fee prescribed for the filing of an action. Fees for docketing, transcription, or other enforcement proceedings shall be as provided for domestic judgments [OF THE SUPERIOR COURT OF THIS STATE].

* Sec. 4. AS 09.43.170 is amended to read:

Sec. 09.43.170. COURT, JURISDICTION. In AS 09.43.010 - 09.43.-180, the term "court" means the [SUPERIOR] court with jurisdiction in [OF] this state. The making of an agreement described in AS 09.43.010 providing for arbitration in this state confers jurisdiction on the [SUPERIOR] court to enforce the agreement under AS 09.43.010 - 09.43.-180 and to enter judgment on an award under the agreement.

* Sec. 5. AS 22.07 is amended by adding a new section to read:

Sec. 22.07.075. IMPEACHMENT. A judge of the court of appeals is subject to impeachment by the legislature for malfeasance or misfeasance in the performance of official duties. Impeachment must originate in the senate and must be approved by two-thirds vote of its members. The motion for impeachment must list fully the basis for the proceeding. Trial on impeachment shall be conducted by the house of representatives. A supreme court justice designated by the court

shall preside at the trial. Concurrence of two-thirds of the members of the house is required for a judgment of impeachment. The judgment may not extend beyond removal from office, but does not prevent proceedings in a court on the same or related charges.

* Sec. 6. AS 22.15.030(a) is amended to read:

(a) The district court has jurisdiction of civil cases, including foreign judgments filed under AS 09.30.200 and arbitration proceedings under AS 09.43.170, as follows:

(1) for the recovery of money or damages when the amount claimed exclusive of costs, interest, and attorney fees does not exceed $35,000 [$25,000];

(2) for the recovery of specific personal property, when the value of the property claimed and the damages for the detention do not exceed $35,000 [$25,000];

(3) for the recovery of a penalty or forfeiture, whether given by statute or arising out of contract, not exceeding $35,000 [$25,000];

(4) to give judgment without action upon the confession of the defendant for any of the cases specified in this section, except for a penalty or forfeiture imposed by statute;

(5) for establishing the fact of death of any person in the manner prescribed in AS 09.55.020 - 09.55.060;

(6) for the recovery of the possession of premises in the manner provided under AS 09.45.070 - 09.45.160 when the value [OF THE PROPERTY OR] of the arrears and damage to the property does not exceed $35,000 [$25,000];

(7) for the foreclosure of a lien when the amount in controversy does not exceed $35,000 [$25,000];

(8) for the recovery of money or damages in motor vehicle

tort cases when the amount claimed exclusive of costs, interest and attorney fees does not exceed $35,000 [$25,000];

(9) over civil actions for taking utility service and for damages to or interference with a utility line filed under AS 42.20.-030;

(10) over cases involving injunctive relief for domestic violence under AS 25.35.010 and 25.35.020.

* Sec. 7. AS 22.15.120 is amended to read:

Sec. 22.15.120. LIMITATIONS ON PROCEEDINGS WHICH MAGISTRATE MAY HEAR. A magistrate shall preside only in cases and proceedings under AS 22.15.040, 22.15.100, and 22.15.110, and as follows,

(1) for the recovery of money or damages only when the amount claimed, exclusive of costs, interest, and attorney fees, does not exceed $5,000;

(2) for the recovery of specific personal property when the value of the property claimed and the damages for the detention do not exceed $5,000;

(3) for the recovery of a penalty or forfeiture, whether given by statute or arising out of contract, not exceeding $5,000;

(4) to give judgment without action upon the confession of the defendant for any of the cases specified in this section, except for a penalty or forfeiture imposed by statute;

(5) to give judgment of conviction upon a plea of guilty by the defendant in a criminal proceeding within the jurisdiction of the district court;

(6) to hear, try, and enter judgments in all cases involving misdemeanors, if the defendant consents in writing that the magistrate may try the case;

(7) to hear, try and enter judgments in all cases involving

22.05.120
22.10.120

infractions under AS 28, violations under AS 11, and violations of ordinances of political subdivisions;

(8) for the extradition of fugitives as authorized under AS 12.70.

* Sec. 8. AS 22.15 is amended by adding a new section to read:

Sec. 22.15.205. IMPEACHMENT. A district judge is subject to impeachment by the legislature for malfeasance or misfeasance in the performance of official duties. Impeachment must originate in the senate and must be approved by two-thirds vote of its members. The motion for impeachment must list fully the basis for the proceeding. Trial on impeachment shall be conducted by the house of representatives. A supreme court justice designated by the court shall preside at the trial. Concurrence of two-thirds of the members of the house is required for a judgment of impeachment. The judgment may not extend beyond removal from office, but does not prevent proceedings in the courts on the same or related charges.

* Sec. 9. AS 22.20.020(a) is repealed and reenacted to read:

(a) A judicial officer may not act in a matter in which

(1) the judicial officer is a party;

(2) the judicial officer is related to a party or a party's attorney by consanguinity or affinity within the third degree;

(3) the judicial officer is a material witness;

(4) the judicial officer or the spouse of the judicial officer, individually or as a fiduciary, or a child of the judicial officer has a direct financial interest in the matter;

(5) a party, except the state or a municipality of the state, has retained or been professionally counseled by the judicial officer as its attorney within two years preceding the assignment of the judicial officer to the matter;

(6) the judicial officer has represented a person as attorney for the person against a party, except the state or a municipality of the state, in a matter within two years preceding the assignment of the judicial officer to the matter;

(7) an attorney for a party has represented the judicial officer or a person against the judicial officer, either in the judicial officer's public or private capacity, in a matter within two years preceding the filing of the action;

(8) the law firm with which the judicial officer was associated in the practice of law within the two years preceding the filing of the action has been retained or has professionally counseled either party with respect to the matter;

(9) the judicial officer feels that, for any reason, a fair and impartial decision cannot be given.

* Sec. 10. AS 22.20.020(b) is repealed and reenacted to read:

(b) The disqualifications specified in (a)(2), (a)(5), (a)(6), (a)(7), and (a)(8) of this section may be waived by the parties and are waived unless a party raises an objection.

* Sec. 11. AS 22.25.010(b) is amended to read:

(b) A justice or judge may be retired for incapacity as provided in this section [BY LAW]. A justice or judge is eligible for retirement pay with two or more years of service at the time of retirement for incapacity. The effective date of retirement under this subsection is the first day of the month coinciding with or after the date that [UPON WHICH] the governor [WITH RESPECT TO A JUSTICE, OR THE SUPREME COURT WITH RESPECT TO A JUDGE] files written notice with the commissioner of administration [A WRITTEN DECLARATION TO THE EFFECT] that a designated justice or judge was retired for incapacity. A duplicate copy of the notice [DECLARATION] shall be filed with the

Judicial Council.

* Sec. 12. AS 22.30.070(c) is amended to read:

(c) On recommendation of the commission or after an appeal under AS 22.30.011(e), the supreme court may (1) retire a judge for disability that seriously interferes with the performance of duties and that is or may become permanent, and (2) publicly or privately censure or remove a judge for action occurring not more than six years before the commencement of the judge's current term which constitutes wilful misconduct in the office, wilful and persistent failure to perform duties, habitual intemperance, conduct prejudicial to the administration of justice, or conduct that brings the judicial office into disrepute. The effective date of retirement under (1) of this subsection is the first day of the month coinciding with or after the date that the supreme court files written notice with the commissioner of administration that the judge was retired for disability. A duplicate copy of the notice shall be filed with the Judicial Council.

5-0116Aa
Ford

#1
Adopted

AMENDMENT

Offered in the HOUSE By Gruenberg

TO: HB 139

Page 1, line 10, following "magistrates":

Insert "; and amending Rule 16(a), Alaska District Court Rules of Civil Procedure"

Page 7, after line 16, insert a new bill section to read:

"* Sec. 13. Rule 16(a) of the Alaska District Court Rules of Civil Procedure is amended to read:

(a) All small claims actions shall be tried by the court without a jury. A judge may [NOT] be peremptorily challenged [EITHER] under Civil Rule 42(c) [OR AS 22.20.022]."

3/2/87

STATE OF ALASKA
THE LEGISLATURE

LEGISLATIVE AFFAIRS AGENCY

POUCH Y STATE CAPITOL
JUNEAU, ALASKA 99811
907 465 3800

MEMORANDUM February 2, 1987

SUBJECT: District Court Rule 16(a)
(Work Order No. 5-0526)

TO: Representative Max Gruenberg

FROM: Michael F. Ford M.F.
Legislative Counsel

You have asked whether District Court Civil Rule 16(a), providing that a judge may not be peremptorily challenged under AS 22.20.022 or Civil Rule 42(c), violates constitutional or statutory rights of litigants. It is a fundamental principle of due process that a litigant is entitled to a fair and impartial trial. In Re Robson, 575 P.2d 771 (Alaska 1978). To implement this principle the legislature enacted AS 22.20.020 providing for disqualification of a judicial officer for cause, and AS 22.20.022, providing for automatic disqualification of a judge. The District Court rule in question provides that the automatic disqualification right created under AS 22.20.022 is not available for litigants that agree to proceed under the small claims rules of procedure.

Although the right to a fair and impartial trial is a recognized due process right, the right to automatic disqualification of a judge is not guaranteed under the due process clause. Halligan v. State, 624 P.2d 281 (Alaska 1981). A more difficult question is whether the denial of the right to automatic disqualification results in the denial of equal protection of the law guaranteed by article I, section 1, of the Constitution of the State of Alaska. Analysis of this question requires application of the sliding scale test described in State v. Erickson, 574 P.2d 1, (Alaska 1978). Depending on the nature of the right, a greater or lesser burden is placed on the state to show that the classification has a fair and substantial relation to a legitimate government objective. The right to automatic disqualification of a judge is only denied under District Court Rule 16(a) if both

parties elect to proceed under the small claims procedure. Either party can preserve the right to automatic disqualification by choosing to proceed under the formal rules of procedure, and a litigant always retains the right to disqualify a judge for cause under AS 22.20.020. Concerning the legitimate government objective in the court rule, it appears that the goal of this procedure is to simplify administration of small claims. In this regard it is instructive to note that the legislature while creating the right to automatic disqualification, also mandated that procedure in small claims be prescribed by court rule to assure "simplicity and the expeditious handling of small claims." AS 22.15.040. Although there is room for argument, I think that District Court Rule 16(a) does have a fair and substantial relation to a legitimate government objective, and is therefore not a denial of constitutional equal protection rights.

There remains the question whether the civil rule infringes upon the substantive right created in AS 22.20.022. It has been established under Gieffels v. State, 552 P.2d 661 (Alaska 1976), that while the right to automatic disqualification is created by the statute, the procedure for invoking the right is strictly within the domain of the court. A litigant can lose the right to peremptory disqualification in a number of ways. (See Civil Rule 42(c).) Since the right created by AS 22.20.022 is preserved for those litigants who choose to proceed under the formal civil rules, it would appear that District Court Civil Rule 16(a) does not infringe on the substantive right created by the legislature in AS 22.20.020 and is a legitimate exercise of the court's power to set procedure for small claims.

The decision to deny the right to peremptory challenge to small claims litigants as a matter of civil procedure is subject to change by the legislature under article IV, section 15, of the Alaska Constitution. If the legislature should disagree with existing procedure, the civil rule could be amended to reflect a procedure approved by the legislature.

MFF:mkr
m8/077

Rule 16. Trial.

(a) All small claims actions shall be tried by the court without a jury. A judge may not be peremptorily challenged either under Civil Rule 42(c) or AS 22.20.022.

(b) The court shall admit any evidence which is relevant and material, despite the fact that such evidence might be inadmissible under formal rules of evidence.

(c) The court may investigate the controversy between the parties either in or out of court. The investigation must be made in the presence of the parties and the findings of fact resulting from the investigation must be stated on the record or reduced to writing and placed in the case file by the court.

(d) Testimony shall be given under oath and may be given in narrative fashion, and the examination of witnesses shall be informal. An adverse party has the right to cross-examine a party or witness. The court may take an active role in the examination of witnesses.

(e) The court may, at any time, consult with the parties on the record for the purpose of reaching a compromise or conciliation.

(f) The date set for trial shall be not less than 15 days from the date the court mails notice of the trial date to the parties. (Supreme Court Order 225 effective May 1, 1976; amended by Supreme Court Order 674 effective June 15, 1986; and by Supreme Court Order 759 effective December 15, 1986)

Problems

① AS 22.20.022 provides a substantive right implemented by CR 42(c). Ct has no power under rule to take away this right - violates separation of powers. Chanel Flyg Inc v Bergsland 451 P2d 578 (Alaska 1969)

② ~~equal protection denies defendant the right to have case~~ denies small claimants the right to small claims procedure & preempts - no rational basis for disallowing removals for small claims

NOTES TO DECISIONS

Magistrates are "judges of other courts" within the meaning of Alaska Const., art. IV, § 4. Buckalew v. Holloway, Sup. Ct. Op. No. 1988 (File No. 4058), 604 P.2d 240 (1979).

Applied in Larson v. State, Sup. Ct. Op. No. 1430 (File No. 2433), 564 P.2d 365 (1977).

Sec. 22.20.020. Disqualification of judicial officer for cause. (a) A judicial officer may not act as such in a court of which the judicial officer is a member in an action in which

(1) the judicial officer is a party or is directly interested;

(2) the judicial officer was not present and sitting as a member of the court at the hearing of a matter submitted for its decision;

(3) the judicial officer is a material witness;

(4) the judicial officer is related to either party by consanguinity or affinity within the third degree;

(5) either party has retained the judicial officer as their attorney or has been professionally counseled by him in any matter within two years preceding the filing of the action;

(6) the judicial officer feels that, for any reason, a fair and impartial decision cannot be given.

(b) In an action specified in (a) (4) and (5) of this section the disqualification may be waived by the parties and is waived unless a party raises the objection.

(c) If a judicial officer disqualifies himself or herself or consents to disqualification, the presiding judge of the district shall immediately transfer the action to another judge of that district to which the objections of the parties do not apply or are least applicable and if there is no such judge, the chief justice of the supreme court shall assign a judge for the hearing or trial of the action. If a judicial officer denies disqualification the question shall be heard and determined by another judge assigned for the purpose by the presiding judge of the next higher level of courts or, if none, by the other members of the supreme court. The hearing may be ex parte and without notice to the parties or judge. (§ 54-2-1 ACLA 1949; am § 1 ch 48 SLA 1967)

Cross references. — For other statutory provisions concerning disqualification of judges, see AS 22.30.070 (a). As to when a judge should disqualify himself, see Canon 3C of the Code of Judicial Conduct.

Editor's notes. — This section was redrafted by the revisor of statutes to remove personal pronouns in conformity with AS 01.05.031(c) and § 4, Chapter 58, SLA 1982.

Legislative history reports. — For report on ch. 48, SLA 1967 (SB 66), see 1967 House Journal, p. 311.

NOTES TO DECISIONS

I. GENERAL CONSIDERATION.

The right of an impartial tribunal is embodied in this section. Amidon v. State, Sup. Ct. Op. No. 1999 (File No. 3664), 604 P.2d 575 (1979).

The fact that a judge, as a trier of fact in a pretrial motion, found defendant's testimony "not believable" does not in itself preclude his presiding at the subsequent trial. Coffey v. State, Sup. Ct. Op. No. 1732 (File No. 3002), 585 P.2d 514 (1978), modified on rehearing on other grounds, 596 P.2d 10 (1979).

Defendant to request appointment of another judge for disqualification question. — Under subsection (c) of this section, it is incumbent on defendant to request the chief justice, as presiding judge of the next higher court, to appoint another judge to determine the question of disqualification. Coffey v. State, Sup. Ct. Op. No. 1732 (File No. 3002), 585 P.2d 514 (1978), modified on rehearing on other grounds, 596 P.2d 10 (1979).

Where no request was made to appoint another judge to determine the disqualification question, the fact that defendant was faced with imminent commencement of trial did not justify his failure to pursue his rights under subsection (c) of this section since the entrapment ruling which provided the basis for the allegation of bias was entered nearly three months before trial. Coffey v. State, Sup. Ct. Op. No. 1732 (File No. 3002), 585 P.2d 514 (1978), modified on rehearing on other grounds, 596 P.2d 10 (1979).

Quoted in Wamser v. State, Sup. Ct. Op. No. 1768 (File No. 4166), 587 P.2d 232 (1978).

Cited in Peterson v. State, Sup. Ct. Op. No. 1411 (File No. 2642), 562 P.2d 1350 (1977); Halligan v. State, Sup. Ct. Op. No. 2299 (File No. 5035), 624 P.2d 281 (1981); Deivert v. Oseira, Sup. Ct. Op. No. 2357 (File No. 4910), 628 P.2d 575 (1981).

II. BASES FOR DISQUALIFICATION.

A. Paragraph (a)(2).

Issuing orders based on both live and recorded testimony. — Where, in a superior court proceeding to terminate parental rights in which the judge sat as the trier of fact, one judge presided over the first part of the adjudication hearing, observed the testimony of two of the state's witnesses, and neither made written findings of fact or conclusions of law with respect to this testimony, nor entered an adjudication order; and another judge presided over the continuation of the hearing, observed the testimony of one witness for the state, listened to the tape recorded testimony given before the first judge, and on the basis of both the recorded and live testimony, issued both the order adjudicating the child a neglected child and the order of disposition, the supreme court noted that the terms of paragraph (a)(2) of this section might prohibit the practice adopted by the superior court. In re C.L.T., Sup. Ct. Op. No. 1866 (File No. 3607), 597 P.2d 518 (1979).

B. Paragraph (a)(5).

The purposes of paragraph (a)(5) are to ensure the actual impartiality of a judge and to eliminate any possible appearance or suspicion of bias, thereby preserving the integrity of the judicial process and the confidence of the public. Keel v. State, Sup. Ct. Op. No. 1290 (File No. 2883), 552 P.2d 155 (1976).

By expanding paragraph (a)(5) in 1967, Alaska's legislature evidenced concern about a somewhat distinct problem: namely, that any professional relationship between a judge and one of the parties, formed or nurtured in any manner during the months preceding the judge's elevation to the bench, might create a risk of partiality or the appearance of partiality. Keel v. State, Sup. Ct. Op. No. 1290 (File No. 2883), 552 P.2d 155 (1976).

Disqualification where judge previously employed by state government. — The legislature did not intend, in enacting paragraph (a)(5), to disqualify a judge because of his prior employment by the state government from all cases in which the state appears as a party during the prohibited period of time. Keel v. State, Sup. Ct. Op. No. 1290 (File No. 2883), 552 P.2d 155 (1976).

Superior court judge who had been employed as an assistant district attorney was not disqualified in a case brought by the state against a defendant where there was no possibility that he might have learned of the facts of the alleged crime while serving in his prosecu-

torial role. Keel v. State, Sup. Ct. Op. No. 1290 (File No. 2883), 552 P.2d 155 (1976).

C. Paragraph (a)(6).

Maintenance of appearance of impartiality. — Paragraph (a)(6) of this section does not provide for disqualification where the sole concern is maintenance of the appearance of impartiality. However, in light of the importance of promoting public confidence in the integrity and impartiality of the judiciary, it would be well to permit disqualification under such circumstances. Amidon v. State, Sup. Ct. Op. No. 1999 (File No. 3664), 604 P.2d 575 (1979)

Review of decisions under paragraph (a)(6). — The supreme court rejected the argument that the disqualification standards under paragraph (a)(6) are wholly subjective and therefore not amenable to appellate review. Clearly, review is contemplated on a challenge for cause grounded in bias. The supreme court's duty to assure that judicial proceedings comply with due process mandates appellate scrutiny of allegations of bias. Coffey v. State, Sup. Ct. Op. No. 1732 (File No. 3002), 585 P.2d 514 (1978), modified on rehearing on other grounds, 596 P.2d 10 (1979).

Since the initial determination under paragraph (a)(6) of this section has been placed in the discretion of the trial judge, that judge's decision should be given substantial weight. When the judge does not recuse himself or herself, the decision should be reviewable on appeal only if it amounted to an abuse of discretion. Amidon v. State, Sup. Ct. Op. No. 1999 (File No. 3664), 604 P.2d 575 (1979).

Collateral references. — Disqualification of judge by relative's ownership of stock in corporation which is a party to action. 8 ALR 295; 110 ALR 472.

Right of party in course of litigation to challenge title or authority of judge. 114 ALR 1207.

Disqualification of judge in pending case as subject to revocation or removal. 162 ALR 641.

Relationship of judge to one who is party in an official or representative capacity as disqualification. 10 ALR2d 1307.

Mandamus as remedy to compel assertedly disqualified judge to recuse self or to certify his disqualification. 45 ALR2d 937.

Relationship to attorney as disqualifying judge. 50 ALR2d 143.

Disqualification of judge in proceedings to punish contempt against or involving himself or court of which he is a member. 64 ALR2d 600.

Prior representation or activity as attorney or counsel as disqualifying judge. 72 ALR2d 443.

Time for asserting disqualification. 73 ALR2d 1238.

Intervenor's right to disqualify judge. 92 ALR2d 1110.

Disqualification of judge for bias against counsel for litigant. 23 ALR3d 1416.

Disqualification of original trial judge to sit on retrial after reversal or mistrial. 60 ALR3d 176.

Disqualification of judge by state, in criminal case, for bias or prejudice. 68 ALR3d 509.

Membership in fraternal or social club or order affected by a case as ground for disqualification of judge. 75 ALR3d 1021.

Sec. 22.20.022. Peremptory disqualification of a superior court judge. (a) If a party or a party's attorney in a district court action or a superior court action, civil or criminal, files an affidavit alleging under oath the belief that a fair and impartial trial cannot be obtained, the presiding district court or superior court judge, respectively, shall at once, and without requiring proof, assign the action to another judge of the appropriate court in that district, or if there is none, the chief justice of the supreme court shall assign a judge for the hearing or trial of the action. The affidavit shall contain a statement that it is made in good faith and not for the purpose of delay.

(b) No judge or court may punish a person for contempt for making, filing or presenting the affidavit provided for in this section, or a motion founded on the affidavit.

3/5/87

Adopted

AMENDMENT

Offered in the House By Martin

To: HB 139

Page 1, line 7, after "judicial disqualification" delete:
"..and" and insert: ", (coma)"

Page 1, line 8, after "impeachment" insert:
"..and reprimands"

Page 2, after line 21, insert a new bill section to read:

"*Section 5. AS 15.58.050 is amended to read:

Sec. 15.58.050. INFORMATION AND RECOMMENDATIONS ON JUDICIAL OFFICIERS. No later than 75 days before the state general election, the judicial council shall file with the lieutenant governor a statement including information about each supreme court justice, court of appeals judge, superior court judge, and district court judge who will be subject to a retention election. The statement shall reflect the evaluation of each justice or judge conducted by the judicial council according to law and shall contain a brief statement describing each public reprimand, censure, ~~or~~ suspension received by the judge under AS 22.30.011 (d)(3) or (4) during the period covered in the evaluation. A statement may not exceed 600 words.

or commendations

Renumber remaining bill sections

Page 7, after line 1, insert a new bill section to read:

"*Sec. 12. AS 22.30.011 is amended by adding a new subsection to read:

(h) If a judge reprimanded under this section seeks retention in office, the commission shall report to the judicial council for the statement filed by the judicial council under AS 15.58.050 the existence of public reprimands, censures ~~or~~ suspensions received by the judge since the appointment of the judge or since the last retention election of the judge."

or commendations

Renumber remaining bill sections

M E M O R A N D U M

DATE: March 2, 1987

TO: Representative John Sund
Chairman, House Judiciary Committee

FROM: Representative Terry Martin

RE: Amendment to HB 139

DRAFT

Under the Alaska system, judges are appointed by the Governor from candidates proposed by the Alaska Judicial Council. To remain on the bench, the judges must be approved periodically by the voters.

Since these judges don't run against another candidate, the voters are simply asked to say "yes" or "no" to a new term. Without any indication to think otherwise, most voters assume that a judge is doing a good job and chances are that the voter will cast an affirmative ballot.

In reality, some of these judges are not doing a good job. Some of these judges have received reprimands from the Judicial Council or the Commission on Judicial Qualifications.

Unfortunately, in most cases, the public is not aware that a judge has been reprimanded. These facts are not included in the information made public prior to a retention election.

By amending HB 139, as I suggest, such information will have to be included in the voters pamphlet prepared by the state and mailed to all registered voters prior to an election. This will enable the voters to make a more informed choice when they vote to retain a judge.

Chapter 30. Judicial Conduct.

SUPP

Sec. 22.30.010. Commission on Judicial Conduct. The Commission on Judicial Conduct shall consist of nine members as follows: three persons who are justices or judges of state courts, elected by the justices and judges of the state courts; three members who have practiced law in this state for 10 years, appointed by the governor from nominations made by the governing body of the organized bar and subject to confirmation by a majority of the members of the legislature in joint session; and three citizens who are not judges, retired judges, or members of the state bar, appointed by the governor and subject to confirmation by a majority of the members of the legislature in joint session. Commission membership terminates if a member ceases to hold the position that qualified that person for appointment. A person may not serve on the commission and on the Judicial Council simultaneously. The commission shall elect one of its members to serve as chairman for a term prescribed by the commission. A vacancy shall be filled by the appointing power for the remainder of the term. (§ 1 ch 213 SLA 1968; am § 23 ch 71 SLA 1972; am § 1 ch 160 SLA 1984)

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(E) conduct in violation of the code of judicial conduct; or
(4) is habitually intemperate.

(b) The commission may hold a hearing on an allegation under (a) of this section. A hearing under this section is a hearing under AS 44.62.310(d) and is private unless a public hearing is requested by the judge.

(c) A judge appearing before the commission at the hearing is entitled to counsel, may present evidence, and may cross-examine witnesses.

(d) The commission may, after a hearing held under (b) of this section,

(1) exonerate the judge of the charges;

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STATE OF ALASKA
THE LEGISLATURE

LEGISLATIVE AFFAIRS AGENCY

POUCH Y STATE CAPITOL
JUNEAU, ALASKA 99811
907 465 3800

M E M O R A N D U M March 9, 1987

SUBJECT: Alaska District Court Civil Rule 16(a) (CSHB 139(Jud))

TO: Representative John Sund

FROM: Michael F. Ford
Legislative Counsel

Section 15 of CSHB 139(Judiciary) amends Rule 16(a) of the Alaska District Court Rules of Civil Procedure to provide that a judge may be peremptorily challenged. Because of the existing language of Rule 16(a), the challenge would be "under Civil Rule 42(c) or AS 22.20.022." This appears to allow a defendant to use either of two different procedures to implement that right. Under Gieffels v. State, 587 P.2d 232 (Alaska 1978), however, the Alaska Supreme Court held that the legislature has very limited power to provide for the means by which the right to preemption is exercised, and therefore the procedural sections of AS 22.20.022 were struck down. See also Tunley v. Municipality of Anchorage Sch. Dist., 631 P.2d 76 (Alaska 1981).

If it is the intent of the legislature in enacting sec. 15 to "reactivate" the procedural provisions of AS 22.20.022 and give a small claims litigant the choice of the procedures of Rule 42(c) or the statutes, it is doubtful that the current version of CSHB 139(Jud) accomplishes that goal.

The preferred method of amending rules of court is to directly amend the rule in question. Section 15 of CSHB 139(Jud) arguably amends Civil Rule 42(c) indirectly by giving the small claims litigant an option to choose the statutory procedure in making a peremptory challenge in a small claims action. This may prove ineffective in changing Civil Rule 42(c), so that the procedure set out in Civil Rule 42(c) will be applied by the courts regardless of the reference in District Court Civil Rule 16(a) to AS 22.20.022. If you desire to create an exception to the applicability of

Rule 42(c), it would be better to directly amend Civil Rule 42(c) to provide the option of a different procedure for small claims actions.

On the other hand, if you desire to defer to Rule 42(c)'s procedural requirements, it would be advisable to delete the reference in Rule 16(a) to AS 22.20.022.

MFF:mkr
m9/116

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STATE OF ALASKA 1987 LEGISLATIVE SESSION
FISCAL NOTE

REQUEST: _____ Bill Version: HB 139
Publish Date:

Revision Date:
Title: Jurisdiction of superior and district courts, qualifications...
Sponsor: Gruenberg, Sund, Pettyjohn...
Requestor: House Judiciary Committee

Agency Affected: Alaska Court System
BRU: Trial Courts
Components:

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 87	FY 88	FY 89	FY 90	FY 91	FY 92
Personal Services	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .
Travel	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .
Contractual	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .
Supplies	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .
Equipment	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .
Land & Structures	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .
Grants & Claims	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .
REVENUE	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .
FUNDING: (Thousands of Dollars)						
General Funds	0.0	0.0	0.0	0.0	0.0	0.0
Federal Funds	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .
Other	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0
POSITIONS:						
Full-time	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .
Part-time	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .
Temporary	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .

ANALYSIS: (Attach a separate page if necessary)

No fiscal impact.

Prepared by: Karla Forsythe, General Counsel
Division: Alaska Court System
Phone: 264-8228
Date: 2-19-87

Approved by: Stephanie J. Cole, Deputy Director
Agency: Alaska Court System
Date: 2-19-87

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management & Budget
Impacted Agency(ies)
Senate Secretary

State of Alaska

House Majority Leader

COMMITTEES

HOUSE HEALTH, EDUCATION
AND SOCIAL SERVICES
HOUSE JUDICIARY
HOUSE RULES

Representative Max F. Gruenberg, Jr.
District 11
Spenard, Upper Midtown Anchorage

P.O. BOX V
JUNEAU, ALASKA 99811
(907) 465-3718
465-4968/4986

714 CLAY COURT
ANCHORAGE, ALASKA 99503
(907) 276-6844

Memorandum

Date: March 2, 1987

To: Members of the House Judiciary Committee

From: Representative Max F. Gruenberg, Jr.

Re: HB 139, "An Act relating to the jurisdiction of the superior and district courts, judicial disqualification and impeachment, the procedure for judicial retirement due to incapacity or disability, and proceedings before magistrates.

HB 139 is based on a bill that passed the House last session as HB 516, which provided a procedure for the impeachment of court of appeals judges and district court judges and the disqualification of judges for cause.

HB 139 incorporates HB 516, with some technical changes suggested by legal counsel. At the request of the judiciary, I have also added a number of other provisions, which increase the jurisdiction of district courts, give magistrates explicit authority to handle violations, and clarify the law regarding judicial retirement.

CONTENTS OF HB 139 COMMITTEE FILE

1. Sectional Analysis of HB 139
2. Max's memo
3. Copy of HB 139
4. Court System memo regarding suggested additions to HB 516 ('86)
5. House Journal excerpt showing passage of Amend. #14 to HB 377, increasing the jurisdictional limit of district courts.
6. Present language of AS 22.20.020 (b) waiver provisions for disqualification of judicial officer for cause.

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Alaska Court System
State of Alaska

OFFICE OF ADMINISTRATIVE DIRECTOR

KARLA L. FORSYTHE
STAFF COUNSEL

303 K Street
Anchorage, Alaska 99501

(907) 264-8228

January 6, 1987

Representative Max F. Gruenberg, Jr.
914 Clay Court
Anchorage, Alaska 99503

Dear Max:

It is my understanding from Art Snowden that you anticipate introducing legislation to increase the monetary jurisdiction of district court to $35,000, and that you would be willing to include other amendments relating to district court jurisdiction.

Over the past year judges and administrative office staff have suggested four statutory changes relating to district court jurisdiction.

1. Judge Serdahely suggests amending the Uniform Enforcement of Foreign Judgments Act to provide that foreign judgments falling within the District Court's jurisdiction [must] may be filed in District Court (see attached letter).

2. Judge Stemp suggests amending the Uniform Arbitration Act to provide that awards may be enforced in district court up to the monetary amount (see attached letter).

3. Judge Stemp also suggests clarifying the jurisdiction of the district court over forcible entry and detainer actions when the value of the property or of the arrears and damage to the property does not exceed $25,000." Although Judge Stemp has not made a specific proposal, I know that you are familiar from your practice with FED actions, and may have some thoughts about the best way to address his concern.

4. Stephanie Cole suggests amending AS 22.15.120(7) to add violations under AS 11 to the categories of cases which magistrates can hear (see attached memorandum).

Thank you for your interest in including these amendments. If I can provide further information or assist you in any way with background or drafting, please let me know.

Sincerely,

Karla L. Forsythe
Staff Counsel

KLF:bs

Att.

cc: Arthur H. Snowden, II, Administrative Director

1/6/87-3

Superior Court
State of Alaska

CHAMBERS OF
DOUGLAS J. SERDAHELY
Presiding Judge

THIRD JUDICIAL DISTRICT
303 K STREET
ANCHORAGE, ALASKA
99501-2083

MEMORANDUM

TO: Karla Forsythe

FROM: Presiding Judge Serdahely

DATE: February 11, 1986

RE: Legislation - Foreign Judgments

Consistent with the increase in District Court jurisdiction to $25,000, we may want to amend the Uniform Enforcement of Foreign Judgments Act, AS 09.30.200 et seq., to provide that foreign judgments falling within the District Court's jurisdiction must be filed in District Court rather than Superior Court.

I just had a wage garnishment case based on a $7400 foreign default judgment, and discovered that I probably could not lawfully remand the matter to District Court.

cc: Judge Finn

District Court

State of Alaska

THIRD JUDICIAL DISTRICT

CHAMBERS OF
RALPH STEMP
JUDGE

341 West Fourth Avenue
Anchorage, Alaska 99501-2074

January 31,1986

Karla Forsythe
General Counsel
303 K Street,
Anchorage, Alaska, 99501-2099

Dear Ms. Forsythe:

With the expanded jurisdiction of the District Court enacted in 1985 you might want to consider two areas of jurisdiction that were not addressed in 1985.

The Uniform Arbitration Act (A.S. 09.43.170) provides that enforcement of awards is proper in the Superior Court regardless of the amount of the controversy. The same is true with regard to enforcement of lawyer fee arbitration awards (Bar Rule 41). You may want to consider whether these two areas of jurisdiction should be amended in order to be consistent with the 1985 act.

Very truly yours,

Ralph Stemp
District Court Judge

cc: Judge Douglas Serdahely
Judge Natalie K. Finn

Memorandum

Alaska Court System

TO: Karla Forsythe
Staff Counsel

DATE : May 27, 1986

FROM: Judge Ralph Stemp

SUBJECT: Proposed Legislation

By the very fact that the District Court is a court of limited jurisdiction there will always be situations in which a litigant, through choosing to be in that court, will incur a loss not on the merits because the court is without jurisdiction to adjudicate his claim. It seems that one such situation, where the litigant's losses will probably always be large, is the area of eviction from "premises." It would therefore seem desirable that the definition of jurisdiction in such area be as clear and simple as possible. Our jurisdiction statute is not that clear on the subject and unfortunately there is not much Alaska precedent in the area of forcible entry and detainer.

The chance for jurisdictional error in forcible entry and detainer actions is not merely hypothetical or academic nor can it be overcome with "good lawyering" by a litigant. The reason that there is a large risk of error is that the statute, in attempting to limit jurisdiction, actually introduces the confusion.

The statute (A.S. 22.15.030(a)(6)) (copy attached for easy reference) provides that the District Court shall have jurisdiction over forcible entry and detainer actions "when the value of the property or of the arrears and damage to the property does not exceed $25,000." There are several problems created by this limitations phrase. First, the notion of "arrears and damages" is not a factor in the forcible entry and detainer summary action.[1] Such matters are separate causes of action which may, but need not be, joined with the summary action for possession. See, McDowell v. Lenarduzzi, 546 P.2d 1315 (Alaska 1976); Thrift Shop, Inc. v. Alaska Mutual Savings Bank, 398 P.2d 657 (Alaska 1965).

Second, the limitation provision deals with the value of "property." There is no indication whether this notion concerns the underlying fee interest, the plaintiff's

present interest, the defendant's present interest, or some other interest. Civil Form 170 seems to suggest that the relevant property interest is that of the nominal plaintiff.

The forcible entry and detainer area is only one example of the problems that are inherent in the grant of limited jurisdiction, and, of course, that will continue to exist. However, when the consequences of error are considered (along with the risk of error not being low or hypothetical) it would seem that the jurisdiction grant should be reviewed for clarity. If it is a desirable policy that the District Court continue to hear these summary lawsuits then perhaps the limiting phrase can be redrafted more carefully. Perhaps, the phrase should be deleted entirely.[2]

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1. This confusion concerning the summary action has been carried into Civil Rule 85(b) which provides that trial of such actions may be in the District Court "when the amount claimed does not exceed the jurisdiction of that court." (emphasis added)

2. The 1985 legislation on concurrent jurisdiction of the Superior and District Courts is a lure for unwary forcible entry and detainer plaintiffs into the District Court when actual jurisdiction may only be in the Superior Court. See A.S. 22.15.030(b).

cc: Judge Douglas Serdahely
Judge Glen Anderson

Memorandum

Alaska Court System

TO: Karla Forsythe

DATE : May 31, 1983

FROM: Stephanie J. Cole
Deputy Director for Services

SUBJECT: Revision of AS 22.15.120

Susan informs me that you collect and handle requests for minor statutory changes.

I would suggest an amendment to AS 22.15.120. This statute limits the types of cases magistrates can hear. In part, AS 22.15.120 allows magistrates:

> ...
> (6) to hear, try, and enter judgments in all cases involving misdemeanors, if the defendant consents in writing that the magistrate may try the case;
> (7) to hear, try and enter judgments in all cases involving infractions under AS 28 and violations of ordinances of political subdivisions;...

A problem is created because of the existence of that small class of offenses (like littering) called "violations." AS 11.81.900 (55) states:

> "violation" is a noncriminal offense punishable only by a fine, but not by imprisonment or other penalty; conviction of a violation does not give rise to any disability or legal disadvantage based on conviction of a crime; a person charged with a violations is not entitled
> (A) to a trial by jury; or
> (B) to have a public defender or other counsel appointed at public expense to represent him;

AS 22.15.120, as presently written, gives no guidance as to whether or not magistrates may hear all phases of violation cases, or if violations must be treated as misdemeanors (requiring a written consent for a trial by magistrate). Logically, violations are akin to infractions, and should be included in AS 22.15.120(7) as one of those types of cases magistrates can hear without the necessity of a defendant's written consent.

I suggest that AS 22.15.120(7) be amended to add "violations under AS 11" to the categories of cases listed.

Adm. F-1
Rev. 2-83

SJC:jm
cc: Carole Baekey
Susan Miller

HCS CSSB 377(Jud)amH

The question being: "Shall Amendment No. 13 be adopted?" The roll was taken with the following result:

HCS CSSB 377(JUD)AMH AM13

Yeas:	20	Binkley, Boucher, Collins, Cotten, Frank, Furnace, Hanley, Jenkins, Larson, Marrou, Martin, Miller,M.W., Pearce, Pettyjohn, Pignalberi, Rieger, Ringstad, Shultz, Thompson, Uehling
Nays:	20	Adams, Cato, Clocksin, Davis, Duncan, Fuller, Goll, Gruenberg, Grussendorf, Herrmann, Hurley, Koponen, Miller,M.M., Navarre, Phillips, Pourchot, Sund, Szymanski, Taylor, Wallis
Excused:	0	
Absent:	0	

And so, Amendment No. 13 was not adopted.

Amendment No. 14 by Gruenberg and Phillips:

Page 9, after line 1, insert a new section 8 as follows:

"* Sec. 8. AS 22.15.030(a) is amended to read:

(a) The district court has jurisdiction of civil cases and proceedings as follows:

(1) for the recovery of money or damages when the amount claimed exclusive of costs, interest and attorney fees does not exceed $35,000 [$25,000];

(2) for the recovery of specific personal property, when the value of the property claimed and the damages for the detention do not exceed $35,000 [$25,000];

(3) for the recovery of a penalty or forfeiture, whether given by statute or arising out of contract, not exceeding $35,000 [$25,000];

(4) to give judgment without action upon the confession of the defendant for any of the cases specified in this section, except for a penalty or forfeiture imposed by statute;

(5) for establishing the fact of death of any person in the manner prescribed in AS 09.55.020 - 09.55.060;

HCS CSSB 377(Jud)amH

(6) for the recovery of the possession of premises in the manner provided under AS 09.45.070 - 09.45.160, when the value [OF THE PROPERTY OR] of the arrears and damage to the property does not exceed $35,000 [$25,000];

(7) for the foreclosure of a lien when the amount in controversy does not exceed $25,000;

(8) for the recovery of money or damages in motor vehicle tort cases when the amount claimed exclusive of costs, interest and attorney fees does not exceed $35,000 [$25,000];

(9) over civil actions for taking utility service and for damages to or interference with a utility line filed under AS 42.20.030;

(10) over cases involving injunctive relief for domestic violence under AS 25.35.010 and 25.35.020.

Renumber remaining sections accordingly.

Representative Gruenberg moved and asked unanimous consent that Amendment No. 14 be adopted.

Representative Collins objected.

The question being: "Shall Amendment No. 14 be adopted?" The roll was taken with the following result:

HCS CSSB 377(JUD)AMH AM14

Yeas:	32	Adams, Binkley, Boucher, Cato, Clocksin, Cotten, Davis, Duncan, Frank, Fuller, Furnace, Goll, Gruenberg, Grussendorf, Herrmann, Hurley, Koponen, Larson, Martin, Miller,M.M., Miller,M.W., Navarre, Pettyjohn, Phillips, Pignalberi, Pourchot, Ringstad, Sund, Szymanski, Taylor, Uehling, Wallis
Nays:	8	Collins, Hanley, Jenkins, Marrou, Pearce, Rieger, Shultz, Thompson
Excused:	0	
Absent:	0	

And so, Amendment No. 14 was not adopted.

Correction to Journal on May 9: Amendment #14 was adopted

NOTES TO DECISIONS

Magistrates are "judges of other courts" within the meaning of Alaska Const., art. IV, § 4. Buckalew v. Holloway, Sup. Ct. Op. No. 1988 (File No. 4058), 604 P.2d 240 (1979).

Applied in Larson v. State, Sup. Ct. Op. No. 1430 (File No. 2433), 564 P.2d 365 (1977).

Sec. 22.20.020. Disqualification of judicial officer for cause. (a) A judicial officer may not act as such in a court of which the judicial officer is a member in an action in which

(1) the judicial officer is a party or is directly interested;

(2) the judicial officer was not present and sitting as a member of the court at the hearing of a matter submitted for its decision;

(3) the judicial officer is a material witness;

(4) the judicial officer is related to either party by consanguinity or affinity within the third degree;

(5) either party has retained the judicial officer as their attorney or has been professionally counseled by him in any matter within two years preceding the filing of the action;

(6) the judicial officer feels that, for any reason, a fair and impartial decision cannot be given.

(b) In an action specified in (a) (4) and (5) of this section the disqualification may be waived by the parties and is waived unless a party raises the objection.

(c) If a judicial officer disqualifies himself or herself or consents to disqualification, the presiding judge of the district shall immediately transfer the action to another judge of that district to which the objections of the parties do not apply or are least applicable and if there is no such judge, the chief justice of the supreme court shall assign a judge for the hearing or trial of the action. If a judicial officer denies disqualification the question shall be heard and determined by another judge assigned for the purpose by the presiding judge of the next higher level of courts or, if none, by the other members of the supreme court. The hearing may be ex parte and without notice to the parties or judge. (§ 54-2-1 ACLA 1949; am § 1 ch 48 SLA 1967)

Cross references. — For other statutory provisions concerning disqualification of judges, see AS 22.30.070 (a). As to when a judge should disqualify himself, see Canon 3C of the Code of Judicial Conduct.

Editor's notes. — This section was redrafted by the revisor of statutes to remove personal pronouns in conformity with AS 01.05.031(c) and § 4, Chapter 58, SLA 1982.

Legislative history reports. — For report on ch. 48, SLA 1967 (SB 66), see 1967 House Journal, p. 311.

State of Alaska

House Majority Leader

COMMITTEES

HOUSE HEALTH, EDUCATION
AND SOCIAL SERVICES
HOUSE JUDICIARY
HOUSE RULES

Representative Max F. Gruenberg, Jr.
District 11
Spenard, Upper Midtown Anchorage

P.O. BOX V
JUNEAU, ALASKA 99811
(907) 465-3718
465-4968/4986

914 CLAY COURT
ANCHORAGE, ALASKA 99503
(907) 276-6844

Memorandum

Date: February 2, 1987

To: Representative John Sund

From: Representative Max Gruenberg

Re: Impeachment of Judges Bill

I would like to know if you are interested in co-sponsoring the Impeachment of Judges bill, copy enclosed.

You co-sponsored the original bill last session as HB 516, which provided a procedure for the impeachment of court of appeals judges and district court judges and the disqualification of judges for cause.

Our new bill incorporates HB 516, with some technical changes suggested by legal counsel. At the request of the judiciary, I have also added a number of other provisions, which increase the jurisdiction of district courts, give magistrates explicit authority to handle violations, and clarify the law regarding judicial retirement.

I intend to introduce this bill on Monday, February 9. If you would like to co-sponsor the bill, please let me know, or contact my legislative aide, Mark Handley, at 465-4986 before 3:00 p.m. on Friday, February 6 so that we can ensure that your name is on the bill.

MEMORANDUM

DATE: February 2, 1987

TO: Potential Co-sponsors

FROM: Max F. Gruenberg, Jr.

RE: Sectional analysis of Impeachment of Judges Bill

Secs. 1,2 and 3
AS 09.30.200, .220 and .230 Foreign judgments are now enforceable only in superior court. The bill allows foreign judgments up to $35,000 to be enforceable in district court.
Sec. 4
AS 09.43.170 The Uniform Arbitration Act is now only enforceable in superior court. The bill allows arbitrations up to $35,000 to be enforceable in district court.
Sec. 5
AS 22.07.075 Provides for the impeachment of court of appeals judges. It uses the present language of AS 22.05.120 and AS 22.10.170 for the impeachment of supreme court justices and superior court judges. This was part of the bill last year.
Sec. 6
AS 22.15.030(a) Raises district court jurisdiction from $25,000.00 to $35,000.00 and clarifies the requirements for district court jurisdiction over evictions. The $35,000 limit was passed as part of the tort reform bill, SB 377, in the House Judiciary Committee and also passed the House floor last year, but did not survive the conference committee.
Sec. 7
AS 22.15.120 Brings criminal violations within the jurisdiction of magistrate courts.
Sec. 8
As 22.15.205 Provides for the impeachment of district court judges. See section 5 above. This was part of the bill last year.
Secs. 9 & 10
AS 22.20.020(a) and (b) Revises and updates the statute for disqualifying a judge for cause. This was part of the bill last year.
Secs. 11 & 12
AS 22.25.010(b) and 22.30.070(c) Clarifies the procedure for judicial retirement for incapacity or disability.

HB 139

officers of the State.

(The amendment to this section was approved by the voters of the state August 27, 1968 and became effective October 11, 1968. The words "and the commission on judicial qualifications" were incorporated in this section.)

Restrictions

SECTION 14. Supreme court justices and superior court judges while holding office may not practice law, hold office in a political party, or hold any other office or position of profit under the United States, and the State, or its political subdivisions. Any supreme court justice or superior court judge filing for another elective public office forfeits his judicial position.

Rule-making Power

SECTION 15. The supreme court shall make and promulgate rules governing the administration of all courts. It shall make and promulgate rules governing practice and procedure in civil and criminal cases in all courts. These rules may be changed by the legislature by two-thirds vote of the members elected to each house.

Court Administration

SECTION 16. The chief justice of the supreme court shall be the administrative head of all courts. He may assign judges from one court or division thereof to another for temporary service. The chief justice shall, with the approval of the supreme court, appoint an administrative director to serve at the pleasure of the supreme court and to supervise the administrative operations of the judicial system.

(The amendment to this section was approved by the voters of the state August 25, 1970 and became effective October 10, 1970. The amendment substituted "the pleasure of the supreme court" for "his pleasure" in the last sentence.)

ARTICLE V

SUFFRAGE AND ELECTIONS

Qualified Voters

SECTION 1. Every citizen of the United States who is at least eighteen years of age, who meets registration residency requirements which may be

OPINION

PER CURIAM.

This is a sentence appeal.

Bennie Washington was convicted of attempted robbery. He was sentenced to five years of imprisonment.

We have reviewed the record in light of *State v. Chan* , 477 P.2d 441 (Alaska 1970); *Donlun v. State*, 527 P.2d 472, 475 (Alaska 1974); *Cleary v. State*, 548 P.2d 952 (Alaska 1976) and *Bradley v. State*, 535 P.2d 1031, 1033–34 (Alaska 1975).

[1] We note that Washington was convicted in Wisconsin in 1970 for armed robbery and for carrying a concealed weapon. He was 31 years old at the time of his sentencing in Alaska. Although Washington labored under certain disadvantages in his early life these are offset by a number of advantages afforded him in his adult life, and in any event do not mitigate his resort to criminal activities.

[2] From our review of the record we cannot say that the sentencing judge was clearly mistaken.

AFFIRMED.

Timothy Leroy GIEFFELS, Petitioner,

v.

STATE of Alaska, Respondent.

No. 2787.

Supreme Court of Alaska.

July 23, 1976.

Defendant was arraigned in the Superior Court, Third Judicial District, Anchorage, Ralph E. Moody, J., and he filed petition for review from judge's orders, claiming that judge's refusal to disqualify himself and his subsequent conducting of arraignment were illegal. The Supreme Court, Boochever, C. J., held that since issues pertaining to preemption of judge were of grave public concern and capable of recurring and escaping review, court would consider issues; that if procedural or administrative action taken by preempted judge could not possibly interfere with defendant's right to fair disposition of his case because of bias or interest on part of preempted judge, then actions would be valid; however, if administrative or procedural action interfered with substantive right of defendant to fair trial before impartial judge, action by preempted judge would be impermissible; and that judge's actions in refusing to disqualify himself, revoking bail, allegedly holding defendant in contempt, and refusing to consider motion to dismiss indictment for failure to state an offense or for lack of warrant and summons were procedural matters not affecting defendant's substantive rights, and thus were permissible action for preempted judge to take prior to his transferal of case to another judicial official.

Affirmed in part and dismissed in part for mootness.

See also, 554 P.2d 460.

1. Constitutional Law ⇐69

Advisory opinions are to be avoided, and cases which do not constitute actual cases or controversies are not properly considered.

2. Action ⇐6

One exception to mootness doctrine is a matter of grave public concern that is recurring and capable of escaping review.

3. Action ⇐6

Although defendant's claims, inter alia, that judge's refusal to disqualify himself at arraignment of defendant, revocation of bail, alleged holding in contempt of defendant, refusal to consider motion to dismiss indictment for failure to state an offense were rendered moot by subsequent occurrence of further proceedings under another judge's supervision, issues pertaining to preemption of judge would be considered due to fact that matter was of grave public

concern and was capable of recurring and escaping review. AS 22.20.022; Rules of Criminal Procedure, rule 25(d).

4. Judges ⇐39

Where two proceedings involved same defendant and necessity of proving same facts and issues, and were in fact based upon indictment for same charge, judge who was preempted in prior proceeding was automatically disqualified from presiding at second proceeding. AS 22.20.022; Rules of Criminal Procedure, rule 25(d).

5. Courts ⇐78

State Supreme Court has power to regulate procedural and administrative matters in state courts. Const. art. 4, § 15.

6. Judges ⇐51(1)

Procedure to be followed in implementing substantive right created by statute providing for peremptory disqualification of judge is subject to rule-making powers of the State Supreme Court. AS 22.20.022; Const. art. 4, § 15; Rules of Criminal Procedure, rule 25(d).

7. Constitutional Law ⇐55

Although legislature has power to create right to fair trial before unbiased judge, and right to preempt judge without requiring actual proof of bias or interest, it has very limited power to provide for means by which that preemption right may be exercised. AS 22.20.022; Const. art. 4, § 15; Rules of Criminal Procedure, rule 25(d).

8. Judges ⇐51(1)

Until legislature validly changes criminal rule regulating means or method by which party's peremptory challenge to judge takes effect, that rule is sole provision which may be consulted in determining whether preemptive right was properly exercised and effect of preemption on procedural and administrative functions of court system. AS 22.20.022; Rules of Criminal Procedure, rule 25(d).

9. Judges ⇐51(1)

Insofar as criminal rule regulating means or method by which party's peremptory challenge to judge takes effect regulates only procedural aspects of peremptory right created by statute, and to extent that rule does not infringe upon substantive right created by statute, provisions of rule supercede statute. AS 22.20.022; Rules of Criminal Procedure, rule 25(d).

10. Judges ⇐51(1)

Although means or method by which peremptory challenge to judge is to be raised and recognized in course of judicial proceedings is usually procedural matter solely within rule-making powers of the State Supreme Court, such procedural regulations cannot be the basis of any action which would interfere with the substantive right created by statute. AS 22.20.022; Rules of Criminal Procedure, rule 25(d).

11. Judges ⇐51(4)

If procedural or administrative action taken by preempted judge under provisions of criminal rule regulating procedure for preemption of judges could not possibly interfere with defendant's right to fair disposition of his case because of bias or interest on part of preempted judge, then substantive right created by statute to fair trial before impartial judge would not be affected; only if administrative or procedural action interferes with substantive parts of statute would action by disqualified judge be impermissible. AS 22.20.022; Rules of Criminal Procedure, rule 25(d).

12. Judges ⇐56

Generally, calendaring orders and other procedural matters regarding master calendar would not directly affect ultimate disposition of case and thus such action could be properly taken by preempted judge; however, rulings on points of law regarding matters such as searches and seizures, sufficiency of indictment, and other pretrial legal decisions could be affected by bias or interest and would have direct effect on ultimate disposition of a defendant's case and thus such rulings should not be made by preempted judge. AS 22.20.022; Rules of Criminal Procedure, rule 25(d).

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Criminal Proce-

Criminal Law ⇐266

If defendant stands mute, then case automatically proceeds under name in indictment, and a positive declaration by defendant that no other name is his true name is not required. Rules of Criminal Procedure, rule 10(b)(2)(ii).

Criminal Law ⇐266

Trial judge had no discretion to punish defendant for standing mute when he was brought before judge for an arraignment since rules do not require defendant to respond. Rules of Criminal Procedure, rule 10(b)(2)(ii).

Judges ⇐56

In absence of specific objection, preempted presiding judge may take a plea, and upon entry of plea of "not guilty" set case for trial and subsequent pretrial hearings. AS 22.20.022; Rules of Criminal Procedure, rule 25(d).

Judges ⇐56

If calendaring becomes disputed issue, preempted judge hearing issue should immediately refer case to another judicial officer. AS 22.20.022; Rules of Criminal Procedure, rule 25(d).

Judges ⇐56

Determination by judge of whether defendant's "guilty" or "nolo contendere" pleas are voluntary and have reasonable basis is matter which may be affected by bias which would interfere with fair disposition of defendant's case, and thus a preempted judge should assign case at this point to another judge for determination of voluntariness of guilty plea. AS 22.20.022; Rules of Criminal Procedure, rules 11, 25(d).

Judges ⇐56

Generally bail questions have no bearing on process that determines guilt or innocence of defendant, and thus may be decided by preempted judge. AS 22.20.022; Rules of Criminal Procedure, rule 25(d).

Judges ⇐56

If amount of bail or conditions thereunder are disputed issues, setting of bail should be immediately referred by preempted judge to another judicial officer. AS 22.20.022; Rules of Criminal Procedure, rule 25(d).

Bail ⇐49

Defendant should be advised of his right to have bail heard by judge other than preempted judge. AS 22.20.022; Rules of Criminal Procedure, rule 25(d).

Judges ⇐56

Despite fact that judge had been preempted in previous case involving defendant, judge's refusal to disqualify himself and his subsequent conducting of arraignment upon proceedings following reindictment on identical charge was proper due to procedural nature of actions taken by judge prior to his transfer of case to another judge. AS 22.20.022; Rules of Criminal Procedure, rule 25(d).

Phillip P. Weidner, Asst. Public Defender, and Brian Shortell, Public Defender, Anchorage, for petitioner.

Ivan Lawner, Asst. Dist. Atty., Joseph D. Balfe, Dist. Atty., Anchorage, Avrum M. Gross, Atty. Gen., Juneau, for respondent.

Before BOOCHEVER, C. J., and RABINOWITZ, CONNOR, ERWIN and BURKE, JJ.

OPINION

BOOCHEVER, Chief Justice.

Issues pertaining to the pre-emption of a judge challenged under the provisions of AS 22.20.022 and Criminal Rule 25(d) are resolved by this petition. On February 11, 1976, petitioner Gieffels was brought before Presiding Judge Ralph E. Moody for an arraignment. Judge Moody had been successfully pre-empted in a previous case involving Gieffels. The indictments in that case were dismissed by another judge because of insufficient evidence and prosecutorial error before the grand jury. The instant case arose as a result of proceed-

ings following reindictment on an identical charge. At the start of the arraignment proceedings after reindictment, the following colloquy took place:

> MR. WEIDNER: Your Honor—I think Your Honor has been pre-empted in the instant proceeding. It might be appropriate to . . .
>
> THE COURT: This is a procedural matter and I will not allow a pre-empt. You will proceed with the arraignment.
>
> MR. WEIDNER: I think you've previously been pre-empted and it's been honored in a similar case . . .
>
> THE COURT: It's denied, and we'll proceed with the arraignment.

Subsequently the court asked Gieffels his true name, and counsel for Gieffels, Mr. Weidner, advised Gieffels not to make any comments. Mr. Weidner stated that he thought the court did not have jurisdiction over Gieffels because no summons or warrant had been issued. The court again asked Gieffels his true name, and Mr. Weidner again advised the defendant not to answer. The following comments were then made:

> THE COURT: I'm going to find you in contempt, sir, if you don't. Are you going to answer? All right. I'll revoke any bail until you answer your name, sir. And we've handed a copy of this [the indictment] to your counsel and that's all we need at this time until he . . .
>
> MR. WEIDNER: Your Honor. . . .
>
> THE COURT: . . . answers his name, no bail will be set. Anything else?
>
> MR. WEIDNER: Yes, Your Honor. I wanted to first of all direct the court's attention to the fact that I believe that Mr. Gieffels has been brought before this court illegally. I'm not aware of any summons that has been served on him or any arrest warrant.

After the arraignment, again on Febr 11, 1976, Judge Moody issued a calend order transferring the case to Judge L

Later the same day, Gieffels filed a tion for review in this court from J Moody's orders. His petition consist objections to Judge Moody's acti mainly, the refusal to disqualify hin the revocation of bail, the alleged hol in contempt of Gieffels, the lack of a rant or summons and the refusal to co er a motion to dismiss the indictment failure to state an offense.

On February 13, 1976, Judge Lewis another arraignment of Petitioner Gie at which time a warrant and sum were issued, and the motion to dismis indictment was heard and denied. thermore, the day after the arraign before Judge Moody, bail was reinsta

Petitioner Gieffels argues first Judge Moody's refusal to disqualify self and his subsequent conducting of arraignment were in total disregar *Channel Flying, Inc. v. Bernhardt*, 45 2d 570 (Alaska 1969). Second, Gie contends that the superior court disreg ed this court's decision in *Gilbert v. S* 540 P.2d 485 (Alaska 1975), to the el that bail must be set in a criminal Third, Gieffels argues that the judge di garded Criminal Rule 9(a), which peti er contends requires that a criminal fendant must be brought before the c by virtue of either a warrant or a s mons. Fourth, Gieffels contends Judge Moody held him in contempt in lation of his fifth amendment privile and that, in any case, Criminal I 10(b)(2) provides that a defendant shal "given the opportunity to declare his name" and not that a defendant shall forced to state his name.

[1] In general, advisory opinions ar be avoided, and cases which do not co tute actual cases or controversies are

1. On February 12, 1976, Justice Erwin issued a stay of all rulings of the superior court entered at the arraignment of Gieffels in order that the case be assigned to ano superior court judge. The order also stated Gieffels' previous bail of $100,00

. again on February
issued a calendaring
case to Judge Lewis.
Gieffels filed a peti-
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in *Gilbert v. State*,
1975), to the effect
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erly considered. *Munroe v. City Council for the City of Anchorage*, 545 P. 165, 169–70 (Alaska 1976); *In re G.M.*, 483 P.2d 1006, 1008 (Alaska 1971). we were to reverse Judge Moody's order all grounds raised by petitioner, the re- would be for further proceedings in rdance with this court's opinion. Fur- proceedings have already occurred, ver, under Judge Lewis' supervision. subsequent proceedings have com- ely eliminated all grounds of petition- bjections,[2] and this raises the ques- s to whether the petition is moot.

[3] One exception to the mootness rine is where a matter is of grave pub- ncern that is recurring and capable of ing review. *Munroe v. City Council the City of Anchorage, supra*; *Doe v.* 487 P.2d 47, 53 (Alaska 1971); *ern Pacific Terminal Co. v. I.C.C.*, S. 498, 515, 31 S.Ct. 279, 55 L.Ed. 30 (1911). The parameters of the damental right to an impartial judge certainly a matter of grave public con- Because here safeguards in Alaska's inal justice system resulted in achiev- the relief petitioner earlier sought, we some indication that the issue is capa- of escaping review. Further because the apparent confusion in this area, the n of a party's pre-emptive rights is to debate. For this reason, we grant ew solely on the issue of the effect of mption under AS 22.20.022 and Crimi- Rule 25(d).

dge Moody was timely pre-empted in ceedings under a prior, identical indict- When the second indictment was is- Judge Moody was assigned the case. Weidner, counsel for Gieffels, orally ted out the prior pre-emption to Judge Moody. Judge Moody did not recognize the pre-emption.

[4] In *McKinnon v. State*, 526 P.2d 18, 25 (Alaska 1974), we stated that where two proceedings involve the same defendant and the necessity of proving the same facts and issues, a judge who was pre-empted in the prior proceeding is automatically disqualified from presiding "at any proceeding against the defendant in which those same charges [are] at issue". Therefore, Judge Moody was automatically pre-empted in the second proceeding.

Even though Judge Moody was pre-empted, the question remains as to whether he could still perform some judicial functions concerning the case from which he was pre-empted.

There are two provisions which apply to peremptory challenges.

AS 22.20.022 reads in part:

> (a) If a party or his attorney in a district court action or a superior court action, civil or criminal, files an affidavit alleging under oath that he believes that he cannot obtain a fair and impartial trial, the presiding district court or superior court judge, respectively, shall at once, and without requiring proof, assign the action to another judge of the appropriate court in that district, or if there is none, the chief justice of the supreme court shall assign a judge for the hearing or trial of the action. The affidavit shall contain a statement that it is made in good faith and not for the purpose of delay.

Criminal Rule 25(d), promulgated by Supreme Court Order No. 185, effective July 1, 1974, reads in part:

> (d) *Change of Judge as a Matter of Right.* In all courts of the state where a master calendar system has been adopt-

[1] Although Judge Moody refused to disqualify himself at the time of the arraignment, he transferred the case to Judge Lewis afterwards, and this court stayed all of the rulings entered at the arraignment. No formal order of contempt was issued by Judge Moody, who ordered that Gieffels be held without bail until he answered the question as to his name. Bail was reinstated the following day, February 12, 1976, by supreme court order. On February 13, 1976, Judge Lewis issued a warrant and summons and denied Gieffels' motion to dismiss the indictment.

ed, a judge may be peremptorily challenged as follows:

(1) *Entitlement.* In any criminal case in superior or district court, the prosecution and the defense shall each be entitled as a matter of right to one change of judge. When multiple defendants are unable to agree upon the judge to hear the case, the trial judge may, in the interest of justice, give them more than one change as a matter of right; the prosecutor shall be entitled to the same number of changes as all the defendants combined.

(2) *Procedure.* At the time required for filing the omnibus hearing form, or within 5 days after a judge is assigned the case for the first time, a party may exercise his right to change of judge by noting the request on the omnibus hearing form or by filing a "Notice of Change of Judge" signed by counsel, if any, stating the name of the judge to be changed. A judge may honor a timely informal request for change of judge, entering upon the record the date of the request and the name of the party requesting it.

(3) *Re-Assignment.* When a request for change of judge is timely filed under this rule, the judge shall proceed no further in the action, except to make such temporary orders as may be absolutely necessary to prevent immediate and irreparable injury before the action can be transferred to another judge. *However, if the named judge is the presiding judge, he shall continue to perform the functions of the presiding judge.* (emphasis added)

In *Channel Flying, Inc. v. Bernhardt, supra*, decided before the promulgation of Criminal Rule 25(d), we stated that the following effect resulted from a successful pre-emption of a judge under the procedures set forth in AS 22.20.022:

> The only meaning that can be given to the requirement that the matter be assigned "at once and without requiring proof" to another judge, is that when a timely and proper affidavit is filed the judge concerned is at once disqualified from acting as a judge in the particular action or proceeding. When he is disqualified he no longer possesses the qualities necessary to act as a judge, i. e., the qualities of power, capacity, fitness or competency to proceed further. In short, when a proper affidavit has been timely filed, the judge involved is without power or jurisdiction to take any further action in the proceeding. If this were not the intent and effect of the statute, then it would be meaningless and ineffective. 451 P.2d at 574 (footnote omitted).

The common-law rule is that pre-empted judges can perform formal, non-discretionary (or "ministerial") acts.[3] Gieffels argues, however, that since the functions

3. Generally, courts have held that a disqualified judge may still perform a purely ministerial or non-discretionary action. *See, e. g., Driver v. State*, 46 So.2d 718, 721–22 (Fla.1950); *People v. Pate*, 53 Ill.2d 485, 292 N.E.2d 387, 398 (1973); *Hass v. Leverton*, 128 Iowa 79, 102 N.W. 811, 812 (1905); *Menifee County Board of Education v. Fiscal Court*, 320 S.W.2d 46, 48 (Ky.1959). Courts have variously defined the allowable actions of a pre-empted judge as follows: as allowing purely ministerial acts in no way connected with the trial [*Hass v. Leverton, supra*]; acts which are purely formal in character and where the judge is only discharging his ministerial duties [*Menifee County Board of Education v. Fiscal Court, supra*,]; mere formal acts [*State v. Compton*, 57 N.M. 227, 257 P.2d 915, 923 (1953)]; formal orders of a routine nature not affecting merits of the cause [*Prather v. Prather*, 263 S.W.2d 57, 59 (Mo.App.1954)]; and that powers are suspended only so far as discretionary action in the case is concerned [46 Am.Jur. 2d "Judges" § 230 at 252].
Examples of actions that have been stated to be permissible when performed by a disqualified judge are: signing certificates seeking testimony and attendance of non-resident witnesses [*State v. James*, 70 N.M. 370, 415 P.2d 350, 355 (196)]; drawing jurors' names from a box, issuing venire, returning venire, discharging from jury duty a man above age for duty [*Driver v. State, supra*]; certification of a transcript to another court [*Hass v. Leverton, supra*]; and

allowable at common law must still be performed by a judge, and since *Channel Flying, Inc.* states that a statutory preemption immediately destroys all judicial attributes, the common-law rule cannot be applied in Alaska.

Even if Gieffels is correct in his reading of *Channel Flying, Inc.*, its authority on that point has been substantially weakened by the subsequent promulgation of Criminal Rule 25(d).

[5] Art. IV, sec. 15 of the Alaska Constitution provides that the legislature may only amend or change rules regulating judicial procedure in the courts of the state; the supreme court is given sole authority to promulgate those rules. We have consistently affirmed our power to regulate procedural and administrative matters in Alaska courts. For example, in *Silverton v. Marler*, 389 P.2d 3, 5–6 (Alaska 1964), we struck down a statute which prescribed how a civil action was to be commenced because it "attempt[ed] to regulate a matter of procedure which is within the province of this court . . . ." Similarly, a statute which provided for automatic continuance of all court proceedings when a party, attorney of record or a principal witness was a member of the legislature was struck down in *City of Valdez v. Valdez Development Co.*, 506 P.2d 1279 (Alaska 1973), because it conflicted with Civil Rule 40(f) which allowed continuance only "for cause shown".[4]

[6] 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.

[7–9] 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),[5] 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

carrying out an order of remand from a higher court [*Stahl v. Board of Sup'rs of Ringgold County*, 187 Iowa 1342, 175 N.W. 772, 776 (1920)]. Examples of impermissible acts are fixing of bail [*State v. Nagel*, 185 Or. 486, 202 P.2d 640, 646 (1949), *cert. denied*, 338 U.S. 818, 70 S.Ct. 60, 94 L.Ed. 495, 496 (1949)] and revoking probation [*Vaughn v. State*, 226 So.2d 443 (Fla.App.1969)].

4. *See also Liberty Nat. Ins. Co. v. Eberhart*, 398 P.2d 997, 999 (Alaska 1965); *Leege v. Martin*, 379 P.2d 447, 448–51 (Alaska 1963); *cf. Winegardner v. Greater Anchorage Area Borough Bd. of Equalization*, 534 P.2d 541, 545–47 (Alaska 1975).

5. Under Alaska's tripartite form of government, the legislature may not impose a rule which would interfere with the proper functioning of the judicial system. Under the inherent power of the judicial branch of government, a presiding judge must be given minimal authority to accomplish the work of the court by conducting the preliminary steps for arraignment; calendaring, including assigning of cases to particular judges; and other acts necessary to the proper functioning of the courts. *See Continental Ins. Cos. v. Bayless & Roberts, Inc.*, 548 P.2d 398, 408–11 (Alaska 1976).

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,[6] 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 liberalizes the method by which a party may exercise a peremptory challenge.[7]

[10] At the time of the February 11, 1976 appearance of Gieffels, Judge Moody was the Presiding Judge of the Anchorage superior court and conducted all arraignments as part of his special duties. Criminal Rule 25(d)(3) provides:

> *Re-Assignment.* When a request for change of judge is timely filed under this rule, the judge shall proceed no further in the action, except to make such temporary orders as may be absolutely necessary to prevent immediate and irreparable injury before the action can be transferred to another judge. *However, if the named judge is the presiding judge, he shall continue to perform the functions of the presiding judge.* (emphasis added)

Although the means or method by which a peremptory challenge is to be raised and recognized in the course of judicial proceedings is usually a procedural matter solely within the rule-making powers of this court, such procedural regulations cannot be the basis of any action which would interfere with the substantive right created by legislative enactment. Therefore, it is necessary to analyze the duties of a presiding judge in light of the substantive right created by AS 22.20.022.[8]

In *Channel Flying, Inc. v. Bernhardt, supra,* 451 P.2d at 575, 576, we stated that the right created and defined by AS 22.20.022 is that:

> [a] litigant is entitled to a fair hearing before a tribunal which is disinterested, impartial and unbiased . . . . The statute does nothing more than provide a reasonable method for assuring a fair trial for all litigants.
>
> . . . . . .
>
> The statute rather creates and defines a right—the right to have a fair trial before an unbiased and impartial judge. (footnotes omitted) [9]

Furthermore, the statute regulates that right by allowing a challenge to be effective without requiring actual proof of bias or interest.

[11] If a procedural or administrative action taken by a disqualified judge under the provisions of Criminal Rule 25(d)(3) could not possibly interfere with a defendant's right to a fair disposition of his case because of bias or interest on the part of the disqualified judge, then the substantive right created by AS 22.20.022 would not be affected. Only if the administrative or procedural action interferes with the sub-

6. In *Kvasnikoff v. State,* 535 P.2d 434, 466 n. 5 (Alaska 1975), we noted the apparent conflict between the rule and the statute: Facially, AS 22.20.022 and Crim.R. 25(d)(2) appear to set forth different time requirements. However, since petitioner's peremptory challenge is untimely under both provisions, we need not resolve the apparent conflict at this time.

7. For example, a notice of change of judge can be filed at the omnibus hearing under Criminal Rule 25(d), which in many cases may be beyond the time limitations imposed by AS 22.20.022(c). Furthermore, not only is an affidavit not required (simple notation on the omnibus hearing form signed by the attorney being sufficient under the rule), but also informal requests are allowed under the rule.

8. The functions of a presiding judge which are particularly relevant to a peremptory challenge include making calendaring orders, arraigning defendants, taking pleas, setting bail and ruling on pre-trial motions.

9. *See also In re G. K.,* 497 P.2d 914, 915 (Alaska 1972); *Roberts v. State, supra,* 458 P.2d at 345–46.

antive part of AS 22.20.022 would an action by a disqualified judge be impermissible. With this in mind, we turn to the functions of a judge at an arraignment to see if there are any actions which could interfere with the right of a defendant to a fair disposition of his case.

[12] Normally, calendaring orders and other procedural matters regarding the master calendar do not directly affect the ultimate disposition of the case. On the other hand, rulings on points of law regarding such matters as search and seizure, sufficiency of the indictment and other pre-trial legal decisions could be affected by bias or interest and would have a direct effect on the ultimate disposition of a defendant's case.

[13, 14] A more difficult problem concerns the taking of a plea. Until the defendant pleads guilty or nolo contendere, Criminal Rule 10 and 11, governing the arraignment, do not permit a judge any discretion. There is thus no possibility of bias that would interfere with the subsequent ability of a defendant to receive a fair disposition of his case. The judge must read the indictment or state the substance of the charge. He must hand a copy of the indictment or information to the defendant before the plea. He must inform the defendant of the name on the indictment and give the defendant the opportunity to declare his true name.[10] Finally, if a defendant has waived counsel, the judge must inform him of his right to a peremptory challenge.

[15, 16] If the defendant pleads "not guilty", then the case is set for trial and subsequent pre-trial hearings. Even if the judge were actually biased, these calendaring actions normally would not have an effect on the ultimate fair disposition of a defendant's case, and thus in the absence of a specific objection, they may be performed by a pre-empted presiding judge. Calendaring, however, under some circumstances may affect substantial rights such as where a defendant or counsel contends he will not be ready for trial on a specified date. Therefore, if calendaring becomes a disputed issue, it should be immediately referred to another judicial officer.

[17] If the defendant pleads "guilty" or "nolo contendere", however, then under Criminal Rule 11, the judge must determine if the plea is voluntary and has a reasonable basis; in addition, he must make inquiries not only of the defendant, but also of counsel for the defendant and the prosecuting attorney. This is an action that may be affected by bias which would interfere with the fair disposition of the defendant's case. At that point, the judge should proceed no further and immediately assign the case to another judge for determination of the voluntariness of the guilty plea.

[18] Another difficult problem, similar to calendaring, arises with the procedural means of setting bail. AS 22.20.022 creates and enforces the right to receive a fair disposition of a case and regulates that right by providing a means of assuring that it is not impinged upon by a biased or partial judge. Bail matters, however, do not affect the final disposition of a case; the resolution of bail questions generally have no bearing on the process that determines the guilt or innocence of a defendant. Therefore, in many cases, the right regulated and enforced by AS 22.20.022 is not impinged upon by allowing a pre-empted judge to hear matters pertaining to bail.

10. Below, Gieffels stood mute when asked his true name. Upon Gieffels' refusal to answer, Judge Moody revoked bail until Gieffels would answer his true name.
Criminal Rule 10(b)(2)(ii) provides:

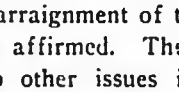
> If the defendant declares no other name to be his true name, the case against the defendant shall proceed under the name which appears in the indictment or information.

If the defendant stands mute, then the case automatically proceeds under the name in the indictment. A positive declaration by the defendant that no other name is his true name is not required. Thus the judge had no discretion to punish Gieffels for standing mute since the rules do not require the defendant to respond.

[19,20] On the other hand, we have consistently recognized the importance of matters concerning both bail [11] and any situation which could lead to the imprisonment, however temporary, of an individual.[12] Inability to meet bail requirements could cause incarceration interfering with a defendant's preparation of his defense. We also recognize that allowing a challenged judge to resolve disputed questions surrounding bail can possibly lead to an unjust temporary imprisonment of an individual. Therefore, if the amount of bail or the conditions thereunder are disputed issues, the setting of bail should be immediately referred to another judicial officer.[13] Furthermore, the defendant should be advised of his right to have bail heard by another judge.

[21] Insofar as Judge Moody as presiding judge refused to disqualify himself prior to the arraignment of the defendant, his action is affirmed. The petition for review as to other issues is denied for mootness.

AFFIRMED IN PART AND DISMISSED IN PART FOR MOOTNESS.



CHAMPION OIL COMPANY, INC., an Alaskan Corporation, Appellant,

v.

Charles F. HERBERT, Commissioner, et al., Appellees.

No. 2395.

Supreme Court of Alaska.

July 19, 1976.

The Superior Court, Third Judicial District, Anchorage, James K. Singleton and Edmond J. Burke, JJ., refu... refiling of suit and refused to ... and plaintiff appealed. The ... Court, Connor, J., held that ... missal after year's inaction by ... failure to prosecute was without ... in absence of indication that ... with prejudice.

Dismissal of refiled ... versed.

Boochever, C. J., filed ... ion.

1. Dismissal and Nonsuit ⇐75

In absence of indication ... dismissal was with prejudice, ... dismissal after over a year's ... want of prosecution was without ... Rules of Civil Procedure, rule 41(...

2. Appeal and Error ⇐905

Where, by virtue of timely ... its "Question of Fact," plaintiff ... dicated that it did not intend to ... motion for summary judgment ... taken, Supreme Court could ... that trial judge, who, inter alia, ... case for failure to prosecute ... granted summary dismissal based ... for summary judgment. Rules ... Procedure, rules 41(e), 56, 77(e).

3. Dismissal and Nonsuit ⇐75

Dismissal after year's ... want of prosecution, whether ... motion or not, is without prejudice ... trial court otherwise specifies. ... Civil Procedure, rule 41(e).

F. T. Wetzel, Salt Lake City, ... Ronald T. West, West & Wood, ... age, for appellant.

Thomas K. Williams, Asst. A... Anchorage, Avrum M. Gross, A... Juneau, for appellees.

11. *See, e. g., Martin v. State*, 517 P.2d 1389 (Alaska 1974); *Gilbert v. State*, 540 P.2d 485 (Alaska 1975).

12. *See, e. g., State v. Browder*, 486 P.2d 925, 933–40 (Alaska 1971); *Baker v. City of Fairbanks*, 471 P.2d 386, 401-... 1970).

13. *State v. Nagel*, 202 P.2d 640, ... 1949), *cert. denied*, 338 U.S. 81... 90, 94 L.Ed. 495, 496 (1949).

Charles R. TUNLEY et al., Appellants and Cross-Appellees,

v.

MUNICIPALITY OF ANCHORAGE SCHOOL DISTRICT et al., Appellees and Cross-Appellants.

Nos. 4796, 4797 and 4826.

Supreme Court of Alaska.

Sept. 12, 1980.

As Amended on Denial of Rehearing Jan. 29, 1981.

Suits by parents of school age children to prevent closure of elementary schools in district were consolidated. The Superior Court, Third Judicial District, Anchorage, J. Justin Ripley, J., granted summary judgment in favor of school district and pa[illegible] appealed. The Supreme Court, Rabinowitz, J., held that: (1) peremptory challenge by one parent or judge was timely; (2) the parent did not, by his actions, waive his right to a peremptory challenge of judge; (3) municipal assembly was authorized to initially determine location of school buildings, but was not inferentially authorized to determine which schools were to discontinue operations; (4) authority to decide whether schools should be closed was vested in school board; (5) approval by the Department of Education was not required before closure action by school board; (6) municipality was required by charter to adopt a procedure for public notice of school board meeting; (7) municipality failed to fulfill requirement, but its failure was not critical to adoption by school board of closure plans; and (8) public notice of five days of school board's meeting concerning school closures was insufficient.

Affirmed in part, reversed in part, and remanded.

1. Judges ⇐51(3)

The principle of *Gieffels* that statute created substantive right to peremptory challenge but that rule of criminal procedure determined whether the right was properly exercised and the procedural effect of peremption applies with equal force to peremptory challenges of a judge in civil proceedings. AS 22.20.022; Rules of Civil Procedure, Rule 42(c).

2. Judges ⇐51(2)

Peremptory challenge to judge which was made by one plaintiff in consolidated cases on day after being notified that his case was effectively reassigned to that judge was "filed before commencement of trial and within five days after notice of that the case had been assigned to a specific judge" and was timely in that plaintiff had notice as to specific judge who would be hearing his case only when consolidation, which both he and other plaintiff opposed, and assignment to particular judge was ordered. AS 22.20.022; Rules of Civil Procedure, Rule 42(c).

3. Judges ⇐52

Plaintiff did not waive his right to a peremptory challenge of judge in school closure case by submitting an affidavit opposing consolidation of his case with another and appearing before judge in hearing on motion to consolidate in that plaintiff had no way of knowing, before judge decided consolidation motion, whether consolidation would be granted and, if so, whether that judge or another would preside over consolidated cases. AS 22.20.022; Rules of Civil Procedure, Rule 42(c)(4).

4. Judges ⇐52

Waiver of right to change a particular judge as a matter of right when one knowingly participates before that judge in any judicial proceeding which concerns merits of action can be found only where requisite participation occurs after party is informed that judge before whom he or she is appearing is judge permanently assigned to hear case or is assigned for trial. AS 22.20.022; Rules of Civil Procedure, Rule 42(c)(4).

5. Schools ⇐92(3)

The school board has an obligation to develop and submit to the municipal assembly a proposed budget for the next fiscal

year and a proposed six-year program for capital improvements and fiscal policies, but the assembly has no legislative power to make appropriations for specific items, programs or priorities provided for the school board's budget and, instead, may increase or decrease the budget of the school district only as to the total amount. AS 14.14.060(d), 14.14.065.

6. Schools ⇐11, 68

The municipal assembly, given the power to condemn property for use as a school site as well as the power to make a decision as to the plans and designs of schools to be constructed and all major rehabilitation, all construction and major repair of school buildings, is authorized to initially determine the location of school buildings, but the assembly is not inferentially authorized to determine which schools are to discontinue operations since the closure of a school does not involve the exercise of the municipality's eminent domain powers, nor does it involve major additional appropriations of municipal funds and in contrast to the municipal government's diminished fiscal and political interests, the school board has strong educational policy interests in deciding which schools are to be closed. AS 14.14.060(d), 14.14.065.

7. Schools ⇐11

The decision as to school closure involves questions of student assignment and attendance areas, which are certainly within the scope of school board authority, rather than that of the municipal assembly. AS 14.12.020(b), 14.14.110, 14.14.120.

8. Schools ⇐154

Pupil assignment and attendance area determinations may be made by a school board as part of its "management and control" authority, subject to statutory and constitutional restrictions. AS 14.12.020(b), 14.14.110, 14.14.120.

9. Schools ⇐11

The assignment power of a school board extended to its logical conclusion, the closing of a school by not assigning any students to a particular school, provides an independent basis for the school board's closure authority. AS 14.12.020(b), 14.14.110, 14.14.120.

10. Schools ⇐11

Given the broad managerial mandate of the school board, and the limited authority of the municipal assembly in educational policy matters, it is the school board which has the authority to decide whether schools should be closed. AS 14.14.060(d), 14.14.065.

11. Schools ⇐11

Requirement in regulation of state approval prior to "discontinuation of schools" is directed only at local, predominantly rural schools. Const. Art. 7, § 1; AS 14.03.010, 14.07.020, 14.07.060, 14.07.075.

See publication Words and Phrases for other judicial constructions and definitions.

12. Schools ⇐11

Closure action taken by school board with respect to elementary school in school district did not require approval by the Department of Education where the closure did not interfere with the stated purpose of the governing regulations of providing local education. Const. Art. 7, § 1; AS 14.03.010, 14.07.020, 14.07.060, 14.07.075.

13. Schools ⇐57

Provision of municipal charter that the assembly was to adopt procedures for maximum reasonable public notice of "all meetings" of the school board was inclusive rather than exclusive since the opportunity for public hearing was intended to apply to every public body.

See publication Words and Phrases for other judicial constructions and definitions.

14. Schools ⇐57

The municipal assembly was required by ordinance, requiring the assembly to adopt procedures for maximum reasonable public notice of "all meetings," to adopt a procedure for public notice of the school board meeting with respect to the closure of elementary school within the municipality.

15. Schools ⇐57

Ordinance whereby the municipal assembly gave the school board power to formulate policy for the operation of schools did not fulfill requirement for adoption of public notice procedures mandated by charter for meeting with respect to the closure of elementary schools in municipality where ordinance did not spec[illegible] any procedure for public notice.

16. Schools ⇐11

Failure of municipal assembly to pass required ordinance with respect to public notice procedures was not fatal to validity of elementary school closures where school board did in fact establish detailed meeting times for board meetings and where school closure date and decision was accompanied with extensive publicity and media coverage. Const. Art. 7, § 1; AS 14.03.010, 14.07.020, 14.07.060, 14.07.075.

17. Schools ⇐11

Any closure decision by school board with respect to elementary schools in districts, in light of impact decision would have on both childrens' and parents' interests in maintenance of neighborhood schools, should have been preceded by a public school board meeting at which those potentially affected were given sufficient notice in order to enable adequate preparation and presentation of their views. Const. Art. 7, § 1; AS 14.03.010, 14.07.020, 14.07.060, 14.07.075.

18. Schools ⇐11

While school board had given notice that it would consider at its next meeting possible closure of elementary schools in district and that specific recommendations were to be made by administration at that time, where only five days' notice was given to interested residents and parents of exactly which schools were strongly recommended for closure by administration, requirement of ordinance that maximum reasonable public notice be given of closure was not fulfilled. Const. Art. 7, § 11; AS 14.03.010, 14.07.020, 14.07.060, 14.07.075.

Charles R. Tunley, pro se, Anchorage, for appellant and cross-appellee Tunley.

Joe P. Josephson, Josephson, Trickey & Lorensen, Inc., Anchorage, for appellant and cross-appellee Niebert.

Peter C. Partnow, Hellen & Partnow, Anchorage, for appellees and cross-appellants.

Before RABINOWITZ, C. J., and CONNOR, BURKE and MATTHEWS, JJ.

OPINION AS AMENDED ON REHEARING

RABINOWITZ, Chief Justice.

The school age population of Anchorage is currently about 1,250 students less than it was at peak enrollment in 1976. Although it is debatable whether the decline in student population will continue, it is undisputed that at this time, Anchorage has a surplus of available classrooms, including eighty elementary school rooms. Because it is economically inefficient to operate schools at less than capacity, the Anchorage school administration in their draft Capital Improvement Plan for 1979–85 included school closure as a possible method of dealing with the surplus classroom space.

The Anchorage School Board considered the various options presented in the Capital Improvement Plan, and in a public board meeting on February 15, 1979, decided to close two elementary schools for the 1979–80 school year. The Anchorage school district administration was directed to prepare recommendations on schools amenable to closure.

The district administration decided on its recommendations for closure by ranking all elementary schools in the district according to criteria developed by the administration. The administration ultimately recommended that Woodland Park and Government Hill elementary schools be closed, and their recommendation was adopted by the Anchorage School Board on March 12, 1979. There were no public hearings held before the school board reached its closure decisions, although the school board meetings were open to the public. Government Hill

is leased by the Anchorage Municipality from the Department of the Air Force, and because the lease is limited to school purposes only, the school site may revert to the Air Force if the elementary school is closed.

In a joint meeting of the Anchorage School Board and Municipal Assembly on March 5, 1979, both bodies adopted a resolution returning to the school board any funds obtained from disposal of the sites of the two schools. The municipal assembly did not attempt to assert control over which schools the board would be allowed to close.

Plaintiffs Tunley and Niebert are both the parents of school-aged children who attend Woodland Park and Government Hill elementary schools, respectively. Both parents filed lawsuits to prevent the closure of the schools; the suits were consolidated. The Anchorage School District filed a motion for summary judgment, and plaintiffs responded with a statement of genuine issues and their own motion for summary judgment. Summary judgment was granted in favor of defendants and this appeal followed.

I. *DID THE SUPERIOR COURT ERR IN DENYING NIEBERT'S PEREMPTORY CHALLENGE OF JUDGE RIPLEY?*

Tunley's complaint was filed on March 19, 1979, and Niebert's complaint was filed three weeks later on April 9, 1979. The Tunley case was assigned to Superior Court Judge Ripley, and the Niebert case was assigned to superior Court Judge Singleton. The defendants, the Anchorage School Board and School District Superintendent, John Peper, moved to consolidate these cases and for a hearing on shortened time on the consolidation question. These motions were granted.[1]

On April 13, 1979, the day after the motion to consolidate was granted, Niebert filed a notice of change of judge, in which he "exercise[d] his right to [a peremptory] challenge [of] the Honorable Justin Ripley, Superior Court Judge presently assigned to the action by his Order of April 12, 1979." The defendants subsequently filed a memorandum opposing the requested change of judge, which argued that Niebert had waived his right to a peremptory challenge of Judge Ripley since Niebert had "participated in a Motion to Consolidate the captioned case before Honorable Justin Ripley." The defendants' memorandum further stated:

> At that time, affidavits submitted by both Plaintiffs [opposing consolidation] were before the Court. In addition, the decision on consolidation concerned the merits of the captioned cases in that the Judge had to determine whether or not the cases were sufficiently similar so as to require consolidation.

The presiding judge denied Niebert's peremptory challenge without any statement of reasons, and no indication appears in the record on appeal that any hearing was had on the question.

[1] Peremptory challenge rights are granted litigants by AS 22.20.022.[2] This

1. On April 12, 1979, a hearing was held on this motion before Judge Ripley. Tunley and Niebert voiced their opposition to consolidation on several grounds, chief among which was the existence of different factual and legal issues as to the closing of each school, the concern with the difficulties in coordinating the presentation of their respective cases, and the concern expressed by Niebert's attorney that the expedited pretrial schedule already established in the Tunley case would not allow him adequate preparation time. Judge Ripley decided that consolidation was appropriate in light of the several legal issues common to both cases, though expressly leaving open the possibility of severance at a later time prior to trial on any unresolved factual issues. At the end of the hearing, Judge Ripley said: "The order has been signed consolidating the cases, and they will be assigned to myself."

2. AS 22.20.022 provides:

> *Peremptory disqualification of a superior court judge.* (a) If a party or his attorney in a district court action or a superior court action, civil or criminal, files an affidavit alleging under oath that he believes that he cannot obtain a fair and impartial trial, the presiding district court or superior court judge, respectively, shall at once, and without requiring proof, assign the action to another judge of the appropriate court in that district, or if there is none, the chief justice of the supreme court shall assign a judge for the

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statute creates peremptory challenge rights in both criminal and civil proceedings. In *Gieffels v. State*, 552 P.2d 661, 667 (Alaska 1976), this court held that AS 22.20.022 created the "substantive right" to a peremptory challenge, but that Alaska Criminal Rule 25(d) is the sole provision which may be consulted in determining whether the peremptory right was properly exercised and in determining the effect of the peremption on the procedural and administrative functions of the court system.[3] The civil rule counterpart to Alaska Rule of Criminal Procedure 25(d) is Alaska Rule of Civil Procedure 42(c), also promulgated by this court in 1974. While the question has not been directly addressed by this court, it seems apparent that the principle of *Gieffels* applies with equal force to peremptory challenges in civil proceedings,[4] and that Alaska Rule of Civil Procedure controls the procedure and scope of such challenges.[5]

hearing or trial of the action. The affidavit shall contain a statement that it is made in good faith and not for the purpose of delay.

(b) No judge or court may punish a person for contempt for making, filing or presenting the affidavit provided for in this section, or a motion founded on the affidavit.

(c) The affidavit shall be filed within five days after the case is at issue upon a question of fact, or within five days after the issue is assigned to a judge, which ver event occurs later, unless good cause is shown for the failure to file it within that time.

(d) No party or his attorney may file more than one affidavit under this section in an action and no more than two affidavits in an action.

For an excellent discussion of the development of peremptory challenges in Alaska, *see* Note, *Peremptory Challenges of Judges in the Alaska Courts*, 6 U.C.L.A.—Alaska L.Rev. 269, 271–77 (1977). For a comprehensive review of state peremption statutes generally, *see* Note, *Disqualification of Judges for Prejudice or Bias—Common Law, Evolution, Current Status and the Oregon Experience*, 48 Or.L.Rev. 311 (1969).

3. Alaska R.Crim.P. 25(d), therefore, "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." *Gieffels v. State*, 552 P.2d 661, 667–68 (Alaska 1976). *See also Padie v. State*, 566 P.2d 1024, 1029–30 (Alaska 1977).

4. In several civil appeals since *Gieffels*, this court has discussed the validity of peremptory challenges in terms of the requirements of Alaska R.Civ.P. 42(c). *See Priest v. Lindig*, 591 P.2d 1299, 1301 (Alaska 1979); *Esch v. Superior Court of Third Judicial Dist.*, 577 P.2d 1039 1041–42 (Alaska 1978); *Veazey v. Veazey*, 560 P.2d 382, 384 (Alaska 1977). One commentator, discussing the meaning of *Gieffels*, has stated:

> whether the statute or the rules of court govern the Alaska peremptory challenge provisions. The holding concedes to the legislature the power to grant the right to challenge a judge, but not the right to devise a method to effectuate that challenge. Because *Gieffels* was a criminal case, the decision purported to decide only the status of Criminal Rule 25(d). However, because its companion rule, Civil Rule 42(c), provides nearly identical provisions, the rationale for the court's views in *Gieffels* should apply with equal force to a civil case, and there appears to be no reason why the *Gieffels* holding should not be extended to civil cases as well. Indeed, it may be argued that the court has probably accomplished such an extension sub silentio. Therefore, it can be concluded that AS 22.20.022 provides only the *right* to preempt a judge. Insofar as it attempts to set forth any procedural guidelines, it has been thoroughly discredited.

Note, *Peremptory Challenges of Judges in the Alaska Courts*, 6 U.C.L.A.—Alaska L.Rev. 269, 277 (1977) (footnote omitted) (emphasis in original).

5. Alaska R.Civ.P. 42(c) provides, in part:

> *Change of Judge as a Matter of Right.* In all courts of the state, a judge or master may be peremptorily challenged as follows:
>
> (1) *Nature of Proceeding.* In an action pending in the Superior or District Courts, each side is entitled as a matter of right to a change of one judge and of one master. Two or more parties aligned on the same side of an action, whether or not consolidated, shall be treated as one side for purposes of the right to a change of judge, but the presiding judge may allow an additional change of judge to a party whose interests in the action are hostile or adverse to the interests of another party on the same side. A party wishing to exercise his right to change of judge shall file a pleading entitled "Notice of Change of Judge." The notice may be signed by an attorney, it shall state the name of the judge to be changed, and it shall neither specify grounds nor be accompanied by an affidavit. A judge may honor an informal request for change of judge. When he does so, he shall enter upon the record the date of the request and the name of the party or parties requesting change of judge. Such

[2] Since Niebert filed his peremptory challenge of Judge Ripley the day after being notified that his case was effectively reassigned to Judge Ripley,[6] there is no question but that that challenge was timely under Civil Rule 42(c)(3), which provides that a notice of change of judge is timely "if filed before commencement of trial and within five days after notice that the case has been assigned to a specific judge."[7] Niebert had notice as to the specific judge who would be hearing his case only when consolidation, which both he and Tunley opposed, and assignment to Judge Ripley were ordered. Thus, we conclude that Niebert's challenge was timely.[8]

Appellees' opposition to the notice of change of judge was based on the argument that Niebert had waived his right to such a change pursuant to the waiver provisions of Civil Rule 42(c)(4)(i). That section of Rule 42 provides:

> (4) *Waiver.* A party waives his right to change a particular judge as a matter of right when he knowingly participates before that judge in:
>
> (i) Any judicial proceeding which concerns the merits of the action and involves the consideration of evidence or of affidavits; . . .

More particularly, appellees argued that Niebert waived his right to a peremptory challenge by submitted an affidavit opposing consolidation and appearing before Judge Ripley in the hearing on the motion to consolidate.

[3, 4] These actions cannot be said to be a waiver under Alaska Rule of Civil Procedure 42(c)(4) for the following reasons. First, as Niebert's supplemental brief ar

> action shall constitute an exercise of the requesting party's right to change of judge.
>
> . . . .
>
> (3) *Timeliness.* Failure to file a timely notice precludes change of judge as a matter of right. Notice of change of judge is timely if filed before commencement of trial and within five days after notice that the case has been assigned to a specific judge. . . . Where a party enters an action after the case has been assigned to a specific judge, a notice of change of judge shall also be timely if filed by the party before the commencement of trial and within five days after he appears or files a pleading in the action.
>
> (4) *Waiver.* A party waives his right to change a particular judge as a matter of right when he knowingly participates before that judge in:
>
> (i) Any judicial proceeding which concerns the merits of the action and involves the consideration of evidence or of affidavits; or
>
> (ii) A pretrial conference; or
>
> (iii) The commencement of trial; or
>
> (iv) If the parties agree upon a judge to whom the case is to be assigned. Such waiver is to apply only to the agreed-upon judge.

6. Judge Ripley intended that the actions brought by Tunley and Niebert retain their separate identity, as he expressly left open the possibility that they might be severed should trial become necessary. In this analytical context, Judge Ripley's consolidation of these cases and assignment of himself as trial judge was, as he recognized, tantamount to a reassignment of Niebert's case from Judge Singleton to himself.

7. *See Hartford Accident & Indem. Co. v. State*, 498 P.2d 274 (Alas[illegible] 1972), where we stated that "an action is not 'assigned to a judge' within the meaning of AS 22.20.022(c) until it has been assigned to a particular judge and a reasonable attempt has been made to notify the parties before the court of that assignment." *Id.* at 276 (footnote omitted) (emphasis in original). *See also Pope v. State*, 478 P.2d 801, 803–04 (Alaska 1970), *reh. denied*, 480 P.2d 697 (Alaska 1971); *Roberts v. State*, 458 P.2d 340, 346 (Alaska 1969).

8. This conclusion effi[illegible]ates the purpose of Civil Rule 42(c)(3) and preserves the separate identity of the Niebert lawsuit. *See Roberts v. State*, 458 P.2d 340, 346 (Alaska 1969) (discussing the purpose of time requirements under AS 22.20.022); *Pope v. State*, 478 P.2d 801, 804 (Alaska 1970), *reh. denied*, 480 P.2d 697 (Alaska 1971), in which we stated:

> Appellant correctly points out that the granting of the five-day period is to allow a party or his attorney an opportunity to investigate the judge to whom the case is assigned and if necessary file the requisite affidavit for disqualification, thus avoiding the waste of judicial time which would result if an affidavit or disqualification were not filed until the date of trial because this would mean that the case would have to be continued until another judge could be assigned and the disqualified judge would not be ready at that time to start the trial of another action. [footnote omitted]

See also McCracken v. State, 521 P.2d 499, 510–11 (Alaska 1974); 5 Moore's Federal Practice § 42.02, at 42–21 to 42–22 (1979).

gues, the section requires that a party "knowingly" participate before the challenged judge. Niebert's supplemental brief states:

> Niebert appeared before Judge Ripley, too whom the Tunley case had been assigned, *solely* to oppose defendants' motion to consolidate the two cases. Niebert had no way of knowing, before Judge Ripley decided the consolidation motion, whether consolidation would be granted, and, if so, whether Judge Singleton or Judge Ripley would preside over the consolidated cases.

This requirement of a knowing waiver requires that waiver can be found only where the requisite participation occurs after the party is informed that the judge before whom he or she is appearing is the judge permanently assigned to hear the case or is assigned for trial. Any other interpretation would be inconsistent with the apparent reason for this scienter requirement[9] and with the due process right to a fair and impartial trial judge which Alaska's peremptory challenge provisions are designed to liberally ensure.[10] In this sense, Niebert cannot be said to have "knowingly" participated before Judge Ripley in this case and to have waived his peremptory challenge rights.[11] The superior court's erroneous denial of Niebert's notice of change of judge must be reversed and Niebert's action remanded with directions that Niebert's case be considered by a superior court judge other than Judge Ripley.[12] However, this

9. One commentator has suggested the following as the origin of the requirement of knowing participation in Alaska R.Civ.P. 42(c)(4):

> The element of scienter in the waiver derives from the practice of the Fourth Judicial District (Fairbanks) not to assign judges to specific cases until the actual hearing date, which makes timely challenge impossible. The court has implored the Fourth Judicial District to change its policy in three different cases: *Hartford Accident & Indem. Co. v. State*, 498 P.2d 274, 275–76 n.5 (Alaska 1972); *Pope v. State*, 478 P.2d 801, 803, *reh. denied*, 480 P.2d 697 (Alaska 1971); and *Roberts v. State*, 458 P.2d 340, 346 (Alaska 1969).

Note, *supra* note 4, at 288 n.119. If this explanation is correct, then knowing participation requires knowledge that the judge before whom one is participating is the one to whom the case is permanently assigned or assigned for trial.

In *Riley v. State*, 608 P.2d 27, 29 (Alaska 1980), we held that knowing waiver requires that the party have the opportunity to consult with counsel before the time to exercise his challenge has expired.

10. While due process certainly does not require the essentially automatic disqualification right provided in AS 22.20.022 and Alaska R.Civ.P. 42(c), this court has recognized the due process values embodied in these provisions. *See, e. g., Kvasnikoff v. State*, 535 P.2d 464, 465 & n.3 (Alaska 1975); *In re G.K.*, 497 P.2d 914, 915 (Alaska 1972) (both cases discussing AS 22.20.-022).

11. Implicit in our holding is the conclusion that Niebert had the right to a peremptory challenge, since the consolidation here should not serve to deprive him of this substantive right. In *Veazey v. Veazey*, 560 P.2d 382 (Alaska 1977), this court recognized peremptory challenge rights in favor of a guardian ad litem appointed to represent a child in child custody proceedings. In *Veazey*, we held that the guardian ad litem had the same rights in that respect as the original parties in the action and that those rights attached when an order was entered formally appointing him guardian. *Id.* at 385. *See also* Annot., *Intervenor's Right to Disqualify Judge*, 92 A.L.R.2d 1110, 1112 (1963), which states:

> Once an application for leave to intervene has been granted, the intervenors are parties to the litigation and as such entitled to all rights enjoyed by parties to the record in the original action, including, according to the doctrine upheld by several decisions, the right to apply for disqualification of the judge.

Similarly, we have recognized the right to a peremptory challenge of a judge to whom one's case is reassigned. *See Priest v. Lindig*, 591 P.2d 1299, 1301 n.4 (Alaska 1979) (dicta). Niebert's status in this case cannot be fairly distinguished from these other contexts.

12. Alaska R.Civ.P. 42(c)(5) provides, in part:

> *Assignment of Action.* After a notice of change of judge is timely filed, the presiding judge shall immediately assign the matter to a new judge within that judicial district.

Therefore, if the notice of change of judge is timely and otherwise proper, the presiding judge has no discretion and must reassign the case to another judge. *See, e. g., Channel Flying, Inc. v. Bernhardt*, 451 P.2d 570, 574 & n.9 (Alaska 1969) where we described the effect of a timely peremptory challenge under AS 22.20.022:

> [T]he judge concerned is at once disqualified from acting as a judge in the particular action or proceeding. When he is disqualified

does not allow us to avoid reaching the merits of the case, since Tunley's status, under these circumstances, is not affected by our remand of Niebert's case due to the superior court's erroneous denial of Niebert's notice of change of judge.[13] We therefore turn to the substantive aspects of this appeal.

II. *DID THE ANCHORAGE SCHOOL BOARD HAVE THE AUTHORITY TO CLOSE THE WOODLAND PARK ELEMENTARY SCHOOL?*

Tunley argued in his summary judgment memorandum that, pursuant to AS 14.14.060(d) and AS 14.14.065, the Anchorage Municipal Assembly was the only local authority which had the power to close Woodland Park Elementary School. The superior court, in its conclusions of law, ruled in part that:

> The decision to cease sending students to a particular elementary school site does not require action by a Municipal Assembly pursuant to AS 14.14.060(d) as made applicable to a municipality by AS 14.14.065, or through any other provision of state law or municipal charter or ordinance. To the contrary, the closures involved in the instant case involve essentially a decision relative to student assignment and reassignment which decisions are committed by state statute and the Alaska Constitution to the local school boards through delegation by the legislature.

Tunley has specified this ruling as error. AS 14.14.060(d) provides:

> The borough assembly shall determine the location of school buildings with due consideration to the recommendations of the borough school board.

As the superior court noted, this provision is also made applicable to the home rule Municipality of Anchorage in its relationship with the Anchorage School Board by AS 14.14.065.[14]

Tunley argues that if the municipal assembly is given the duty to "determine the location" of schools, it must be implied that this includes "the exclusive power to close" and "abandon" schools. Enumerating the other subject areas in which the municipal assembly has been given authority over the school board by the legislature,[15] Tunley concludes that the school board has no power to close schools and that the power is implied in the assembly's power to establish schools. We think that an explanation of the general Alaska scheme allocating edu-

> he no longer possesses the qualities necessary to act as a judge, i. e., the qualities of power, capacity, fitness or competency to proceed further. In short, when a proper affidavit has been timely filed, the judge involved is without power or jurisdiction to take any further action in the proceeding. If this were not the intent and effect of the statute, then it would be meaningless and ineffective.

Id. at 574 (footnote omitted). *See also Hartford Accident & Indem. Co. v. State*, 498 P.2d 274, 275 (Alaska 1972); *Pope v. State*, 478 P.2d 801, 804 (Alaska 1970), *reh. denied*, 480 P.2d 697 (Alaska 1971). After the promulgation of Alaska R.Civ.P. 42(c) and Alaska R.Crim.P. 25(d), this court recognized the common law rule that a judge removed by a peremptory challenge can perform nondiscretionary or ministerial acts. *Gieffels v. State*, 552 P.2d 661, 666 (Alaska 1976). *Gieffels* modified the rule of *Channel Flying, Inc.* to allow a disqualified judge to take procedural or administrative action which does not interfere with the substantive rights of a defendant, thus upholding that part of Alaska R.Crim.P. 25(d) which provides that a disqualified presiding judge may continue to perform the functions of the presiding judge. 552 P.2d at 666–69. *See also Padie v. State*, 566 P.2d 1025, 1029–30 (Alaska 1977).

13. Tunley did not join in Niebert's application for change of judge, nor did he claim the issue as error on appeal. At oral argument, he admitted his time to challenge Judge Ripley had already passed. As to the issues raised in the municipality's cross-appeal, we need not address these because of the remand we have ordered.

14. That statutory section provides as follows:

> *Relationship between city school district and city.* The relationships between the school board of a city school district and the city council and executive or administrator are governed in the same manner as provided in § 60 of this chapter for the school board of a borough school district and the borough assembly and executive or administrator.

15. See the provisions of AS 14.14.060, which is made applicable to the Municipality of Anchorage by AS 14.14.065, *supra* note 14.

cational authority suggests that the conclusion urged by appellees, and accepted by the superior court, is preferable.[16]

The Anchorage School Board was created by the authority of the state legislature, and is the delegated state authority to govern its school district and manage the operations of the schools within that district.[17] The number of members on the Anchorage School Board,[18] its powers and duties,[19] and its relationship with the municipal government[20] are typical matters resolved by Alaska statutes. While the school board is elected by the same voters as is the municipal assembly, and is also a part of the Municipality of Anchorage, it is a legislative body with legal responsibilities which in important respects are distinct from those exercised by the assembly.[21]

[5] Nowhere is the independent status of the Anchorage School Board more apparent than in school system budgetary matters. The Anchorage Municipal Assembly and the School Board are required to hold joint conferences "at least four (4) times yearly in public session to discuss and coordinate financial planning, capital improvement needs, the comprehensive plan, and other matters of mutual concern." Anch. Mun.Charter § 6.04; Anch.Mun.Code § 29.-20.010. However, while the school board has an obligation to develop and submit to the municipal assembly a "proposed budget for the next fiscal year and a proposed six-year program for capital improvements and fiscal policies," Anch.Mun.Code § 29.-20.020, the assembly has no legislative power to make appropriations for specific items,

16. We are not concerned here with an actual effort by the municipality by ordinance or charter to control aspects of education other than as specifically authorized by the legislature. Accordingly, we are not confronted with an issue involving the extent of home rule powers under Alaska Const. Art. X, § 11, by which a home rule municipality "may exercise all legislative powers not prohibited by law or by charter." The school board does argue that § 17.05 of the Anchorage Municipal Charter (see sections IV and V, *infra*) could potentially be used by the assembly to unauthorizedly control such areas of education, an argument in which we see no merit for the reasons discussed in n.33, *infra*.

17. *See Macauley v. Hildebrand*, 491 P.2d 120, 122 (Alaska 1971). This delegation of authority is common:

> Historically, Americans have considered schools to be an extension of the local community. Thus, although state legislatures possess plenary power over the educational system, local initiative with respect to education is so highly regarded that most states have delegated extensive authority over the actual administration of the schools to local institutions. States have divided their territory into "school districts" that perform the sole function of establishing and maintaining the public schools. Boards of education, commonly referred to as school boards, have been created as the governing body of the school district and are typically responsible for the day-to-day operation of the public schools.

Project, *Education and the Law: State Interests and Individual Rights*, 74 Mich.L.Rev. 1373, 1380 (1976) (footnotes omitted). *See also* 3A C. Antieau, Local Government Law § 30Q:5.01, at 30Q–44 to 30Q–46 (1979).

18. *See* AS 14.12.030(b) ("city school district with an average daily membership exceeding 5,000 has a school board of seven members"); Anch.Mun.Charter § 6.01 (seven person school board). *See also* AS 29.23.310 (providing basic requirements for election of school board members "unless a different election date or interval of years is provided by ordinance"). "Composition of the local school boards and their manner of election or appointment are regularly governed by statute." 3A C. Antieau, *supra* note 17, at 30Q–45. *See* AS 14.12.050 (school board terms); AS 14.12.070 (vacancies on school board); AS 14.12.090 (oath required of members).

19. *See, e. g.*, AS 14.14.090 (additional duties of school board).

20. *See* AS 14.14.060; AS 14.14.065.

21. The Anchorage School Board's plenary educational authority is recognized by the Anch. Mun.Charter § 6.03:

> *Powers of the School Board.* The School Board has the powers provided by law, including but not limited to, the power to:
>
> (1) formulate policy for the operation of the schools;
>
> (2) appoint and provide for suspension and removal of school personnel, including the superintendent;
>
> (3) serve as a board of personnel appeals;
>
> (4) generally supervise School District fiscal affairs, including preparation and submission of the annual budget and six-year plan.

See also Anch.Mun.Code § 29.10.040 (reiterating these school board powers).

programs or priorities provided for by the school board's budget. Instead, "[t]he Assembly may increase or decrease the budget of the School District only as to total amount." Anch.Mun.Charter § 6.05(b); Anch.Mun.Code § 29.20.030.

This general absence of municipal assembly legislative appropriations power is particularly striking in light of the large proportion of municipal revenues devoted to the school system budget. *See* Anch.Mun. Code § 21.05.075A ("Nearly 70% of the local tax dollar now goes to elementary and secondary educational programs."). It is this budgetary and political reality which in all likelihood prompted the state legislature to give municipal assemblies certain powers with regard to school board budgetary and accounting processes in AS 14.14.060(a)–(c), and with regard to certain major capital expenditures for the design, construction, and repair of schools in AS 14.14.060(d)–(f). Among the latter areas of authority allowed, the assembly has the power, provided in AS 14.14.060(d), the breadth of which is in dispute in the case at bar, to determine the location of school buildings with due consideration to the recommendations of the . . . school board."

[6] If seen in this perspective, the school board's argument in this case that AS 14.14.060(d) only gives the municipal assembly the authority to initially determine the location of school buildings makes a great deal of sense. Since, as the school board concedes, the municipality, and not the school board, has the power to condemn property for use as a school site, the municipal assembly has a strong interest in and reason for making the decision as to school site selection. This is consistent with the municipality's exercise of eminent domain powers and its obligation to compensate the owners of property condemned for school purposes.[22] To allow the municipal assembly to determine the site of schools to be built in AS 14.14.060(d) is also consistent with the succeeding subsections (e) and (f) of that statute, which grant the assembly decision-making power with respect to the plans and designs of schools to be constructed and "all major rehabilitation, all construction and major repair of school buildings."

This statutory consistency is not furthered by also inferring assembly power to determine which schools are to discontinue operations. The closure of a school does not involve the exercise of the municipality's eminent domain powers, nor does it involve major additional appropriations of municipal funds. Furthermore, in contrast to the municipal government's diminished fiscal and political interests, the school board has strong educational policy interests in deciding which schools are to be closed. This decision effectively determines the size, the design, and therefore the nature of the educational programs of the schools which remain open.

[7–9] Similarly, as the school board argues, the closure decision involves questions of student assignment and attendance areas, which are certainly within the scope of school board authority, rather than that of the municipal assembly. In this regard, AS 14.12.020(b) provides:

> Each borough or city school district shall be operated on a district-wide basis under the management and control of a school board.

It is clear that pupil assignment and attendance area determinations may be made by a school board as a part of its "management and control" authority, subject to statutory and constitutional restrictions.[23] This as-

22. *See* AS 29.73.020 ("A home rule or general law municipality may exercise the powers of eminent domain . . . ."); AS 09.55.240(a)(3) (right of eminent domain may be exercised for "public buildings and grounds for the use of . . . [a] school district"). The procedures for exercising eminent domain powers are detailed in AS 09.55.290 to AS 09.55.460. *See also* Alaska R.Civ.P. 72. Article I, § 18 of the Alaska Constitution provides that "[p]rivate property shall not be taken or damaged for public use without just compensation." *See Greater Anchorage Area Borough v. 10 Acres*, 563 P.2d 269 (Alaska 1977).

23. *See, e. g., Older v. Board of Educ.*, 27 N.Y.2d 333, 318 N.Y.S.2d 129, 266 N.E.2d 312, 813 (N.Y.1971) ("It cannot be denied that the power

signment power extended to its logical conclusion—the closing of a school by not assigning any students to the particular school—provides an independent basis for the school board's closure authority in the case at bar.[24]

[10] Given the broad managerial mandate of the school board, and the limited authority of the municipal assembly in educational policy matters, we think that it is the school board which has the authority to decide whether schools should be closed.

III. *DID THE ANCHORAGE SCHOOL BOARD HAVE THE AUTHORITY TO CLOSE WOODLAND PARK ELEMENTARY SCHOOL WITHOUT COMPLYING WITH 4 AAC 05.090?*

In the superior court, Tunley argued that 4 AAC 05.090 required the school board to obtain the approval of the Alaska Department of Education before closing these schools. The superior court ruled that "[t]he school closures involved in this case did not require the prior approval of the Department of Education pursuant to 4 AAC 05.090 or otherwise."

The Alaska Constitution,[25] as interpreted by this court, provides a clear "mandate for pervasive state authority in the field of education."[26] The state agency which has been delegated the state's general authority in this regard is the Department of Education.[27] The governing body of this state department is the state Board of Education, which is empowered to promulgate any regulations which are necessary to carry out the state's educational mandate.[28]

It was pursuant to this regulatory power that the Department of Education promulgated 4 AAC 05.090, which provides:

> *DISCONTINUATION OF SCHOOLS.* Once provision of a school in a community has been initiated by undertaking major renovation of an existing facility or construction of a new facility, that school may only be discontinued through action of the governing body of the district. Plans for discontinuation of a school under this section must be submitted to the department for approval and may not be executed until they are approved. Plans will be considered approved if the department does not disapprove them within 90 days after submission.

The flaw in Tunley's position is apparent when one examines the general scheme of the regulatory chapter of which 4 AAC 05.090 is a part. Chapter 05 of the Department of Education's regulations is entitled "LOCAL EDUCATION," and was promulgated with an effective date of September 3, 1976, to implement the state's policies, which were developed as a part of litigation on settlement in the *Hootch* case, on local education in rural communities. *See Hootch v. Alaska State-Operated School System*, 536 P.2d 793 (Alaska 1975). *See also Tobeluk v. Lind*, 589 P.2d 873, 875 (Alaska 1979). The purpose of chapter 05 is stated as follows:

> The legislature shall by general law establish and maintain a system of public schools open to all children of the State ....

to assign pupils to sc' ols within the district is a power that is 'rea nably necessary' to the management and con rol of the educational affairs of the district."). *also* AS 14.14.110; AS 14.14.120.

24. *See Wells v. Board of Educ.*, 289 S.W.2d 492, 494 (Ky.App.1956) (authority to transfer children to other subdistricts interpreted to allow discontinuance in school). *See also* 2 E. Yokley, Municipal Corporations § 388, at 313 (1957) (where authorized by statute, board may abandon and close a school and order students to transfer to another school).

25. Alaska Const. Art. VII, § 1 provides, in part:

26. *Macauley v. Hildebrand*, 491 P.2d 120, 122 (Alaska 1971). *See* AS 14.03.010 (establishing "in the state a system of public schools to be administered and maintained as provided in this title").

27. *See* AS 14.07.010; AS 14.07.020.

28. *See* AS 14.07.075 (creating Board of Education consisting of seven members); AS 14.07.060 (requiring Board of Education to promulgate regulations "necessary" to implement state educational policy). *See also* AS 14.07.020 (duties of Department of Education).

4 AAC 05.010. *PURPOSE.* (a) The purpose of this chapter is to ensure that, consistent with the desires of parents and of local communities, the school-age children in the State of Alaska have the opportunity to attend an elementary or secondary school in the local communities in which they reside.

(b) Nothing in this chapter is intended to require the construction of a new facility in which to conduct a school established pursuant to this chapter, if there exists in the community a suitable facility in which the school may be conducted.

While "community" is broadly defined to include "a home-rule city, city of any class, and incorporated and unincorporated villages," 4 AAC 05.020, the apparent focus of these regulations is on the provision of local schools in rural Alaska based on the following principle:

4 AAC 05.030. *LOCAL EDUCATION.* (a) Every child of school age has the right to a public education in the local community in which he resides.

(b) Neither the department nor the district may require a child to live away from the local community in which he resides to obtain an education.

Accordingly, the regulations of the chapter are addressed to: establishing schools or school programs in communities in which a threshold number of children available to attend such schools resides; delineating the power of local school committees and school district governing boards in the process by which local schools are to be established: providing time requirements and exceptions thereto for this process of establishing local schools; and setting standards and procedures on such matters as program planning and evaluation, school curriculum, and personnel.

[11, 12] Read in the context of this chapter's sole purpose of establishing local, rural community school services, the requirement of state approval prior to "discontinuation of schools" of 4 AAC 05.090 would seem to be imposed on a more narrow class of schools than Tunley suggests; it would seem to be directed only at local, predominantly rural schools established pursuant to the regulatory chapter of which it is a part. We find this is the most sensible interpretation and apparently is the interpretation placed on 4 AAC 05.090 by the state Department of Education,[29] which makes this case a most appropriate one for adhering to the oft-stated rule that a reviewing court will give deference to an agency's interpretation of its own regulations.[30] Since the closure of the Woodland Park Elementary School did not interfere with the stated purpose of chapter 05 of providing local education, *see* 4 AAC 05.030, we hold that 4 AAC 05.090 does not require State Department of Education approval of that closure action by the Anchorage School Board. Thus, we conclude that the superior court did not err in so deciding this issue.

29. In an April 16, 1979, letter from Anchorage School Superintendent John Peper to State Commissioner of Education Marshall Lind, Peper inquired whether 4 AAC 05.090 applied "to the closure of locally constructed schools built by a city or borough school district prior to the adoption of 4 AAC 05.090 in 1976." Lind replied in a letter dated April 20, 1979:

> The department is not prepared to address the retroactive effect, if any, of 4 AAC 05.090. Nevertheless, it is my view, concurred in by the Department of Law, that 4 AAC 05.090 is inapplicable to the closures of Woodland Park Elementary School and the Government Hill Elementary School since 4 AAC Chapter 5 requires prior approval of the department only where closure necessitates a child attending the school subject to closure to live away from the local community in which he or she resides in order to obtain an education.

30. *See, e. g., Department of Highways v. Green*, 586 P.2d 595, 602 n.21 (Alaska 1978), in which we stated:

> An administrative agency's interpretation of its own regulation is normally given effect unless plainly erroneous or inconsistent with the regulation. 1A C. Sands, Sutherland Statutory Construction § 31.06, at 362 (4th ed. 1972). *See Udall v. Tallman*, 380 U.S. 1, 4, 85 S.Ct. 792, 795, 13 L.Ed.2d 616, 619 (1965); *Burglin v. Morton*, 527 F.2d 486, 490 (9th Cir. 1975), *cert. denied*, 425 U.S. 973, 96 S.Ct. 2171, 48 L.Ed.2d 796 (1976).

IV. *WAS THE ASSEMBLY OF THE MUNICIPALITY OF ANCHORAGE REQUIRED BY SECTION 17.05 OF THE ANCHORAGE MUNICIPAL CHARTER TO ADOPT A PROCEDURE FOR PUBLIC NOTICE OF THE SCHOOL BOARD MEETING?*

The next issue is whether the superior court erred in not holding that Section 17.05 of the Anchorage Municipal Charter required the assembly to adopt procedures for reasonable public notice of school board meetings, and that the adoption of school closure recommendations was invalid in the absence of such regulations.[31] The full text of section 17.05 is:

> (a) All meetings of the Assembly, the School Board and other boards and commissions shall be public. The Assembly by ordinance shall adopt procedures for maximum reasonable public notice of all meetings. At each such meeting the public shall have reasonable opportunity to be heard. An executive session may be held to discuss pending litigation or any matter the immediate public knowledge of which would tend to affect adversely the finances of the municipality or to defame or prejudice the character or reputation of any person. The general matter for consideration in executive session shall be expressed in the motion calling for the session. No official action may be taken in executive session.
>
> (b) Except in emergency, the Assembly, School Board, and all municipal boards and commissions may take no official action between the hours of twelve midnight and 7:00 o'clock a. m., actual time. Action taken in violation of this paragraph is void.[32]

Both Tunley and the school board rely on only the first two sentences of part (a). Tunley argues that the requirement that the assembly adopt procedures for public notice for "all meetings" in the second sentence applies to the "assembly, the School Board, and other boards and commissions" mentioned in the first sentence of the statute. The school board argues that, on the contrary, the requirement of adoption of an ordinance for public notice applies only to the assembly's meetings, and not to those of the school board and other commissions.

The first sentence of Section 17.05 clearly establishes that all meetings of the assembly, school board, and other commissions shall be public. However, the "all meetings" clause in the second sentence is ambiguous; it could reasonably require the assembly to adopt an ordinance for public notice of every board's or commission's meeting or only those of the assembly.

[13, 14] Section 17.05 of the Anchorage Municipal Charter applies to all public meetings, not just those of the assembly. The "all meetings" in the first sentence clearly applies to meetings of the school board. The normal construction of the "all meetings" in the second sentence, considered in the context of the entire section on public meetings, would include the school board and other commissions in its procedural requirement of proper notice. If only the assembly was to be governed by the sentence, this could have been made clear by use of the word "its" rather than "all." The more comprehensive interpretation is strengthened by the third sentence, which reads, "[a]t each such meeting the public shall have reasonable opportunity to be heard." If the school board's interpretation of the statute is accepted, then "each such meeting" would logically apply only to assembly meetings. We think that the opportunity for public hearing was intended to apply to every public body, including the school board, and this requires that "all meetings" in the second sentence be inclu-

31. Although this issue was originally raised by Niebert, we note that Tunley did object to the conclusions of law of the superior court judge on this point. Since the cases were consolidated, since both the judge below and appellee on appeal had a chance to address the issue due to Niebert's raising it, and since we regard § 17.05 as a preferable ground of decision to the due process argument raised by Tunley, we choose to address the point here.

32. This identical provision is in § 1.25.010 of the Anchorage Municipal Code.

sive rather than exclusive. Thus, we conclude that Tunley's interpretation of Section 17.05 of the Charter is the more reasonable one.

[15] The school board argues, in the alternative, that the assembly fulfilled its responsibility to enact an ordinance for notice of school board meetings by enacting Municipal Code § 29.10.040, which provides in part:

> The School Board has the powers provided by law, including but not limited to, the power to:
>
> A. Formulate policy for the operation of the schools.

However, this ordinance does not specify any procedure for public notice and thus does not fulfill the requirement for adoption of public notice procedures mandated by Section 17.05 of the Charter.

[16] Since we have found that the assembly had the duty to enact an ordinance for public notice of school board meetings, and failed to do so, the issue is whether the assembly's failure is critical to the adoption by the Anchorage School Board of the closure plan. The Anchorage School Board did in fact establish detailed meeting times for board meetings, and the school closure debate and decision was accompanied by extensive publicity and media coverage. If in fact ample notice was given by the school board, the failure of the assembly to pass the required ordinance would not be fatal to the validity of the school closure.[33] In that event the underlying purposes of § 17.05 of the charter—ensuring "maximum reasonable public notice" of all meetings and affording the public a "reasonable opportunity to be heard"—will have been satisfied. We turn next to the question of whether such notice was given.

V. *WAS APPROPRIATE PUBLIC NOTICE OF SCHOOL BOARD'S MEETING CONCERNING THE SCHOOL CLOSURES GIVEN?*

The relevant facts pertaining to this question are as follows. The issue of school closure first arose in December 1978, when the administration submitted to the Anchorage School Board a draft Capital Improvement Plan for 1979 through 1985. School closure was mentioned as one option, because of excess classroom capacity and budgetary pressures. The Capital Improvement Plan was considered by the school board on January 17, 1979, at a work session. On February 15, 1979, in a public meeting, the school board voted to close two elementary schools for the 1979–80 school year. On February 15, there existed a list of schools which might be closed, but no definite recommendations had been made. This list included Woodland Park Elementary School and Government Hill. In its regular February 19 meeting, the school board directed the administration to prepare recommendations on specific schools amenable to closure by March 12, 1979. This decision was widely reported in the local media. The schools recommended to be closed, Woodland Park and Government Hill, were publicly disclosed on March 7, 1979, five days before the school board's March 12 meeting, and were published in local papers. The agenda for the March 12 meeting, which indicated that consideration of the closure recommendations would occur at that time, was also publicized. At the public meeting of March 12, the Anchorage

33. The school board argues that, under appellant's interpretation of § 17.05, the assembly could, by refraining from adopting an appropriate ordinance, totally frustrate the school board's ability to take action on any subject, in violation of state law. *See Macauley v. Hildebrand*, 491 P.2d 120 (Alaska 1971). However, implicit in our discussion of the reasonableness of the five-day notice actually given by the school board is the premise that, were the actual notice given sufficiently detailed and timely in relation to the meeting, the purposes of § 17.05 would be served whether or not the assembly actually passed the ordinance. As such, any party would be unable to show the requisite prejudice stemming from the assembly's failure to pass an ordinance, and thus the board's actions would not be invalid on that ground. We thus reject the suggestion that the assembly could effectively paralyze the board by refusing to pass the required statute.

School Board adopted the administration's recommendation of closing Woodland Park and Government Hill.[34] Thus, there was a five-day period between the announcement of the probable closure of the Woodland Park and Government Hill schools and the final adoption of the closure plan.

Determination of this last remaining issue depends on whether the five day notice provided by the school board fulfills the expressed purposes of § 17.05 of the charter in the context of this case.

[17] In light of the impact any closure decision would have on both the child's and parent's interests in the maintenance of neighborhood schools, any closure decision should have been preceded by a public school board meeting at which those potentially affected were given sufficient notice in order to enable adequate preparation and presentation of their views. While the school board, at its February 15 meeting had given notice that it would consider at its next meeting on March 12 the possible closure of schools and that specific recommendations were to be made by the administration at that time, there was only five days notice to interested residents and parents of exactly which schools were strongly recommended for closure by the administration.

[18] Five days is not sufficient time for appropriate preparation of opposition concerning an issue of this complexity and importance. Further, such short notice lessens the likelihood of a fair hearing before the school board and of the school board reaching a reasoned administrative decision. For these reasons we conclude that the five-day notice given did not satisfy the purposes of § 17.05 of the charter.[35]

Since our holding is that the five-day notice was insufficient, this case is remanded to the superior court with directions to remand to the school board to conduct the public hearing after adequate notice.[36]

As to Tunley, we Affirm in part, Reverse in part, and Remand for further proceedings in conformity with the foregoing.

As to Niebert, the superior court's grant of summary judgment is Reversed and Vacated and the matter Remanded to the superior court for further proceedings and reassignment to a different superior court judge.

BOOCHEVER, J., not participating.

34. In summary, the timing of the process was:

1.	December, 1978	Submission to board of draft Capital Improvement Plan
2.	January 17, 1979	Special board work session to consider plan
	(29 days)	
3.	February 15, 1979	Board voted to close two elementary schools for 79–80 year
	(4 days)	
4.	February 19, 1979	Board directed administration to prepare recommendations on closure
	(16 days)	
5.	March 7, 1979	Closure recommendations made public
	(5 days)	
6.	March 12, 1979	Closure recommendations for Woodland Park and Government Hill adopted by the school board

35. Implicit in this is our conclusion that the notice required by Section 17.05 includes reasonable notice of the subject of each meeting. Without such a requirement the public can hardly be said t have been afforded "a reasonable opportunity to be heard" as required by the charter. As Antieau states:

> It is the general rule that a required notice of meeting should unambiguously set forth reasonable information concerning the subject matter of the meeting to the end that adequate warning be given to all persons whose rights and interests may be affected by action of the local governing body.

1 C. Antieau, Municipal Corporation Law § 4.02 at 4–7 (1980).

36. We have examined Tunley's claim of discrimination against his child because of race and have concluded that this claim is without merit. Similarly, we are of the view that Tunley's assertion that there existed genuine issues of material fact which prevented entry of summary judgment is also lacking in merit.

5-0116A
Ford
2/3/87

IN THE HOUSE BY GRUENBERG

HOUSE BILL NO.

IN THE LEGISLATURE OF THE STATE OF ALASKA

FIFTEENTH LEGISLATURE - FIRST SESSION

A BILL

For an Act entitled: "An Act relating to the jurisdiction of the superior and district courts, judicial disqualification and impeachment, the procedure for judicial retirement due to incapacity or disability, and proceedings before magistrates."

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

* Section 1. AS 09.30.200 is amended to read:

Sec. 09.30.200. FILING AND STATUS OF FOREIGN JUDGMENTS. A copy of a foreign judgment authenticated in accordance with the Act of Congress or the laws of this state may be filed in the office of the clerk of the [SUPERIOR] court <u>with jurisdiction in</u> [OF] this state. The clerk shall treat the foreign judgment in the same manner as a <u>domestic</u> judgment [OF THE SUPERIOR COURT]. A judgment so filed has the same effect and is subject to the same procedures, defenses, and proceedings for reopening, vacating, or staying as a <u>domestic</u> judgment [OF THE SUPERIOR COURT] and may be enforced or satisfied in like manner.

* Sec. 2. AS 09.30.220 is amended to read:

Sec. 09.30.220. STAY. (a) If the judgment debtor shows the [SUPERIOR] court that an appeal from the foreign judgment is pending or will be taken, or that a stay of execution has been granted, the court shall stay enforcement of the foreign judgment until the appeal is concluded, the time for appeal expires, or the stay of execution expires or is vacated, upon proof that the judgment debtor has

furnished the security for the satisfaction of the judgment required by the state in which it was rendered.

(b) If the judgment debtor shows the [SUPERIOR] court any ground upon which enforcement of a judgment of the [SUPERIOR] court of this state would be stayed, the court shall stay enforcement of the foreign judgment for an appropriate period, upon requiring the same security for satisfaction of the judgment that [WHICH] is required in this state.

* Sec. 3. AS 09.30.230 is amended to read:

Sec. 09.30.230. FEES. A person filing a foreign judgment shall pay to the clerk of court the fee prescribed for the filing of an action. Fees for docketing, transcription, or other enforcement proceedings shall be as provided for domestic judgments [OF THE SUPERIOR COURT OF THIS STATE].

* Sec. 4. AS 09.43.170 is amended to read:

Sec. 09.43.170. COURT, JURISDICTION. In AS 09.43.010 - 09.43.180, the term "court" means the [SUPERIOR] court with jurisdiction in [OF] this state. The making of an agreement described in AS 09.43.010 providing for arbitration in this state confers jurisdiction on the [SUPERIOR] court to enforce the agreement under AS 09.43.010 - 09.43.180 and to enter judgment on an award under the agreement.

* Sec. 5. AS 22.07 is amended by adding a new section to read:

Sec. 22.07.075. IMPEACHMENT. A judge of the court of appeals is subject to impeachment by the legislature for malfeasance or misfeasance in the performance of official duties. Impeachment must originate in the senate and must be approved by two-thirds vote of its members. The motion for impeachment must list fully the basis for the proceeding. Trial on impeachment shall be conducted by the house of representatives. A supreme court justice designated by the court

shall preside at the trial. Concurrence of two-thirds of the members of the house is required for a judgment of impeachment. The judgment may not extend beyond removal from office, but does not prevent proceedings in a court on the same or related charges.

* Sec. 6. AS 22.15.030(a) is amended to read:

(a) The district court has jurisdiction of civil cases, including foreign judgments filed under AS 09.30.200 and arbitration proceedings under AS 09.43.170, as follows:

(1) for the recovery of money or damages when the amount claimed exclusive of costs, interest, and attorney fees does not exceed $35,000 [$25,000];

(2) for the recovery of specific personal property, when the value of the property claimed and the damages for the detention do not exceed $35,000 [$25,000];

(3) for the recovery of a penalty or forfeiture, whether given by statute or arising out of contract, not exceeding $35,000 [$25,000];

(4) to give judgment without action upon the confession of the defendant for any of the cases specified in this section, except for a penalty or forfeiture imposed by statute;

(5) for establishing the fact of death of any person in the manner prescribed in AS 09.55.020 - 09.55.060;

(6) for the recovery of the possession of premises in the manner provided under AS 09.45.070 - 09.45.160 when the value [OF THE PROPERTY OR] of the arrears and damage to the property does not exceed $35,000 [$25,000];

(7) for the foreclosure of a lien when the amount in controversy does not exceed $35,000 [$25,000];

(8) for the recovery of money or damages in motor vehicle

tort cases when the amount claimed exclusive of costs, interest and attorney fees does not exceed $35,000 [$25,000];

(9) over civil actions for taking utility service and for damages to or interference with a utility line filed under AS 42.20.-030;

(10) over cases involving injunctive relief for domestic violence under AS 25.35.010 and 25.35.020.

* Sec. 7. AS 22.15.120 is amended to read:

Sec. 22.15.120. LIMITATIONS ON PROCEEDINGS WHICH MAGISTRATE MAY HEAR. A magistrate shall preside only in cases and proceedings under AS 22.15.040, 22.15.100, and 22.15.110, and as follows,

(1) for the recovery of money or damages only when the amount claimed, exclusive of costs, interest, and attorney fees, does not exceed $5,000;

(2) for the recovery of specific personal property when the value of the property claimed and the damages for the detention do not exceed $5,000;

(3) for the recovery of a penalty or forfeiture, whether given by statute or arising out of contract, not exceeding $5,000;

(4) to give judgment without action upon the confession of the defendant for any of the cases specified in this section, except for a penalty or forfeiture imposed by statute;

(5) to give judgment of conviction upon a plea of guilty by the defendant in a criminal proceeding within the jurisdiction of the district court;

(6) to hear, try, and enter judgments in all cases involving misdemeanors, if the defendant consents in writing that the magistrate may try the case;

(7) to hear, try and enter judgments in all cases involving

infractions under AS 28, violations under AS 11, and violations of ordinances of political subdivisions;

(8) for the extradition of fugitives as authorized under AS 12.70.

* Sec. 8. AS 22.15 is amended by adding a new section to read:

Sec. 22.15.205. IMPEACHMENT. A district judge is subject to impeachment by the legislature for malfeasance or misfeasance in the performance of official duties. Impeachment must originate in the senate and must be approved by two-thirds vote of its members. The motion for impeachment must list fully the basis for the proceeding. Trial on impeachment shall be conducted by the house of representatives. A supreme court justice designated by the court shall preside at the trial. Concurrence of two-thirds of the members of the house is required for a judgment of impeachment. The judgment may not extend beyond removal from office, but does not prevent proceedings in the courts on the same or related charges.

* Sec. 9. AS 22.20.020(a) is repealed and reenacted to read:

(a) A judicial officer may not act in a matter in which

(1) the judicial officer is a party;

(2) the judicial officer is related to a party or a party's attorney by consanguinity or affinity within the third degree;

(3) the judicial officer is a material witness;

(4) the judicial officer or the spouse of the judicial officer, individually or as a fiduciary, or a child of the judicial officer has a direct financial interest in the matter;

(5) a party, except the state or a municipality of the state, has retained or been professionally counseled by the judicial officer as its attorney within two years preceding the assignment of the judicial officer to the matter;

(6) the judicial officer has represented a person as attorney for the person against a party, except the state or a municipality of the state, in a matter within two years preceding the assignment of the judicial officer to the matter;

(7) an attorney for a party has represented the judicial officer or a person against the judicial officer, either in the judicial officer's public or private capacity, in a matter within two years preceding the filing of the action;

(8) the law firm with which the judicial officer was associated in the practice of law within the two years preceding the filing of the action has been retained or has professionally counseled either party with respect to the matter;

(9) the judicial officer feels that, for any reason, a fair and impartial decision cannot be given.

* Sec. 10. AS 22.20.020(b) is repealed and reenacted to read:

(b) The disqualifications specified in (a)(2), (a)(5), (a)(6), (a)(7), and (a)(8) of this section may be waived by the parties and are waived unless a party raises an objection.

* Sec. 11. AS 22.25.010(b) is amended to read:

(b) A justice or judge may be retired for incapacity as provided <u>in this section</u> [BY LAW]. A justice or judge is eligible for retirement pay with two or more years of service at the time of retirement for incapacity. The effective date of retirement under this subsection is the first day of the month coinciding with or after the date <u>that</u> [UPON WHICH] the governor [WITH RESPECT TO A JUSTICE, OR THE SUPREME COURT WITH RESPECT TO A JUDGE] files <u>written notice</u> with the commissioner of administration [A WRITTEN DECLARATION TO THE EFFECT] that a designated justice or judge was retired for incapacity. A duplicate copy of the <u>notice</u> [DECLARATION] shall be filed with the

Judicial Council.

* Sec. 12. AS 22.30.070(c) is amended to read:

(c) On recommendation of the commission or after an appeal under AS 22.30.011(e), the supreme court may (1) retire a judge for disability that seriously interferes with the performance of duties and that is or may become permanent, and (2) publicly or privately censure or remove a judge for action occurring not more than six years before the commencement of the judge's current term which constitutes wilful misconduct in the office, wilful and persistent failure to perform duties, habitual intemperance, conduct prejudicial to the administration of justice, or conduct that brings the judicial office into disrepute. The effective date of retirement under (1) of this subsection is the first day of the month coinciding with or after the date that the supreme court files written notice with the commissioner of administration that the judge was retired for disability. A duplicate copy of the notice shall be filed with the Judicial Council.

5-0116B

Error on 798

Original sponsors: Gruenberg, Sund, Pettyjohn, et al.

IN THE HOUSE BY THE JUDICIARY COMMITTEE

CS FOR HOUSE BILL NO. 139 (Judiciary)

IN THE LEGISLATURE OF THE STATE OF ALASKA

FIFTEENTH LEGISLATURE - FIRST SESSION

A BILL

For an Act entitled: "An Act relating to the jurisdiction of the superior and district courts; judicial disqualification, disciplinary actions, and impeachment; the procedure for judicial retirement due to incapacity or disability; proceedings before magistrates; and amending Rule 16(a), Alaska District Court Rules of Civil Procedure."

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

* Section 1. AS 09.30.200 is amended to read:

Sec. 09.30.200. FILING AND STATUS OF FOREIGN JUDGMENTS. A copy of a foreign judgment authenticated in accordance with the Act of Congress or the laws of this state may be filed in the office of the clerk of the [SUPERIOR] court with jurisdiction in [OF] this state. The clerk shall treat the foreign judgment in the same manner as a domestic judgment [OF THE SUPERIOR COURT]. A judgment so filed has the same effect and is subject to the same procedures, defenses, and proceedings for reopening, vacating, or staying as a domestic judgment [OF THE SUPERIOR COURT] and may be enforced or satisfied in like manner.

* Sec. 2. AS 09.30.220 is amended to read:

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is concluded, the time for appeal expires, or the stay of execution expires or is vacated, upon proof that the judgment debtor has furnished the security for the satisfaction of the judgment required by the state in which it was rendered.

(b) If the judgment debtor shows the [SUPERIOR] court any ground upon which enforcement of a judgment of the [SUPERIOR] court of this state would be stayed, the court shall stay enforcement of the foreign judgment for an appropriate period, upon requiring the same security for satisfaction of the judgment that [WHICH] is required in this state.

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Sec. 09.30.230. FEES. A person filing a foreign judgment shall pay to the clerk of court the fee prescribed for the filing of an action. Fees for docketing, transcription, or other enforcement proceedings shall be as provided for domestic judgments [OF THE SUPERIOR COURT OF THIS STATE].

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Sec. 09.43.170. COURT, JURISDICTION. In AS 09.43.010 - 09.43.180, the term "court" means the [SUPERIOR] court with jurisdiction in [OF] this state. The making of an agreement described in AS 09.43.070 providing for arbitration in this state confers jurisdiction on the [SUPERIOR] court to enforce the agreement under AS 09.43.010 - 09.43.180 and to enter judgment on an award under the agreement.

* Sec. 5. AS 15.58.050 is amended to read:

Sec. 15.58.050. INFORMATION AND RECOMMENDATIONS ON JUDICIAL OFFICERS. No later than August 7 of the year in which the state general election will be held, the judicial council shall file with the lieutenant governor a statement including information about each supreme court justice, court of appeals judge, superior court judge,

and district court judge who will be subject to a retention election. The statement shall reflect the evaluation of each justice or judge conducted by the judicial council according to law and shall contain a brief statement describing each public reprimand, public censure, or suspension received by the judge under AS 22.30.011(d)(3) or (4) during the period covered in the evaluation. A statement may not exceed 600 words.

* Sec. 6. AS 22.07 is amended by adding a new section to read:

Sec. 22.07.075. IMPEACHMENT. A judge of the court of appeals is subject to impeachment by the legislature for malfeasance or misfeasance in the performance of official duties. Impeachment must originate in the senate and must be approved by two-thirds vote of its members. The motion for impeachment must list fully the basis for the proceeding. Trial on impeachment shall be conducted by the house of representatives. A supreme court justice designated by the court shall preside at the trial. Concurrence of two-thirds of the members of the house is required for a judgment of impeachment. The judgment may not extend beyond removal from office, but does not prevent proceedings in a court on the same or related charges.

* Sec. 7. AS 22.15.030(a) is amended to read:

(a) The district court has jurisdiction of civil cases, including foreign judgments filed under AS 09.30.200 and arbitration proceedings under AS 09.43.170, as follows:

(1) for the recovery of money or damages when the amount claimed exclusive of costs, interest, and attorney fees does not exceed $35,000 [$25,000];

(2) for the recovery of specific personal property, when the value of the property claimed and the damages for the detention do not exceed $35,000 [$25,000];

(3) for the recovery of a penalty or forfeiture, whether given by statute or arising out of contract, not exceeding $35,000 [$25,000];

(4) to give judgment without action upon the confession of the defendant for any of the cases specified in this section, except for a penalty or forfeiture imposed by statute;

(5) for establishing the fact of death of any person in the manner prescribed in AS 09.55.020 - 09.55.060;

(6) for the recovery of the possession of premises in the manner provided under AS 09.45.070 - 09.45.160 when the value [OF THE PROPERTY OR] of the arrears and damage to the property does not exceed $35,000 [$25,000];

(7) for the foreclosure of a lien when the amount in controversy does not exceed $35,000 [$25,000];

(8) for the recovery of money or damages in motor vehicle tort cases when the amount claimed exclusive of costs, interest and attorney fees does not exceed $35,000 [$25,000];

(9) over civil actions for taking utility service and for damages to or interference with a utility line filed under AS 42.30.-030;

(10) over cases involving injunctive relief for domestic violence under AS 25.35.010 and 25.35.020.

* Sec. 3. AS 22.15.120 is amended to read:

Sec. 22.15.120. LIMITATIONS ON PROCEEDINGS WHICH MAGISTRATE MAY HEAR. A magistrate shall preside only in cases and proceedings under AS 22.15.040, 22.15.100, and 22.15.110, and as follows,

(1) for the recovery of money or damages only when the amount claimed, exclusive of costs, interest, and attorney fees, does not exceed $5,000;

(2) for the recovery of specific personal property when the value of the property claimed and the damages for the detention do not exceed $5,000;

(3) for the recovery of a penalty or forfeiture, whether given by statute or arising out of contract, not exceeding $5,000;

(4) to give judgment without action upon the confession of the defendant for any of the cases specified in this section, except for a penalty or forfeiture imposed by statute;

(5) to give judgment of conviction upon a plea of guilty by the defendant in a criminal proceeding within the jurisdiction of the district court;

(6) to hear, try, and enter judgments in all cases involving misdemeanors, if the defendant consents in writing that the magistrate may try the case;

(7) to hear, try and enter judgments in all cases involving infractions under AS 28, violations under AS 11, and violations of ordinances of political subdivisions;

(8) for the extradition of fugitives as authorized under AS 12.70.

* Sec. 9. AS 22.15 is amended by adding a new section to read:

Sec. 22.15.205. IMPEACHMENT. A district judge is subject to impeachment by the legislature for malfeasance or misfeasance in the performance of official duties. Impeachment must originate in the senate and must be approved by two-thirds vote of its members. The motion for impeachment must list fully the basis for the proceeding. Trial on impeachment shall be conducted by the house of representatives. A supreme court justice designated by the court shall preside at the trial. Concurrence of two-thirds of the members of the house is required for a judgment of impeachment. The judgment may not

extend beyond removal from office, but does not prevent proceedings in the courts on the same or related charges.

* Sec. 10. AS 22.20.020(a) is repealed and reenacted to read:

(a) A judicial officer may not act in a matter in which

(1) the judicial officer is a party;

(2) the judicial officer is related to a party or a party's attorney by consanguinity or affinity within the third degree;

(3) the judicial officer is a material witness;

(4) the judicial officer or the spouse of the judicial officer, individually or as a fiduciary, or a child of the judicial officer has a direct financial interest in the matter;

(5) a party, except the state or a municipality of the state, has retained or been professionally counseled by the judicial officer as its attorney within two years preceding the assignment of the judicial officer to the matter;

(6) the judicial officer has represented a person as attorney for the person against a party, except the state or a municipality of the state, in a matter within two years preceding the assignment of the judicial officer to the matter;

(7) an attorney for a party has represented the judicial officer or a person against the judicial officer, either in the judicial officer's public or private capacity, in a matter within two years preceding the filing of the action;

(8) the law firm with which the judicial officer was associated in the practice of law within the two years preceding the filing of the action has been retained or has professionally counseled either party with respect to the matter;

(9) the judicial officer feels that, for any reason, a fair and impartial decision cannot be given.

* Sec. 11. AS 22.20.020(b) is repealed and reenacted to read:

(b) The disqualifications specified in (a)(2), (a)(5), (a)(6), (a)(7), and (a)(8) of this section may be waived by the parties and are waived unless a party raises an objection.

* Sec. 12. AS 22.25.010(b) is amended to read:

(b) A justice or judge may be retired for incapacity as provided in this section [BY LAW]. A justice or judge is eligible for retirement pay with two or more years of service at the time of retirement for incapacity. The effective date of retirement under this subsection is the first day of the month coinciding with or after the date that [UPON WHICH] the governor [WITH RESPECT TO A JUSTICE, OR THE SUPREME COURT WITH RESPECT TO A JUDGE] files written notice with the commissioner of administration [A WRITTEN DECLARATION TO THE EFFECT] that a designated justice or judge was retired for incapacity. A duplicate copy of the notice [DECLARATION] shall be filed with the Judicial Council.

* Sec. 13. AS 22.30.011 is amended by adding a new subsection to read:

(b) If a judge has been publicly reprimanded, suspended, or publicly censured under this section and the judge has filed a declaration of candidacy for retention in office, the commission shall report to the judicial council for inclusion in the statement filed by the judicial council under AS 15.58.050 each public reprimand, suspension, or public censure received by the judge

(1) since appointment; or

(2) if the judge has been retained by election, since the last retention election of the judge.

* Sec. 14. AS 22.30.070(c) is amended to read:

(c) On recommendation of the commission or after an appeal under AS 22.30.011(e), the supreme court may (1) retire a judge for

disability that seriously interferes with the performance of duties and that is or may become permanent, and (2) publicly or privately censure or remove a judge for action occurring not more than six years before the commencement of the judge's current term which constitutes wilful misconduct in the office, wilful and persistent failure to perform duties, habitual intemperance, conduct prejudicial to the administration of justice, or conduct that brings the judicial office into disrepute. The effective date of retirement under (1) of this subsection is the first day of the month coinciding with or after the date that the supreme court files written notice with the commissioner of administration that the judge was retired for disability. A duplicate copy of the notice shall be filed with the Judicial Council.

* Sec. 15. Rule 16(a) of the Alaska District Court Rules of Civil Procedure is amended to read:

(a) All small claims actions shall be tried by the court without a jury. A judge may [NOT] be peremptorily challenged [EITHER] under Civil Rule 42(c) [OR AS 22.20.022].