U.S. Department of Justice
Office of Legal Policy
Federal Justice Research Program

Judicial Substitution: An Examination of Judicial Peremptory Challenges In the States

March 1986

Judicial Substitution:

An Examination of Judicial Peremptory Challenges in the States

Larry C. Berkson, Principal Investigator
Sally Dorfmann, Research Associate

Koba Associates, Inc.
March 1986

This project was supported by Contract Number 5C-X-OLP-0011 awarded to Koba Associates, Inc., by the Federal Justice Research Program of the Office of Legal Policy, U.S. Department of Justice. The views and conclusions contained in this document are those of the authors and should not be interpreted as necessarily representing the official policies, either express or implied, of the U.S. Government.

Table of Contents

TABLE OF CONTENTS

TABLE OF CONTENTS
(Continued)

TABLE OF CONTENTS
(Continued)

TABLE OF CONTENTS
(Continued)

TABLE OF CONTENTS
(Continued)

TABLE OF CONTENTS
(Continued)

List of Tables

LIST OF TABLES

LIST OF TABLES
(Continued)

LIST OF TABLES
(Continued)

Preface

PREFACE

At the beginning of 1985, 16 states allowed for the automatic substitution of judges, without a determination of cause, upon motion by a litigant or attorney.[1/] These procedures are known generically as judicial peremptory challenges. Their purpose is to help ensure a fair trial[2/] and to preserve the integrity and public image of the judicial system[3/] by allowing the parties involved to remove a judge they perceive as biased or prejudiced. Peremptory challenges have also been viewed as a means of disciplining judges who deviate widely from generally accepted norms of judicial and personal behavior.[4/]

Often confused with the peremptory challenge of jurors, these provisions have gone largely unrecognized outside the states which utilize them. In recent years, however, they have gained increased notoriety. In several of the 16 states they have been attacked as inappropriate or unconstitutional.[5/] In

---

1/ Alaska, Arizona, California, Idaho, Illinois, Indiana, Minnesota, Missouri, Montana, Nevada, North Dakota, Oregon, South Dakota, Washington, Wisconsin and Wyoming.

2/ See, e.g., Ernest J. Getto, "Peremptory Disqualification of Federal Judges," University of Kansas Law Review, 30 (Winter, 1982), 22, 25.

3/ "Disqualification of Judges for Prejudice or Bias-- Common Law, Evolution, Current Status and the Oregon Experience," Oregon Law Review, 48 (1969), 311, 360.

4/ Richard M. Coleman, "An Idea Whose Time Has Come," Los Angeles Lawyer, 4 (September, 1981), 6.

5/ See, e.g., Linda De La Mora, "Statutes Allowing Substitution of Judge Upon Peremptory Challenge Does Not Violate Separation of Powers Doctrine, State v. Holmes, 106 Wis.2d 31, 315 N.W.2d (1982)," Marquette Law Review, 66 (1983), 414-31; and Jeffrey R. Tone, "Substitution of Judges in Illinois Criminal Cases," University of Illinois Law Forum, (1978), 519-39.

others, they have been criticized for causing administrative difficulties.[6/] Peremptory challenges have also become controversial in states which do not provide for them. In Delaware, for example, a senator has introduced legislation co-sponsored by all but one of his colleagues to provide for the procedure in Family Court.[7/] In 1981 the Indiana Supreme Court adopted rules nullifying state statutes which provided for the procedure in criminal cases.[8/] Three years later the New Mexico Supreme Court adopted similar rules nullifying statutes which applied to both criminal and civil proceedings.[9/] Recently, considerable opposition has arisen to the rules and the court has decided to change them and revert once again to a form of peremptory challenge.[10/]

The procedures have also gained increased attention as a result of debate surrounding bills in Congress which would apply them to federal district courts.[11/] Initially, the United States Department of Justice took a stand

---

6/ See Jon B. Ables and Charles A. Thompson, "Change of Judge in Indiana: A Continuning Dilemma," Indiana Legal Forum, 2 (Fall, 1968), 164-86; and Andrew Jacobs, Sr., "Some Observations Regarding Crime Control," Indiana Law Review, 11 (February, 1978), 403-29.

7/ Conversation between Robert Coonin, Esq., Wilmington, Delaware, and Larry Berkson, April 23, 1985.

8/ Ind. R. Crim., P. 12.

9/ N.M. 1983-84 Advance Ann. and Rules, Rules 88.1 (civil) and 34.1 (criminal), superceding N.M. Stat. Ann. secs. 38-3-9 and 38-3-10 (1977).

10/ Letter from Chief Justice William R. Federici to Larry Berkson, March 4, 1985.

11/ See, e.g., H.R. 1419, 99th Cong., 1st Sess., March 5, 1985; H.R. 3125, 98th Cong. 1st. Sess., May 24, 1983; H.R. 1649, 97th Cong. 1st Sess., February 4, 1981; and H.R. 7473, 96th Cong. 2d Sess., May 30, 1980. One of the first such proposals was offered in 1971. See Hearings on S. 1064 before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary, 93d Cong., 1st. Sess. (1971-73).

against the concept.[12/] In the latter part of 1983 the Department invited proposals to evaluate how peremptory challenges are functioning in the states and how they might operate if applied to the federal judiciary.[13/] In December 1984, Koba Associates, Inc. of Washington, D.C. was awarded a contract to investigate these two considerations. The following report is the result of that endeavor.

Part A consists of ten chapters. It begins with a brief history of judicial peremptory challenges and then describes the statutes and rules which are in effect today. Next the arguments for and against the concept are explored. A review of the present state of knowledge about peremptory challenges is undertaken and note is made about weaknesses in the literature. From this, a methodology is developed to study how they operate in the states. Subsequently, findings of the empirical investigation are reported.

Part B consists of five chapters and explores how peremptory challenges may impact the federal judiciary should they be adopted by Congress. Initially, a review is undertaken of federal disqualification procedures. Subsequently, the arguments for and against extending the concept to the federal level are examined. Recent proposals for peremptory challenges at the federal level are reviewed as well. Finally, a set of overall conclusions and recommendations about the construction of a federal statute to provide for peremptory challenges is presented.

12/ See letter from Alan A. Parker, Assistant Attorney General, to Congressman Robert F. Drinan, in Hearings Before the Subcomm. on Criminal Justice of the Comm. on the Judiciary House of Representative, H.R. 7473 and H.R. 7817, 96th Cong., 2d Sess. (1980), 221-25.

13/ Letter from Carolyn Boyle, Research Management Analyst, Federal Justice Research Program, to John P. Bellassai, Director, Criminal Justice Division, Koba Associates, Inc., December 9, 1983.

Like most studies, this one has benefited from the assistance of a large number of people. Helen Shaw and Carolyn Boyle of the Office of Legal Policy, United States Department of Justice, provided constant support and advice throughout the project. Dennis Mullins, formerly from the Office of Legal Policy must also be recognized for his support and commentary throughout the project. Similarly, our advisory committee consisting of 10 outstanding individuals provided invaluable assistance, furnishing information, offering suggestions and critiquing various chapters of the report. Their inclusion in this report, however, in no way evidences either their acceptance or agreement with any of the conclusions or recommendations made in this report. Several members of the Board disagreed in whole or in part with the final conclusions reached. Members included: Honorable Shirley Abrahamson, Supreme Court of Wisconsin, Madison, Wisconsin; John J. Cleary, Esq., Cleary and Sevilla, San Diego, California; Richard M. Coleman, Esq., Coleman and Farrell, Los Angeles, California; Honorable John B. Jones, United States District Court, Sioux Falls, South Dakota; Honorable Paul A. Magnuson, United States District Court, St. Paul, Minnesota; Honorable Dorothy W. Nelson, United States Court of Appeals, Los Angeles, California; Honorable James J. Richards, Superior Court of Lake County, Hammond, Indiana; Professor Elliot Slotnick, the Ohio State University, Columbus, Ohio; Lawrence Spears, Esq., Bismarck, North Dakota; and Honorable Robert A. Wenke, Los Angeles Superior Court, California. To them we extend a special note of appreciation.

We would also like to thank Larry Meisse, OMB Clearance Officer, United States Department of Justice for his assistance in obtaining approval for the survey of California Judges; Dixie Knoebel, Staff Associate, National Center for

State Courts, for her assistance in obtaining a wide variety of information for the project; and Susan Carbon for her assistance in editing several drafts of the manuscript.

The study would not have been possible without the kind cooperation of literally dozens of judges, attorneys and justice system administrators in the states examined. They are too numerous to mention here but their names may be found in Appendix E. Likewise, the names of various organizations supplying information for the study may be found in Appendix F. To them we are particularly appreciative.

We would also like to thank the hundreds of individuals who responded to our letters of inquiry about how well peremptory challenges are working in their states. It is an understatement to note that without them, the study could not have been completed.

Naturally we are indebted to several members of the staff at Koba Associates, Inc. for their advice, consultation and participation in various aspects of the project. They include Ford T. Johnson, Jr., President, for his guidance and assistance, as well as Ruthie Doyal, Arvette Covington, Mohammed Haque, and Mary Kochenowski for their administrative support throughout the project.

One individual must be singled out for special comment. Ilene Baylinson, Acting Director of Koba's Law and Justice Division, was a constant source of support, serving as liaison between Koba Associates and the Department of Justice and helping to resolve difficult problems of process and procedure. To her, we are particularly grateful.

Larry Berkson, Principal Investigator
Sally Dorfmann, Research Associate

Part A:

Peremptory Challenges In The States

Chapter I:
A Brief History of Judicial Peremptory Challenges

CHAPTER I

A BRIEF HISTORY OF JUDICIAL PEREMPTORY CHALLENGES

"No man shall be a judge in his own case."[1/] This common law prohibition is fundamental to the concept of a fair trial, long treasured as a basic right in Anglo-American law. From the stricture emerged two types of judicial substitution.[2/] The first, known as recusal, takes place when a judge voluntarily removes himself from a case. The second, usually referred to as disqualification, takes place when a judge is involuntarily removed from hearing litigation.

THE LAW OF JUDICIAL SUBSTITUTION

At the common law in England, grounds for recusal or disqualification were very narrow. Indeed, as John Frank has written, "... English common law practice at the time of the establishment of the American court system was simple in the extreme. Judges [could be] disqualified for financial interest. No other disqualifications were permitted and bias, today the most controversial grounds for disqualification, was rejected entirely."[3/]

Nonetheless, English courts were "... sensitive to the possibility that trained habits of impartiality could at times give way to the human

---

1/ Quoted in John Frank, "Disqualification of Judges," Yale Law Journal, 56 (April, 1947), 605, 610.

2/ See John P. Frank, "Disqualification of Judges: In Support of the Bayh Bill," Law and Contemporary Problems, 35 (Winter, 1970), 43, 44-45.

3/ Frank, supra note 1, at 611-12.

frailties ... ."[4] As a result, during the Nineteenth Century they gradually held that judges were disqualified if a real possibility of bias could be demonstrated.[5] English jurists believed that personal animosity between a judge and a party, or membership of a judge in a class which would be interested in the outcome, were sufficient grounds for recusation.[6]

By contrast American courts were much more restrictive.[7] During the 1800s they did mandate disqualification if a judge (1) was related to the parties in a case either by affinity or consanguinity; (2) had a prior relationship in a case or; (3) had a pecuniary interest in a case.[8] However, the courts drew a distinction between the terms "interest" and "prejudice."[9] Judges could only be disqualified if "an interest" was present. As a result, there were numerous decisions which upheld a judge's right to hear litigation even though

---

4/ "Disqualification of Judges for Prejudice or Bias--Common Law Evolution, Current Status and the Oregon Experience," Oregon Law Review, 48 (1969), 311, 321 [hereinafter cited as Oregon Study].

5/ "Disqualification of a Judge on the Ground of Bias," Harvard Law Review, 41 (November, 1927), 78, 79. (See also Ibid., at 327.

6/ Ibid., at 79. See also Bernard Schwartz, "Disqualification for Bias In the Federal District Courts," University of Pittsburgh Law Review," 11 (Spring, 1950), 415.

7/ "Disqualification of Judges for Bias In the Federal Courts," Harvard Law Review, 79 (May, 1966), 1435, 1436.

8/ Oregon Study, supra note 4, at 322-32. See also "State Procedures for Disqualification of Judges for Bias and Prejudice," New York University Law Review, 42 (May, 1967), 484.

9/ Oregon Study, supra note 4, at 321-22. A note in the Harvard Law Review refers to the distinction as "irrational." See "Disqualification of a Judge on the Ground of Bias," supra note 5, at 79.

he had expressed a premature opinion about the merits of the case or was hostile to one party.[10/]

Moreover, at a relatively early date an important exception was made to the common law and statutory disqualification rules. It was not unusual that a judge who was related to the parties, had previously participated in the controversy, or had a pecuniary interest in the litigation, would be the sole person available to hear the case.[11/] As a result, American courts had no inhibition about following English precedent and allowing a judge to hear the controversy as long as the "interest was not of unreasonble proportions."[12/]

It was not until the latter part of the Nineteenth Century that states began establishing bias and prejudice as bases for disqualifying a judge.[13/] In some states, courts redefined the common law while in others the legislatures enacted various disqualification statutes.[14/] Many, although not all, of the states required that proof of actual bias or prejudice be established.

THE DEVELOPMENT OF JUDICIAL PEREMPTORY CHALLENGES

One of the types of disqualification procedures which began to emerge during the late 1800s was judicial peremptory challenges. These provisions

---

10/ "Disqualification of a Judge on the Ground of Bias," supra note 5, at 80. One writer has summarized thusly. "The numerous instances where, in the absence of statutes, the bias or prejudice of a trial judge was unsuccessfully challenged at the appellate level, seems proof enough that the majority of our early judges felt themselves adequately insulated against human weaknesses." Oregon Study, supra note 4, at 322.

11/ Oregon Study, supra note 4, at 326.

12/ Ibid.

13/ Ibid., at 331.

14/ Ibid., at 331-32.

allowed for the automatic substitution of judges, without a determination of cause, upon motion by a litigant or attorney.

At least five states adopted such a procedure before the beginning of the Twentieth Century.[15/] The first state to enact a peremptory challenge statute was Wisconsin. In 1853 the legislature adopted a bill which provided for the substitution of judges in criminal cases.[16/] It required the submission of an affidavit of prejudice but the allegations did not need to be proven.[17/] This procedure remained in effect until 1969 when the affidavit was discarded. In its place the legislature required a "written request for a substitution."[18/] Additionally, the statute prohibited the parties from listing grounds for the substitution or alleging any prejudice. In 1982 the Wisconsin Supreme Court upheld the statute's constitutionality despite charges that it violated the separation of powers doctrine. Justice Abrahamson, writing for the majority, concluded that the legislature's purpose was "to ensure the right to a fair trial by permitting parties to strike a judge who is prejudiced or gives the appearance of being prejudiced."[19/] The provisions in the statute were a

---

15/ Rigorous attempts have been made to obtain accurate dates for the initial enactment of judicial peremptory challenge procedures in each state. However, because of the difficulties involved, the accuracy of the dates should be treated with caution. See caveats throughout the text.

16/ Linda De La Mora, "Statute Allowing Substitution of Judge Upon Peremptory Challenge Does Not Violate Separation of Powers Doctrine, State v. Holmes, 106 Wis.2d 31, 315 N.W.2d 703 (1982)," Marquette Law Review, 66 (1983), 414, 418, citing Wis. Laws 75, sec.1. See also State v. Holmes cited above at 712.

17/ Bachmann v. City of Milwaukee, 47 Wis. 435, 2 N.W. 543 (1849).

18/ Wis. Stat. sec. 971.20 (1969).

19/ State v. Holmes, 106 Wis.2d 31, 315 N.W.2d 703, 715 (1982).

constitutional means of accomplishing this goal. The legislature did not remove the case from the judiciary; rather it merely removed the individual judge from a single case. This did not deprive the court of the power to hear cases and thus did not materially impair the proper functioning of the judiciary. The court acknowledged possible abuses of the system but concluded that unless serious impairment could be demonstrated, it would accept the legislature's balancing of the positive and negative factors associated with judicial peremptory challenges.

The first code enacted by the Legislative Assembly in Dakota Territory provided for the peremptory challenge of judges.[20/] When North Dakota and South Dakota joined the Union in 1889, both states continued using the procedure.[21/] In South Dakota, the legislative provision was examined by the Supreme Court within a few years. The Court held that when an affidavit of prejudice or bias was filed, "no issuable question" was presented.[22/] In other words, the judge could not rule on the substance of the affidavit. He could only "call in some other judge."[23/] The statutory language was revised in 1919,[24/] but the Supreme Court held, nonetheless, that the trial judge could not "interrogate the accused as to the facts constituting the bias."[25/] The statute was subsequently amended

---

20/ Laws of Dakota Territory 1874-75, sec. 285, ch. 35. See also Code of Criminal Procedure, Revised Codes of Dakota, sec. 285 (1877).

21/ State v. Thompson, 180 N.W. 73, 74 (S.D. 1920); and State ex rel. Johnson v. Thomson, 34 N.W.2d 80, 85 (N.D. 1948).

22/ State v. Thompson, supra note 21, at 74. See also State v. Palmer, 4 S.D. 543, 57 N.W. 490, 491 (1894).

23/ State v. Thompson, supra note 21.

24/ S.D. Revised Code 1919, sec. 4813.

25/ State v. Thompson, supra note 21.

several times by legislative enactments and Supreme Court rules but throughout its history South Dakota has retained a judicial peremptory challenge provision.

The history of peremptory challenges in North Dakota is similar. Upon entering the Union, the state retained the concept.[26] The North Dakota Supreme Court held early in its history that the right to change a judge "was absolute upon the timely filing of the statutory affidavit."[27] During the first years of statehood the trial judge was allowed to call in any other judge as a substitute. In 1921, however, a statute was enacted which provided that once the affidavit of prejudice was filed, the judge should "proceed no further."[28] Instead, it authorized the Supreme Court to make the substitution. Like its Southern neighbor, North Dakota has retained a peremptory challenge statute throughout its history.

Wyoming's territorial legislators also enacted a disqualification statute. In 1877, the legislature provided that when an objection was made to a judge because of bias or prejudice, he was to call in a substitute.[29] The statute continued in effect when Wyoming became a state in 1890.[30] Its parameters were examined in 1914 by the Supreme Court which held that once the affidavit of

---

26/ State ex rel. Johnson v. Thomson, supra note 21, citing N.D. Const. Schedule, sec. 2; and Compiled Laws of Dakota 1887, sec. 7312.

27/ State ex rel. Johnson v. Thomson, supra note 21, citing State v. Kent, 4 N.D. 577, 593, 62 N.W. 631, 27 L.R.A. 686, and State v. Boyd, 26 N.D. 224, 144 N.W. 232.

28/ Laws 1921, ch. 129, secs. 1, 4.

29/ John S. Evans, "Civil and Criminal Procedure--Disqualification of District Judges for Prejudice in Wyoming," Land and Water Law Review, 6 (1971), 743; and Murdica v. State, 22 Wyo. 196, 137 P. 574 (1914).

30/ Wyo. Comp. Stat. 1910, sec. 5148.

prejudice was filed, it had the "effect of absolutely disqualifying the judge to proceed in the case or to determine any further question touching or effecting the trial."[31/] In later years the Wyoming Supreme Court adopted rules governing peremptory challenges. However, on March 10, 1983, the Supreme Court abrogated the peremptory disqualification rules for both civil and criminal cases. Shortly before the June 13, 1983 effective date, the chief justice notified all members of the Wyoming Bar Association about the change. He asked for their cooperation in complying with the new rules and in assessing fairly and honestly their effects on law practices. Apparently, there was considerable adverse reaction among the bar and upon recommendation of a majority of the Permanent Rules Committee, the Supreme Court restored peremptory challenge procedures effective October 31, 1984.[32/]

Oklahoma had a peremptory challenge procedure as early as 1890.[33/] An affidavit of prejudice was required but no facts had to be alleged. Disqualification was automatic upon a timely filing of the challenge. The procedure was apparently repealed in 1909 and from that date forward Oklahoma has been without a peremptory challenge provision.[34/]

31/ Murdica v. State, supra note 30.

32/ The following information is drawn from correspondence and materials supplied by Robert L. Duncan, Court Coordinator, Supreme Court of Wyoming, April 22, 1985.

33/ Oregon Study, supra note 4, at 338, n. 148, citing Okla. Stats. 1890, ch. 72, art. 8, sec. 49(3).

34/ Id., citing Okla. Laws 1909, ch. 14, art. 1, sec. 1. See also Diehl v. Crump, 27 Okla. 108, 179 P. 4, 6 (1919); and 5 A.L.R. 1275.

Several states adopted peremptory challenge procedures during the first two decades of the Twentieth Century. Among them were Arizona, Montana, Minnesota, Washington, and Oregon.

Records indicate that Arizona adopted peremptory challenge legislation in 1901 while it was still a territory.[35/] Upon entering the Union in 1912, its legislature enacted statutes providing for the procedure in civil cases.[36/] Three years later the Supreme Court held that the "truth of the affidavit filed is not what disqualifies the judge, but the affidavit itself."[37/] Statutory revisions were made in 1921, 1928 and 1939.[38/]

During the early years of Arizona statehood affidavits of prejudice were allowed to be rebutted in criminal proceedings.[39/] Thus, they cannot be considered peremptory challenges. In 1939, however, statutory revisions provided that once the challenge was filed, judges were to "proceed no further."[40/] The provision that challenges could be rebutted was dropped.[41/] Apparently this

---

35/ Letter to Larry Berkson from Justice James Cameron, Arizona Supreme Court, March 6, 1985. See also Ariz. Laws, Title 17, ch. 10, sec. 1380 (1901); and Kraig J. Marton, "Peremptory Challenges of Judges: The Arizona Experience," Law and the Social Order, (1973), 95.

36/ Revised Stats. of Ariz., Civil Code, Title 6, sec. 500 (1913). The criminal statute appears not to provide for a peremptory challenge. See Revised Stats. of Ariz., title 8, sec. 1000 (1913).

37/ Stephens v. Stephens, 17 Ariz. 306, 152 P. 164, 165 (1915).

38/ Laws of Ariz., ch. 107, sec. 500 (1921); Ariz. Revised Code, sec. 3721 (1928); and Ariz. Code, 21-107 (1939).

39/ Revised Code of Ariz., Title 8, sec. 1000 (1913); and Revised Code of Ariz., art. 4, secs. 5022-5023 (1928).

40/ Ariz. Code Ann., secs. 44-1202 and 44-1205 (1939).

41/ Ariz. Code Ann., secs. 44-1201 and 44-1202 (1939). However, the statute did require that the grounds for the challenge had to be stated.

statute continued in effect for over two decades, for in 1956 the language in the Arizona Rules of Criminal Procedure was identical.[42/] In 1975, the rules were altered to allow a party to file a pleading entitled a "Notice of Change of Judge."[43/] There was no requirement that grounds for the allegation be asserted in the notice.

Judicial peremptory challenge procedures had a unique origin in Montana. In a dispute between copper companies, a judge friendly with one party issued an injunction against the adversary. As a result, the Governor convened a special session of the legislature in December, 1903, for the purpose of enacting general legislation to allow for the disqualification of district judges if they were biased or prejudiced.[44/] The legislature met and amended the code of civil procedure to provide that, upon the filing of an affidavit of prejudice, a judge was proscribed from acting further in a case.[45/] The following year the Montana Supreme Court upheld the provision stating that disqualifying a judge "by the mere filing of an affidavit of prejudice" was not a violation of the Constitution.[46/]

42/ Ariz. Rules of Crim. Pro., Rule 196 (1956).

43/ Ariz. Rules of Crim. Pro., Rule 10.2.

44/ State ex rel. Anaconda Copper Mining Co. v. Clancy, 30 Mont. 529, 77 P. 312 (1904). See also Frank, supra note 1, at 608, n.8.

45/ Mont. Code Civ. Pro., sec. 180 (1903).

46/ State ex rel. Anaconda, supra note 44. For a summary of recent activity in Montana see Joint Subcommittee on Judiciary, The District Courts, Indigent Defense, and Prosecutorial Services in Montana (Helena: Montana Legislative Council, 1982), 13-16.

In 1905 Minnesota adopted its first peremptory challenge statute.[47] Any party was allowed to file an affidavit alleging that he had good reason to believe he could not receive a fair trial because of judicial prejudice or bias.[48] The judge, forthwith, was to secure some other judge to hear the case. Initially, strict construction was given to the statute,[49] but in 1949 the Minnesota Supreme Court held that the statute, then embodied in a court rule, was to be given a "liberal construction."[50]

Washington apparently enacted its first judicial peremptory challenge statute in 1911.[51] The provisions were eventually amended in 1927 and again in 1941,[52] although no substantial changes took place. The moving party had to simply file a motion stating that the judge was prejudiced and subsequently he would be replaced.

Oregon, Washington's neighbor to the south, enacted a judicial peremptory challenge provision in 1919.[53] It provided that any party could file a motion, supported by an affidavit, alleging a judge's prejudice. The affidavit had to be made in good faith and not for the purposes of delay. However, it could not

---

47/ State v. Hoist, 126 N.W. 1090, 1091 (Minn. 1910).

48/ Id., at 1090.

49/ See Jones v. Jones, 64 N.W.2d 508, 514-15 (1954).

50/ Weidemann v. Weidemann, 228 Minn. 174, 178, 36 N.W.2d 810, 813 (1949).

51/ See Enacted Laws 1911, ch. 121, sec. 2, p. 617, cited in Rev. Code of Wash. Ann., chs. 4.12.040 and 4.12.050.

52/ Revised Code of Wash. Ann., chs. 4.12.040 and 4.12.050.

53/ Ore. Laws 1919, ch. 160, cited in Oregon Study, supra note 4, at 361.

be challenged. In 1926 the Supreme Court upheld the statute's constitutionality.[54/]

During the next two decades several statutory changes took place in Oregon. The most important occurred in 1947 when the legislature dropped the requirement that prejudice be alleged.[55/] The amendment was held unconstitutional nine years later as a violation of the separation of powers doctrine.[56/] The legislature immediately reenacted the statute as it had existed prior to the 1947 amendment.[57/]

During the Depression four states adopted judicial peremptory challenge procedures. Nevada was the first.[58/] In 1931 the state legislature enacted a statute allowing parties to file an affidavit alleging that they could not receive a fair and impartial trial on account of judicial bias or prejudice.[59/] The Nevada Supreme Court almost immediately upheld the statute's constitutionality.[60/] Revisions made in 1938, however, were declared unconstitutional because they lacked a requirement that an allegation of prejudice or bias be made.[61/] As a result, the 1931 statute remained in effect.

54/ U'ren v. Bagley, 118 Ore. 77, 245 P. 1074 (1926).

55/ Ore. Laws 1947, chs. 145, 162, cited in Oregon Study, supra note 4, at 362.

56/ State ex rel. Bushman v. Vandenberg, 203 Ore. 326, 276 P.2d 432, 280 P.2d 344 (1955).

57/ Oregon Study, supra note 4, at 362.

58/ Nev. Stats. 1931, ch. 153, secs. 45, 45a, and 45b, cited in State ex rel. Beach v. Fifth Judicial District, 53 Nev. 444, 5 P.2d 535, 536 (1931).

59/ Id.

60/ Id.

61/ Clover Valley Lumber Co. v. the Sixth Judicial District Court, 58 Nev. 456, 83 P.2d 1031 (1938).

In 1977 the Nevada legislature passed another statute similar to the 1931 version.[62] It, too, did not require an allegation of bias or prejudice and again it was declared unconstitutional.[63] As a result, an earlier statute which mandated an allegation of bias or prejudice remained in effect. Today the system is governed by a supreme court rule adopted in 1982.

Two years after Nevada adopted its first peremptory challenge statute, Idaho followed suit.[64] Either party in an action was allowed to file an affidavit alleging bias or prejudice. Upon filing of the affidavit the judge was "without authority to act further in the action, motion or proceeding."[65]

That same year, 1933, New Mexico enacted its first peremptory challenge statute.[66] A judge was prohibited from proceeding further in a case once an affidavit had been filed. The mandatory language was held constitutional in State ex rel. Hannah v. Armijo.[67] As a result, judicial peremptory challenge statutes continued to be operative in New Mexico until 1984.[68] That year the New Mexico Supreme Court again examined the state's peremptory challenge

---

62/ Nev. Stat. 1977, ch. 398, sec. 2.

63/ Johnson V. Goldman, 94 Nev. 6, 575 P.2d 929 (1978).

64/ See Davis v. Irwin, 139 P.2d 474, 475 (Ida. 1942), citing 1933 Sess. Laws, ch. 218, p. 464.

65/ Id., at 476.

66/ State ex rel. Hannah v. Armijo, 38 N.M. 73, 28 P.2d 511 (1933), citing N.M. Laws 1933, ch. 184, secs. 1 and 2. See also Gesswein v. Galvan, 100 N.M. 769, 676 P. 1334, 1335 (1984).

67/ 38 N.M. 73, 28 P.2d 511 (1933).

68/ N.M. Stat. Ann. secs. 38-3-9 and 38-3-10 (1977).

provisions.[69] At issue was the statute, with minor amendments, which had been reviewed in 1933, and a 1982 Supreme Court Rule modifying the statute.[70] The Court held that its decision in Hannah should be considered "in light of present day circumstances."[71] It also held that it had the authority to "adopt a rule of procedure when the operation of the court is involved and the existing process has created a problem."[72] The Court concluded that there were "significant problems inherent in the ... system" and that the "ever increasing number of disqualifications" constituted "an unreasonable burden on the system and should be changed."[73] Consequently, it decided that the Supreme Court Rule was "inappropriate" and was therefore "retracted."[74] Subsequently, the Court adopted new rules which required bias or prejudice to be established before a substitution was allowed.[75] Thus the judicial peremptory challenge procedure was abolished.

According to Chief Justice William R. Federici, considerable opposition has arisen to the 1984 rules. Recently, the court has decided to change them and revert once again to a form of peremptory challenge.[76] Rules are being drafted at the time of this writing.

69/ Gesswein v. Galvan, supra note 66.

70/ Crim. Pro. Rule 34.1 (Crim. Supp. 1983).

71/ Id., at 1336.

72/ Id., at 1337.

73/ Id., at 1338.

74/ Id.

75/ N.M. 1983-84 Advance Ann. and Rules, Rules 88.1 (civil) and 34.1 (criminal).

76/ Letter to Larry Berkson from Chief Justice William R. Federici, March 4, 1985.

In 1937, California enacted its first peremptory challenge statute for general jurisdiction trial court judges.[77/] It provided for the substitution of a judge upon a "peremptory challenge in writing ... without any further act or proof." In other words, the statute did not require an allegation of bias or prejudice. That same year the Third District Court of Appeals held the provision unconstitutional for, among other things, being an illegal delegation of power to a private citizen who arbitrarily may "by a few words, disrupt the ordinary functions of one of the co-ordinate branches of the state government."[78/] The following year the Supreme Court affirmed the appeals court.[79/]

In 1957, California again enacted legislation to provide for judicial peremptory challenge procedures. The statute applied only to civil cases,[80/] but two years later legislation was enacted to cover criminal cases as well.[81/] A written affidavit stating that the party believed the judge to be prejudiced was mandatory.[82/]

77/ Cal. Civ. Code Proc., sec. 170.5 (1937). Between 1853 and 1933, California justices of the peace could be peremptorily challenged. See John W. Willis, "Civil Procedure--Judges--Peremptory Challenge of Judge--Cal. Code Civ. Proc. (1937), sec. 170.5," Southern California Law Review, 11 (1938), 517, 520, citing Practice Act (1853), sec. 582; Cal. Code Civ. Proc. (1931), sec. 833(2), repealed by Cal. Stats. (1933) c. 744, p. 1904.

78/ Daigh v. Schaffer, 73 Cal. App.2d 449, 73 P.2d 927, 933 (1937).

79/ Austin v. Lambert, 11 Cal.2d 73, 77 P.2d 849 (1938).

80/ Code Civ. Pro., sec. 170.6 (1957).

81/ Cal. Stat. 1959, ch. 640.

82/ In 1961 the statute was liberalized to allow an oral statement under oath to be substituted for the written affidavit. Cal. Stat. 1961, ch. 526. See Judicial Council of California, "Disqualification of Judges," 1962 Annual Report of the Administrative Office of the California Courts (January, 1963), 34.

The Supreme Court upheld the 1957 enactment noting that it differed materially from the statute of twenty years earlier.[83] The 1937 statute did not require "the person making the challenge to state the grounds for his objection or to make a declaration under oath that the ground in fact existed."[84] Conversely, the Court noted, the 1957 statute had such a requirement and thus, was constitutional.

In 1977 the Supreme Court was called upon to reconsider its 1958 decision in light of experience with the statute as applied in a criminal context.[85] Once again, it held the provision constitutional. The Court rejected the argument that the peremptory challenge provision should be declared void because it had been abused by attorneys and litigants. In response to this contention the court quoted from its earlier opinion:

> The possibility that the section may be abused by parties seeking to delay trial or to obtain a favorable judge was a matter to be balanced by the Legislature against the desirability of the objective of the statute .... [A]nd the fact that some persons may abuse the section is not a ground for holding the provision to be unconstitutional.[86]

Indiana was the only state during the 1950s to acquire a judicial peremptory challenge procedur. In 1955 the Supreme Court adopted a rule providing

---

83/ Johnson v. Superior Court, 50 Cal.2d 693, 329 P.2d 5 (1958). See also Solberg v. Superior Court, 19 Cal. 3d 182, 561 P.2d 1148, 137 Cal. Rptr. 460 (1977).

84/ Johnson v. Superior Court, 50 Cal.2d 693, 329 P.2d 5, 9 (1958).

85/ Solberg v. Superior Court, 19 Cal.3d 182, 561 P.2d 1148, 137 Cal. Rptr. 460 (1977).

86/ Id., at 1157.

for an unverified application for the substitution of a judge.[87] In other words, no affidavit was required.[88] Despite the fact that a statute still exists in Indiana which provides for peremptory challenges in criminal matters,[89] it is no longer controlling.[90] In 1981, the Supreme Court adopted Criminal Rule 12 which requires judges to hold a hearing on the sufficiency of the affidavit which alleges bias or prejudice.[91]

The next state to adopt a peremptory challenge provision was Indiana's neighbor, Illinois. In 1963 the legislature passed a bill which allowed a defendant to file a motion alleging that the judge was so prejudiced against him that he could not receive a fair trial.[92] Once the motion was filed the judge could proceed no further.

Alaska followed Indiana in 1967. That year the legislature enacted comprehensive peremptory challenge statutes.[93] In 1974, in response to objections that the statutes were unconstitutional as violative of the separation of

---

87/ Ind. Sup. Ct. Rules, 1-12B.

88/ "Change of Venue and Change of Judge in a Civil Action in Indiana: Proposed Reforms," Indiana Law Journal, 38(1963), 289, 293. Confirmed in letter from Judge James L. Richards, Superior Court of Lake County, to Larry Berkson, March 7, 1985.

89/ Burns Ind. Stats. Ann., ch. 5, sec. 35-36-5-1 (1984).

90/ They are allowed in civil matters. See Ind. R. Trial P. 76 and 79 (1984).

91/ Ind. R. Crim. P. 12. Upheld in State ex rel. Gaston v. The Gibson Circuit Court, 462 N.E.2d 1049 (Ind. 1984).

92/ Ill. Rev. Stat. 1963, ch. 38, sec. 114-5.

93/ Alas. Stats. sec. 22.20.022.

powers doctrine, the Supreme Court promulgated rules to provide for peremptory challenge procedures.[94/]

The most recent state to adopt provisions was Missouri. In 1973 a rule was enacted by the Supreme Court which departed from the older rules. It declared that a change of judge was mandatory upon the filing of a written application by any party, agent or attorney.[95/] The applicant did not need to "allege or prove any cause for such a change of judge."[96/]

SUMMARY

Historically, at least 18 states have provided for judicial peremptory challenges at one time or another (See Table I-1).[97/] Five, including Arizona, North Dakota, Oklahoma, South Dakota and Wyoming, acquired them while they were still territories and continued with them upon entering the Union. Most states

---

94/ Alas. R. Crim. P. 25(d); and Alas. Civil R. Ct. 42(c).

95/ Miss. R. Civ. P. 51.05 (1984). See Natural Bridge Development Co. v. St. Louis County Water Co., 563 S.W.2d 522, 524 (1978).

96/ Natural Bridge Development Co. v. St. Louis County Water Co., supra note 93.

97/ Reference has been made to the fact that Ohio once had a peremptory challenge statute. See, e.g., "Disqualification of a Judge on the Ground of Bias," supra note 5, at 80 and n.15. The case of State ex rel. Wulle v. Dirlam, 7 Ohio Cir. Ct. Rept. 457; 18 Ohio Cir. Decisions 69 (1906) is generally referenced. However, a close reading of that circuit court decision does not make it clear that Ohio had such a statute. In that case, Ohio Rev. Stat. 550 was being interpreted. The statute had been passed in 1888 (Laws of Ohio, 68th Gen. Ass. (1889), p. 363, amending Revised Stats, of Ohio, sec. 550) and contained esssentially the same wording as that employed in the present statute (Ohio Rev. Code, sec. 2937.20) which is clearly not a peremptory challenge provision. See Ohio 3d Jur., Courts and Judges, sec. 133, citing More v. State, 166 N.E. 532; and Tumbleson v. Noble, 109 O App. 242, 10 O. Ops.2d 470, 164 N.E.2d 808. But see 5 A.L.R. 1275, 1277.

have retained peremptory challenge provisions continually throughout their history. The only exceptions are California and Wyoming which experienced a hiatus in the history of their provisions.

Judicial peremptory challenges are no longer permitted in two of the states which at one time used them. Oklahoma abolished them in 1909 and New Mexico in 1984.

We now turn to an examination of peremptory challenge provisions which are in effect today.

Table I-1

INITIAL ADOPTION DATES OF JUDICIAL PEREMPTORY CHALLENGE STATUTES*

State	Year
Alaska	1967
Arizona	1901
California	1937
Idaho	1933
Illinois	1963
Indiana	1955
Minnesota	1905
Missouri	1973
Montana	1903
Nevada	1931
New Mexico	1933
North Dakota	1874
Oklahoma	1890
Oregon	1919
South Dakota	1874
Washington	1911
Wisconsin	1853
Wyoming	1877

* Rigorous attempts have been made to obtain accurate dates for the initial enactment of judicial peremptory challenge statutes. However, because of the difficulties involved, the accuracy of the dates should be treated with caution. See caveats throughout the text.

Chapter II:
Judicial Peremptory Challenges Today

CHAPTER II

JUDICIAL PEREMPTORY CHALLENGES TODAY

As noted earlier, 16 states provide for judicial peremptory challenges. Citations to their legislative statutes and court rules are listed in Table II-1. Complete texts may be found in Appendix A.

LEGAL BASIS OF JUDICIAL PEREMPTORY CHALLENGE PROCEDURES

Judicial peremptory challenge procedures are found in the statutes of twelve states and in the court rules of ten states (See Table II-2). Alaska, Arizona, Minnesota, Missouri, Montana and South Dakota have both statutes and rules which provide for the procedure.

Minnesota is the only state which has an order issued by the state court administrator which serves as legal authority for the process. Apparently, prior to 1984, there was a great deal of confusion about which statutes and rules applied to the various trial courts in the state.[1/] On March 23 of that year, the Conference of Chief Judges and Assistant Chief Judges met and considered the issues involved. They authorized the state court administrator to develop a comprehensive policy statement on the subject. Subsequently an order was issued outlining uniform procedures to be followed throughout the state when a peremptory challenge is filed.[2/]

1/ Disqualification of Judges, Memorandum from Michael B. Johnson, Judicial Planning Committee, to Sue Dosal, State Court Administrator, Minnesota, October 24, 1983.

2/ Administrative Policy No. 10 (1984).

Table II-1
JUDICIAL PEREMPTORY CHALLENGE PROVISIONS IN SIXTEEN STATES

1. Alaska

Alaska Stat. §22.20.022 (1976)
Alaska R. Crim. P. 25(d)
Alaska Civ. R. Ct. 42(c)

2. Arizona

Ariz Rev. Stat. Ann. §12-409 (civil)
Ariz. R. Crim. P. 10.2,10.4-10.6
Ariz R. Civ. P. 42(f)

3. California

Cal. Civ. Proc. Code §170.6 (1982)

4. Idaho

Idaho Crim. R. 25 (1983)
Idaho R. Civ. P. 40(d) (1)(1983)

5. Illinois

Ill. Crim. Law and Proc., ch. 38, §114-5 (1979)

6. Indiana

Ind. R. Trial P. 76
Ind. R. Trial P. 79

7. Minnesota

Minn. Stat. Ann. §487.40 (West Supp. 1982)
Minn. Stat. Ann. §542.16 (Supp. 1982)
Minn. R. Civ. P. 60.03
Minn. R. Civ. P. 60.04
Administrative Policy No.10

8. Missouri

Mo. Stat. Ann. §545.650 (1984)
Mo. R. Crim. P. 32.06-32.09
Mo. R. Civ. P. 51.05-51.06

9. Montana

Mont. Code Ann. §3-1-802 (1983)
Mont. Sup. Ct. R. 3-1-802 (1983)

10. Nevada

Nev. Sup. Ct. R. 48.1

11. North Dakota

N.D. Cent. Code §29-15-21 (1983 supp.)

12. Oregon

Ore. Rev. Stat. §14.50-14.270 (1983 supp.)

13. South Dakota

S.D. Codified Laws, Ch. 15-12 to 15-36 (1983 supp.)

14. Washington

Wash. Rev. Code Ann. §4.12.040-4.92.050 (1962)

15. Wisconsin

Wisc. Stat. Ann. §971.20 (1983 supp.) (crim.)
Wisc. Stat. Ann. §801.58 (1983 supp.)(civil)
Wisc. Stat. Ann. §48.29 (1984) (Children's code)
Wisc. Stat. Ann. §799.205 (1979) (small claims)
Wisc. Stat. Ann. §345.315 (1984) (vehicle code)

16. Wyoming

Wyo. R. Crim. P. 23 (1984)
Wyo. R. Civ. P. 40.1 (b) (1) (1984)

Table II-2

LEGAL BASIS OF JUDICIAL PEREMPTORY CHALLENGE PROCEDURES

State	Statutes	Court Rules
Alaska	x	x
Arizona	x	x
California	x	
Idaho		x
Illinois	x	
Indiana		x
Minnesota	x	x
Missouri	x	x
Montana	x	x
Nevada		x
North Dakota	x	
Oregon	x	
South Dakota	x	x
Washington	x	
Wisconsin	x	
Wyoming		x

NAMES OF JUDICIAL PEREMPTORY CHALLENGE PROCEDURES

The phrase "judicial peremptory challenge" is a generic term which is used widely in the literature on judicial disqualification.[3/] However, it is specifically used in the statutes and rules of only four states: Alaska, California, Montana and Nevada (see Table II-3). The challenge is called a "peremptory disqualification" in Wyoming. In Arizona, Indiana, Missouri, North Dakota and South Dakota, it is referred to as a "change of judge" provision and in Idaho, Minnesota, Oregon, and Washington the phrases "disqualification of judge," "disqualification for prejudice" or "prejudice of judge" are used. In Illinois and Wisconsin the procedure is referred to as a "substitution of judge."

NAMES OF JUDICIAL PEREMPTORY CHALLENGE PLEADINGS

The names of the pleadings which must be filed also vary among the states (see Table II-3). Generally they are referred to as notices, motions, or applications. In three states, Oregon, South Dakota and Washington, the more formal term "affidavit" is used. However, only in Oregon and Washington is the pleading still called an "affidavit of prejudice." In recent times, use of the term "prejudice" has come under attack. It is argued that many of the challenges are invoked for reasons other than bias or prejudice. Moreover, it

---

3/ See, e.g., John R. Bartels, "Peremptory Challenges to Federal Judges: A Judge's View," American Bar Association Journal. 68 (April, 1982), 449-51; Linda De La Mora, "Statutes Allowing Substitution of Judge Upon Peremptory Challenge Does not Violate Separation of Powers Doctrine, State v. Holmes, 106 Wis.2d 31, 315 N.W.2d (1982), "Marquette Law Review, 66 (1983), 414-31; Ernest J. Getto, "Peremptory Disqualification of the Trial Judge," Litigation, 1 (Winter, 1975), 22-25; and Robert A. Levinson, "Peremptory Challenges of Judges in the Alaska Courts," UCLA-Alaska Law Review, 6 (Spring, 1977), 209-300.

Table II-3

NAMES OF JUDICIAL PEREMPTORY CHALLENGE PROCEDURES AND PLEADINGS

State	Name of Procedure	Name of Pleading
Alaska	Peremptory Challenge	Notice of Change of Judge
Arizona	Change of Judge	Notice of Change of Judge
California	Peremptory Challenge	Peremptory Challenge
Idaho	Disqualification of Judge	Motion of Disqualification
Illinois	Substitution of Judge	Motion for Substitution of Judge
Indiana	Change of Judge	Application or Motion for Change
Minnesota	Disqualification of Judge	Notice to Remove
Missouri	Change of Judge	Application for Change
Montana	Peremptory Challenge	Motion for Substitution
Nevada	Peremptory Challenge	Peremptory Challenge of Judge
North Dakota	Change of Judge	Demand for Change of Judge
Oregon	Disqualification for Prejudice	Affidavit of Prejudice
South Dakota	Change of Judge	Informal Request, Affidavit for Change of Judge
Washington	Prejudice of Judge	Motion and Affidavit of Prejudice
Wisconsin	Substitution of Judge	Written Request for Substitution
Wyoming	Peremptory Disqualification	A Written Motion

is argued that the term is offensive to judges.[4/] Consequently, several states which once used the term have stopped doing so.[5/]

COURTS IN WHICH JUDICIAL PEREMPTORY CHALLENGE PROCEDURES ARE PERMITTED

In all of the 16 states which allow for the use of peremptory challenges the procedure is limited to trial court judges. Appellate judges may not be substituted in this manner.[6/] At one time, however, there was some confusion about whether the California statute applied to the appellate departments of the superior courts.[7/] In 1963, the Judicial Council recommended that they be treated the same as all other appellate courts and thus be excluded from the peremptory challenge process.[8/] In Idaho, challenging district judges acting in an appellate capacity is specifically prohibited in both civil and criminal proceedings.

4/ See, e.g., Robert A. Levinson, supra note 3.

5/ See, e.g., Administrative Order No. 10 (1984), State Court Administrator, Minnesota, where the phrase "Notice to Remove" was substituted for "Affidavit of Prejudice" in Minnesota rules and statutes; and Levinson, supra note 3 at 282.

6/ See, e.g., Lester B. Orfield, "Recusation of Federal Judges, Buffalo Law Review, 17 (Spring, 1968), 799, 806. Few individuals, if any, have suggested that peremptory challenges be used in appellate courts. For the general arguments see Ellen M. Martin, "Disqualification of Federal Judges for Bias Under 28 U.S.C. Section 144 and Revised Section 455," Fordham Law Review, 45 (1976), 139, 162 n.166.

7/ Judicial Council of California, "Disqualification of Judges," 1962 Annual Report of the Administrative Office of the California Courts, (January, 1963), 34. It was clear that the California statute did not apply to judges on the Supreme Court or District Courts of Appeal.

8/ Ibid. Exactly when challenges were abolished in the appellate departments is unclear. By 1971, however, they apparently were no allowed. See Hearings on S. 1064 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary, 93d Cong. 1st. Sess. (1971-73), pp. 52-56.

In all but three states judicial peremptory challenges are allowed in both civil and criminal proceedings (see Table II-4). In Indiana and Nevada they can be exercised only in civil proceedings and in Illinois, they are permitted only in criminal proceedings.

Table II-4

COURTS IN WHICH JUDICIAL PEREMPTORY CHALLENGES ARE ALLOWED

State	Courts	Civil	Criminal
Alaska	District, Superior	x	x
Arizona	Superior	x	x
California	Superior, Municipal, Justice	x	x
Idaho	District, Magistrate	x	x
Illinois	Circuit		x
Indiana	Trial	x	
Minnesota	District, County, Municipal	x	x
Missouri	Circuit	x	x
Montana	District	x	x
Nevada	District	x	
North Dakota	District, County	x	x
Oregon	Circuit, District, Municipal	x	x
	Recorders	x	x
South Dakota	Circuit, Magistrate	x	x
Washington	Superior	x	x
Wisconsin	Trial	x	x
Wyoming	District	x	x

Chapter III:

A Comparative Analysis Of Peremptory Challenge Provisions

CHAPTER III

A COMPARATIVE ANALYSIS OF JUDICIAL PEREMPTORY CHALLENGE PROVISIONS

Most of the statutes and court rules designate specifically the persons who may invoke the challenge. Table III-1 lists the individuals mentioned in the provisions.

INDIVIDUALS WHO MAY EXERCISE THE CHALLENGE

Many of the states allow either the parties to an action or their attorneys to initiate the challenge. Missouri's provisions are perhaps the most comprehensive. They allow any party or attorney to invoke it in criminal proceedings and any plaintiff, defendant, third party plaintiff, third party defendant or intervenor to invoke it in civil actions. Provisions in states such as Arizona, Idaho, Indiana, Montana, Nevada and North Dakota do not specifically include attorneys as initiators of the challenge. However, in practice, attorneys are allowed to do so in most of them. Illinois and Wisconsin limit the use of challenges in criminal cases to defendants or their counsel.

Provisions in some states allow parties to an action or their attorneys to sign the pleading. In Arizona, however, counsel must sign it. North Dakota allows an authorized officer of a corporation to sign the pleading but does not allow an attorney to sign it without permission of the party.

CONTENT OF PLEADING

The required content of judicial peremptory challenge pleadings varies widely among the states. In Montana the only requirement is a statement that "the undersigned moves for substitution of another Judge for judge _____ in this

Table III-1

INDIVIDUALS WHO MAY INVOKE THE CHALLENGE OR SIGN THE PLEADING

State	Who May Invoke	Who May Sign
Alaska	Party or Attorney, Prosecution or Defense	Party or Counsel
Arizona	Party to Action	Counsel
California	Party or Attorney	Party or Attorney
Idaho	Any Party	Not stated
Illinois	Defendant	Not stated
Indiana	Party	Not stated
Minnesota	Any Party or Attorney	Not stated
Missouri	Plaintiffs, Defendants, 3d Party Plaintiffs, 3d Party Defendants, Intervenors	Party or Attorney
Montana	Any Party	Not stated
Nevada	Each Party	Party or Attorney
North Dakota	Party	Party, Authorized Officer of a Corp. or Attorney[1/]
Oregon	Party or Attorney	Not stated
South Dakota	Party or Attorney	Not stated
Washington	Party or Attorney	Not stated
Wisconsin	Defendant,[2/] Any Party[3/]	Defendant or Attorney
Wyoming	State, Defendant, Plaintiff	Not stated

1/ With permission of the party

2/ In criminal cases

3/ In civil cases

cause." Similarly, in Wisconsin a party or attorney must simply complete a form which "requests a substitution for the Hon. _____ as judge in the above entitled action." The Wyoming rules require only that the challenged judge be named.

Five states, Alaska, Arizona, Idaho, Indiana and Nevada, prohibit enumerating specific grounds in the pleading. Missouri provisions state that parties and attorneys "need not allege or prove any reason for such change" and South Dakota laws provide that a party or attorney is not required to state reasons but "may do so" if desired.

Several states require that the pleadings contain certain affirmations. Alaska, North Dakota, Oregon and South Dakota require a statement that the challenge is made in good faith and not for purposes of delay. In Idaho, the phrase "to hinder, delay or obstruct the administration of justice" is used.

Eight states require the pleadings to assert that the affiant has reason to believe that the judge is biased or prejudiced.[1/] Of these, two mandate that the statement be made under oath. In Alaska, the person requesting the substitution must swear that he believes that a "fair and impartial trial cannot be obtained." Similarly, in California the party or attorney "under penalty of perjury" must swear that he believes the judge is "prejudiced" and that he "cannot have a fair and impartial trial or hearing before such judge."

1/ Alaska, Arizona, California, Illinois, North Dakota, Oregon, South Dakota and Washington.

Provisions in five states do not specifically require that statements alleging bias or prejudice be made under oath or penalty of perjury. Nonetheless, they do require that general allegations about judicial partiality be asserted. In Arizona, for example, the party must state that he "has cause to believe and does believe that on account of bias, prejudice, or interest of the judge he cannot obtain a fair and impartial trial." In Illinois a similar statement must be made by a criminal defendant. He must allege that the "judge is so prejudiced against him that he cannot receive a fair trial." Analogous statements are required in Oregon, South Dakota and Washington.[2/] The most comprehensive requirements for the content of pleadings are found in North Dakota and South Dakota. In both states the affiant must assert that the demand for change is filed in good faith and not for the purpose of delay. In South Dakota the affiant must state additionally that:

> in the ordinary course of litigation such action or some issue therein is expected to come on for trial before such judge or magistrate sought to be disqualified; that the party making such affidavit has good reason to believe and does actually believe that such party cannot have a fair and impartial trial before the named judge or magistrate.

North Dakota has a unique requirement. There the affiant must "certify" that the judge "has not ruled upon any matter pertaining to the action or proceeding in which the moving party was heard or had an opportunity to be heard." The prohibition prevents attorneys and litigants from seeking a new judge by exercising the challenge after an unfavorable ruling.

2/ Statutes in Minnesota have similar language but they appear to be superseded by a court authorized policy statement which does not require a statement about judicial partiality. See Administrative Policy No. 10 (1984).

TIME LIMITATIONS

Each state has strict time frames in which peremptory challenges must be exercised. An accurate comparison is very difficult because states utilize dissimilar administrative processes, employ varying calendaring techniques and assign judges to hear cases at different stages in the judicial process. Further, some states have provisions which enumerate separate requirements for civil and criminal cases while others do not. Nonetheless, several observations may be made.

Criminal Cases. Restrictions on when judicial peremptory challenges may be exercised in criminal cases vary widely among the 14 states which permit them. At one extreme is Wyoming which requires prosecutors to initiate the challenge when the information or indictment is filed. At the other is South Dakota which allows the substitution of a judge in nonjury proceedings, a mere five days before trial. For purposes of this discussion the restrictions have been placed into four categories: those which focus on a preliminary stage in the judicial process, those which focus on the date when a case is first assigned to a judge, those which focus on the date when a case is scheduled for trial, and those which focus on the trial date.[3/]

A few states have time limitations which are triggered by preliminary proceedings. In California, a challenge in single-judge districts must be made within 30 days after the initial appearance. In Wisconsin a challenge may be

---

3/ Several states have multiple time limitation provisions and thus are discussed in more than one category in the following analysis.

invoked at the initial appearance if the parties wish to substitute the judge assigned to the preliminary hearing.[4/]

In several states time restrictions focus on the date of arraignment. For example, in Wisconsin a request to substitute the trial judge must be made before arraignment. Wyoming provisions require defendants to initiate the challenge at the time of their arraignment. In Arizona, both the state and defendant must enter the challenge within 10 days after arraignment.[5/] In Missouri, both sides have 30 days after arraignment to invoke the challenge.[6/]

Six states fix time limitations to the date when a case is first assigned to a judge. Alaska is the most restrictive. There affiants must challenge a judge within five days after the assignment is made.[7/] At the other extreme is Missouri where parties or attorneys in felony cases may have up to 30 days after a judge is designated to make the challenge.[8/] Arizona, Illinois, Montana and North Dakota allow 10 days after the assignment has been made.[9/]

4/ The provision allows the challenge to be invoked any time prior to five days before the preliminary hearing. Missouri provisions allow the challenge to be made any time prior to three days before the preliminary examination in felony cases.

5/ If a judge is not assigned at arraignment, both parties have 10 days after the case is assigned to a judge to invoke the challenge.

6/ If a judge is not assigned at arraignment, both parties have 30 days after a judge is designated to invoke the challenge. If the designation occurs less than 30 days before trial, the application must be filed prior to commencement of any proceeding on the record.

7/ An exception is made if "good cause is shown for the failure to file...[the challenge] within that time."

8/ If the designation is less than 30 days before trial, the application must be filed prior to any proceeding.

9/ Montana adds the caveat that both sides in the case must be aware of the assignment. In North Dakota the restriction may be superseded by other provisions.

Time limitations are related to the date when cases are scheduled for trial in four states. California and Washington allow challenges to be made no later than the day on which the case is called to be set for trial.[10/] Idaho provisions require the challenge to be made within five days after service of notice that the action is set for trial. North Dakota allows the challenge to be made within 10 days after notice that the trial has been scheduled.[11/]

Time limitations are related to the trial date in two states. Missouri requires the challenge to be made at least 10 days before the trial of misdemeanors.[12/] Similarly, South Dakota requires the challenge to be made at least 10 days before trial in actions triable by jury in circuit court. In actions triable without a jury the challenge must be made at least five days before the trial date.

Minnesota has a unique time limitation. In county and district courts the notice to remove must be filed not less than two days before the expiration of the time allowed by law for the attorney to prepare for trial.

North Dakota also has a rather unusual time limitation. There the demand for change of judge must be made within 10 days after the earliest of the following occurrences:

10/ In California this procedure applies only to courts using the master calendar system for scheduling cases. In Washington the procedure applies to counties where there is only one resident judge.

11/ In North Dakota the restriction may be superseded by other provisions.

12/ If the designation of the trial judge occurs less than 10 days before trial, the application may be filed anytime prior to trial.

(1) The date of the notice of assignment or reassignment of a judge for the trial of a case.

(2) The date of notice that a trial has been scheduled.

(3) The date of any ex parte order in the case signed by the judge against whom the demand is filed.

Civil Litigation. Like time limitations in criminal cases, most restrictions in civil litigation relate to specific events in the judicial process. For purposes of this discussion they have been grouped into five categories: the date a preliminary proceeding is held, the date when a case is at issue, the date when a case is first assigned to a judge, the date when a case is set for trial, and the date of trial.

Four states have provisions which focus on the date a preliminary proceeding is held. In Wyoming the challenge must be made by a plaintiff at the time a complaint is filed. The defendant must invoke the challenge at or before the first time the responsive pleading is filed or within 30 days after the service of a complaint on him, whichever occurs first. The Wisconsin procedure is more permissive. Challenges by the plaintiff must be filed within 60 days after the complaint is filed. Respondents must file within 60 days of reviewing the complaint. In order to substitute a judge scheduled to preside at a pretrial hearing in Nevada the challenge must be made three days in advance of the proceeding. In South Dakota the requirement is two days.

Alaska, Indiana and Oregon provisions focus on the date when a case is at issue. In both Alaska and Oregon the challenge must be filed within five

days.[13] Indiana requires that it be made within 10 days after the issues are first closed on the merits.[14]

Three states have provisions which focus on the date a case is first assigned to a judge. Minnesota is the most restrictive. There, challenges must be filed within one day of the case assignment. Nevada allows three days; Montana and North Dakota allow 10 days.[15]

California, Idaho, North Dakota and Washington have time limitations which focus on the date a case is set for trial. North Dakota is the most permissive, allowing challenges to be filed within 10 days after notice has been given that a trial has been scheduled.[16] Idaho allows only five days and California and Washington require the challenge to be made on or before the day the case is set for trial.[17]

Missouri has provisions which focus both upon the date a case is set for trial and the date of the trial. There the application must be filed within

---

13/ In Alaska if a judge is not assigned where the case is at issue, the parties have until five days after the case is assigned to make the challenge. Oregon allows 10 days in the latter instance.

14/ In cases where no pleading or answer is required by the defending party, each party has 30 days after the filing to request a change of judge.

15/ In Nevada this provision only applies if a judge is not assigned 30 days or more before the date set for trial. The provision in Montana adds the caveat that both sides must be aware of the assignment. In North Dakota the 10 day restriction may be superseded by other provisions.

16/ This restriction may be superseded by other provisions.

17/ In California this provision applies only where the master calendar system is used. In Washington the provision apparently applies only in single-judge districts.

five days after a trial date is set or at least 30 days before the trial date.[18/]

Four other states have provisions which focus on the date of the trial. California is the most permissive. When the judge scheduled to try a case is known at least 10 days before the trial date, the challenge must be made at least five days before that date. In South Dakota the time restriction varies with the type of case and level of court. In circuit courts the challenge must be made at least five days before the trial date of non-jury proceedings and at least 10 days before proceedings using a jury. In magistrates courts the challenge must be made at least five days before the trial. Nevada and Arizona are more restrictive. In the former, challenges must be filed at least 30 days before the trial date, and in the latter, at least 60 days before the trial date.[19/]

When a New Judge Has Been Assigned. At least eight states have specific time restrictions which apply in instances when a substitute judge has been newly assigned. Arizona, Indiana, Montana and Oregon provide that the challenge must be made within 10 days after the assignment of a new judge. Wisconsin requires that these challenges be made within 10 days of the notice of assignment in

---

18/ A caveat is added that if a trial judge has not been designated within that time, the application may be filed within 10 days after the trial judge has been designated or at any time prior to trial, whichever date is earlier.

19/ In Nevada, if a judge has not been assigned 30 days before the hearing a challenge may be filed within three days after the parties have been notified of that date or before the jury is sworn, evidence taken, or any ruling is made in the trial, whichever occurs first.

civil cases,[20] and within 15 days of the notice of assignment in criminal cases.[21]

At the other extreme are South Dakota and Illinois. In the former the affidavit must be filed within two days after the parties receive notice of a disqualification.[22] In Illinois the challenge must be made within 24 hours.

When an Appellate Court Orders a New Trial. At least four states have provisions which place time limitations on peremptory challenges when a new trial is ordered by an appellate or trial court. In Idaho, each party has the opportunity to challenge a judge within five days after they are notified of the retrial. Arizona, Indiana and Montana allow 10 days.

Miscellaneous Time Limitations. Time restrictions in the statutes and rules of all 16 states imply that judicial peremptory challenges may not be made once the hearing or trial has begun. Provisions in a few states, however, make this explicit. For example, the California statute provides that "in no event" may a judge be substituted after (1) the name of the first juror is drawn, (2) the opening statement is made by counsel, (3) the swearing of the first witness has taken place, or (4) the taking of evidence has begun. The Nevada rule prohibits

---

20/ If notice is received less than 10 days before trial, the request must be made within 24 hours. If the notice is received less than 24 hours before trial, the action must proceed to trial only upon stipulation of the parties.

21/ If the notice is received less than 20 days before trial, the request must be made within 48 hours. If the notice is received less than 24 hours before trial, the request may be made prior to commencement of proceedings.

22/ South Dakota also has a separate provision for an unanticipated change of judge. It allows a challenge to be filed anytime prior to the time set for trial.

challenges after "the jury [is] sworn, evidence taken, or any other ruling [is] made in the trial or hearing, whichever occurs first." Idaho rules simply state that all challenges "must be made before any contested proceeding...has been submitted for decision to the judge." Similarly, the Washington statute prohibits challenges after a judge has "made any ruling whatsoever in the case." There is a proviso in the statute, however, which enumerates what is not considered to be a "ruling." Included are: (1) the arrangement of the calendar, (2) the setting of an action, motion or proceeding for hearing or trial, (3) the arraignment of the accused in a criminal action, or (4) the fixing of bail.

THE NUMBER OF CHALLENGES ALLOWED

Provisions in all of the states carefully restrict the number of challenges allowed in each action. Unlike time limitation provisions, state restrictions on the number of challenges are relatively uniform.

Criminal Cases. Most states allow one challenge per defendant (see Table III-2). Oregon allows two as does Illinois when class X felonies or offenses punishable by life imprisonment or death are invoked.[23/] An unusual provision is found in Arizona. When multiple defendants are involved, a motion for change of judge by one of them does not require a change for the others, even though the result may be a severance for trial purposes. In Missouri, each party may challenge a judge holding the preliminary hearing and subsequently file a new challenge if the defendant is held for trial.

23/ The total number of challenges, however, may not exceed the number of defendants.

Table III-2
NUMBER OF CHALLENGES ALLOWED

State	Criminal	Civil
Alaska	1 per side[1/]	1 per side[6/]
Arizona	1 per party[2/]	1 per party[7/]
California	1 per side	1 per side
Idaho	1 per party[3/]	1 per party[8/]
Illinois	1 per defendant; 2 per defendant in major cases[4/]	does not apply
Indiana	does not apply	1 per party
Minnesota	1 per party	1 per party
Missouri	1 per party[5/]	1 per party[9/]
Montana	1 per adverse party	2 per adverse party
Nevada	does not apply	1 per side
North Dakota	1 per party	1 per party
Oregon	2 per party	2 per party
South Dakota	1 per party	1 per party
Washington	1 per party	1 per party
Wisconsin	1 per defendant	1 per party
Wyoming	1 per party	1 per party

1/ When multiple defendants are unable to agree upon a judge, the trial judge may grant them more than one challenge. The prosecutor is entitled to the same number of challenges as all of the defendants combined.

2/ When multiple defendants are involved, a motion for change of judge by one of them does not require a change for all others even though the result may be a severance for trial purposes.

3/ When multiple defendants are involved, the trial judge may permit each party a challenge if adverse interests are found.

4/ Major cases include class X felonies and offenses punishable by life imprisonment or death. The total number of challenges may not exceed the number of defendants.

5/ Each party may file a challenge to the judge holding a preliminary examination. They may also file a second challenge if the defendant is held for trial.

6/ The presiding judge may allow an additional change of judge to a party whose interests in the action are hostile or adverse to the interest of another party on the same side.

7/ Whenever two or more parties on a side have adverse or hostile interests, the presiding judge may allow additional changes of judge but each side shall have a right to the same number.

8/ When the trial court determines that coparties have an adverse interest in the action, it may grant a challenge to each of the parties.

9/ Missouri provisions enumerate the parties: plaintiffs, defendants, third-party plaintiffs (where a separate trial has been ordered), third-party defendants, and intervenors. Each of the foregoing classes is limited to one change of judge except in condemnation cases involving multiple defendants, in which case separate trials are to be held. Each separate trial to determine damages must be treated as a separate case for purposes of change of judge.

California restricts the number of challenges to one per side no matter how many defendants are involved. A similar provision exists in Alaska. However, there, when multiple defendants are unable to agree upon a new judge, the trial judge may grant them more than one challenge.[24/] Similarly, in Idaho the trial judge must determine whether multiple parties have a common interest in the action. If they do not, the judge may permit each adverse party the right to one challenge. Montana provisions allow one challenge "per adverse" party.

Civil Litigation. Three states, Alaska, California and Nevada, limit challenges to one per side in civil cases, regardless of how many plaintiffs or defendants are involved in the action.[25/] Ten states restrict the number of challenges to one per party while Montana and Oregon allow two each.[26/]

Challenges on Retrial. Only a few states have a provision outlining the number of challenges which are allowed if a retrial is ordered. The Arizona provision states that all rights are renewed. Indiana and Wisconsin allow one additional challenge per party. Similarly, Montana allows one additional challenge despite the fact that two were allowed per party for the first trial.

24/ If more than one challenge is granted to the defendants, the prosecutor is entitled to the same number as all of the defendants combined.

25/ In Alaska 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.

26/ For variations in Arizona, Idaho and Missouri see the appropriate notes in Table III-2.

WHEN A CHALLENGED JUDGE CEASES ACTION

Several states, including Indiana, Nevada, Oregon, Washington and Wyoming, do not specify when the challenged judge must cease action in a case. Others, however, are very clear. Although slightly different language is used, the general requirement is that a challenged judge must remove himself "at once" upon the filing of a timely motion, affidavit or notice. This is essentially the requirement in Alaska, California, Idaho, Illinois, Minnesota, Missouri, Montana, North Dakota, South Dakota and Wisconsin. The Montana provision adds a caveat that even though the judge must cease action once the notice is filed, he may nonetheless subsequently call in another judge and set the calendar. Several other states specifically allow the challenged judge to make a ruling on the timeliness of the application.[27/] In North Dakota, however, the challenged judge is specifically prohibited from making such a ruling.

THE INDIVIDUAL WHO ASSIGNS A NEW JUDGE

In most states the presiding or chief judge of the court in which a trial judge is challenged is responsible for securing a substitute.[28/] Included in this group are Alaska, Arizona, Minnesota, North Dakota, Oregon, South Dakota, Washington and Wisconsin.[29/] Five of these states, Alaska, Minnesota, Missouri,

---

27/ See, e.g., Minnesota and Wisconsin.

28/ Provisions in Idaho and Wyoming are silent on the issue of who has the responsibility.

29/ In South Dakota if the presiding judge is absent or is the challenged judge, the senior judge of the circuit makes the assignment. In Missouri, if the challenged judge is in a circuit with three or more judges, the case is transferred to the presiding judge for assignment by lot.

Oregon and Washington, also provide that if there are no other judges in the district or an inter-district transfer is required, the chief justice or supreme court is authorized to make the assignment.

There are variations among the provisions in other states. Illinois and Montana, for example, allow the challenged judge to assign the substitute judge. In Montana, if substitute judges are challenged, the original judge is authorized to continue making the assignments. Nevada provisions allow a challenged judge to transfer the case to another department of the court, if there is one, or to request the chief justice to assign the case to a judge of another district.

California authorizes the supervising judge of the master calendar to make the new assignment. If there is no such judge, the chairman of the Judicial Council, who is also Chief Justice of the Supreme Court, is authorized to make the substitution.

Indiana clearly has the most unique procedure for assigning a substitute judge. In an adversary proceeding the parties are allowed to agree upon any eligible judge. If the parties do not agree, they then may consent to the selection of a judge by the challenged judge. If this procedure is unsuccessful, the presiding judge has two days within which to develop a list of three judges. Each party is then allowed to strike one name, the plaintiff striking first. This aspect of the process must take place between seven and 14 days after the list is presented.[30/] The judge remaining on the list becomes the

---

30/ If the moving party fails to strike within the time limits, the right to challenge is lost. If the non-moving party fails to strike within the time limits, the clerk strikes for him.

substitute. If this judge is later disqualified the Supreme Court appoints a special judge.

ADMINISTRATIVE PROCEDURES

Most states have explicit administrative procedures which must be followed when a judge is peremptorily challenged.[31/] Affirmative responsibilities are placed on the party challenging a judge in eight states. In Alaska, for example, the challenging litigant in civil cases is required to file copies with the court, the other parties involved, the presiding judge and the court administrator. Similarly, copies must be filed with the court and delivered to the other parties in Arizona, Minnesota, Missouri, Nevada and South Dakota. In Indiana the party filing the challenge must notify the presiding judge and in North Dakota if an attorney files the demand, he must certify that he has mailed a copy to his client.

Specific responsibilities are placed on court clerks in seven states. Arizona provisions require the clerk to transfer all papers in the proceeding to the newly assigned judge. In Minnesota the clerk must notify the judge against whom the removal has been filed, the chief judge and the court administrator. In Montana, the clerk must notify all parties involved as well as the judge named in the motion. In North Dakota and South Dakota the clerk must notify the

---

31/ Provisions which have little or no reference to administrative procedures other than who assigns the substitute judge are found in Idaho, Illinois, Oregon and Wyoming.

presiding judge and the judge sought to be disqualified.[32/] Provisions in Washington require the clerk in single-judge districts to send a certified copy of the motion to the clerk of the supreme court or the state court administrator. In Wisconsin, a request for substitution is filed with the court clerk who then has the responsibility of immediately contacting the challenged judge for a ruling on the timeliness of the motion and the propriety of the form in which it is filed. If no ruling is made within seven days, the clerk refers the matter to the chief judge for a determination and reassignment if necessary.

Indiana places an unusual responsibility on the court clerk. It will be recalled that there challenging parties are allowed to strike one name from a list of three prepared by the presiding judge. If the non-moving party does not do so within specified time limits, the clerk strikes for him.

South Dakota recently revised its provisions to mandate an informal procedure before the filing of a formal affidavit is allowed. The challenging party or attorney must informally request the judge, who would ordinarily be assigned to hear the case, to disqualify himself. Three "informal" methods are provided: (1) letter, (2) oral communication, or (3) dictation into the record in open court or chambers. Opposing parties must be notified of the request but may not contest it. If the challenged judge grants the request, the presiding judge is notified and the case is reassigned. If the challenged judge refuses the

---

32/ In Montana, whenever an acceptance of jurisdiction is filed by a new judge, the clerk must mail a copy to the original judge and a copy by certified mail, with return receipt requested, to each attorney of record. Service to an attorney may be also made by personal delivery to the attorney by the clerk. In South Dakota the clerk also notifies the newly assigned judge and mails certified copies to all parties and their attorneys. If the chief justice is required to make the new assignment, the clerk administers the process.

request, the parties are notified in writing and the more formal procedures may begin.

Provisions in Alaska and Arizona allow, but do not mandate, that judges honor a timely informal peremptory challenge. The challenged judge simply enters into the record the date of the request and the names of the party requesting the substitution.

WAIVER OF THE RIGHT

Six states have explicit provisions outlining when the right to a peremptory challenge has been waived. In Alaska a party loses the right once he agrees to the assignment of a judge. In both Alaska and Arizona parties lose their right to challenge when they participate before a judge in any omnibus hearing, any subsequent pretrial hearing, or the commencement of a trial. Similarly, in Nevada, North Dakota and South Dakota the challenge may not be filed against a judge who has made a ruling on any contested matter or commenced hearing testimony in the action. In Indiana a party is deemed to have waived a request for change of judge if a cause is set for trial and no objection is immediately made by the parties once they have been informed that the trial has been scheduled.

The remaining states have no specific provisions which enumerate when the right to a judicial peremptory challenge is waived. In these states waiver of the right is controlled exclusively by the time restrictions determining when a challenge may be filed. All of these appear to preclude challenge after any judicial action has occurred.

MISCELLANEOUS PROVISIONS

Several states have unique provisions in their statutes and rules. Alaska, for example, has a provision that judges may not hold anyone in contempt of court for filing a peremptory challenge. Nevada requires that the pleading must be accompanied by a $100 fee which the clerk sends to the state treasurer for credit toward the travel of district judges. A Minnesota provision specifies that all challenges must be formally filed and that none go unrecorded. This requirement apparently was included so that an accurate count could be made of the number of challenges being invoked throughout the state.[33/]

Provisions in two states refer to "speedy trial" rules. In Idaho, if the defendant invokes the challenge, the time within which he must be given a speedy trial commences to run anew on the date of disqualification. In Minnesota, the chief judge has the discretion of changing the trial to another county to ensure that a speedy trial takes place.

In South Dakota the peremptory challenge may not be exercised in any proceeding for contempt committed in the presence of the court, or habeas corpus. Provisions in North Dakota allow the disqualified judge to submit comments to the presiding judge.

Wisconsin has special provisions to regulate peremptory challenges in probate matters. A party may file a written request specifically stating the issue for which the substitution is requested. The judge is substituted for that

---

33/ In some states it is clear that challenges, at times, go unrecorded. See Hearings on S. 1064 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary, 93rd Cong., 1st Sess. (1971-73), at 53.

issue but after its resolution the case is again referred to the judge who was originally assigned to the matter. A party may also file for a new judge for the entire proceeding.

Finally, in Washington a provision permits the parties involved to allow the challenged judge to hear arguments and rule upon preliminary motions, demurrers and other matters. The stipulation must be in writing.

SUMMARY

If there is one generalization which may be made from the foregoing analysis, it is that judicial peremptory challenge provisions vary greatly among the states. Some are found in court rules while others are found in legislative enactment. One state even has an administrative policy which outlines procedures for the challenge.

There are at least six different names for the provisions and at least a dozen different phrases for the pleadings. In most states challenges may be exercised in both criminal and civil proceedings but in two, Indiana and Nevada, they may be used only in civil litigation. In Illinois peremptory challenges may be exercised only in criminal cases. Most states allow both parties to an action and their attorneys to initiate the challenge but in some only one or the other is permitted to do so. In criminal cases in Ilinois and Wisconsin, only defendants may initiate the challenge. Prosecutors are proscribed from doing so. Similar differences apply to those who are allowed to sign the pleadings.

Some states prohibit the pleading from containing specific allegations about the judge while others do not. A few require a simple statement requesting the substitution of a judge while others require a detailed statement

that the allegation is made in good faith, not for the purposes of delay and that the party has reason to believe that he cannot receive a fair and impartial trial before the assigned judge because of bias or prejudice.

The time limitations for invoking the challenges likewise vary among the states. In Wyoming criminal cases, the challenge must be exercised as early as the filing of the case, but in South Dakota as late as a mere five days before trial. Between the extremes, time limitations focus on various dates that pretrial procedures take place such as the initial appearance, arraignment and preliminary hearing. Time limitations also focus on the dates when a case is first assigned to a judge, when a case is scheduled for trial or the date of the trial. Similarly, in civil litigation time restrictions are tied to a variety of events in the judicial process: the filing of an action; the date when a case is at issue, is first assigned to a judge, or is scheduled for trial; or the trial date itself.

Some states specify when the challenge must be made if a substitute judge has been assigned or if an appellate court orders a new trial. Others do not. Illinois and Oregon are the only states which allow two challenges in criminal cases. Oregon and Montana are the only states which allow two challenges in civil cases. Most states permit each party in criminal and civil cases to exercise the challenge but a few states allow only one challenge per side. Several states specifically enumerate when a challenged judge must cease hearing the case: others are silent on the issue.

Most states have provisions specifying who has the authority to assign a substitute judge. Idaho and Wyoming do not. It is most common to allow the presiding or chief judge to assign the substitute judge but Illinois and Montana

assign the responsibility to the challenged judge. In California the supervising judge of the master calendar has this responsibility and in Indiana there is a totally different method of selecting the substitute. There, each party strikes a name from a list of three individuals, prepared by the chief judge. The remaining individual becomes the substitute judge.

The responsibilities of the challenging parties and court clerks also vary among the states. In some jurisdictions they must simply file the challenge, while in others they must notify all of the judges, administrators and parties involved.

All of the states by implication provide for a waiver of the right to initiate the peremptory challenge. However, only six specifically enumerate when the right has been foregone.

Finally, several states have distinctive provisions. They range from noting exceptions to when the challenge may be invoked to special procedures for its usage. Perhaps most unique is the $100 filing fee required by the state of Nevada.

We turn now to the controversy which rages over the propriety of judicial peremptory challenge provisions.

Chapter IV:

The Controversy Surrounding Peremptory Challenges

CHAPTER IV

THE CONTROVERSY SURROUNDING PEREMPTORY CHALLENGES

Historically, numerous arguments have been advanced to support and oppose the concept of judicial peremptory challenges. They range from the philosophical and legal through the administrative and practical.[1/] A few are based on actual experience, but most are based on speculation about anticipated benefits or detriments. For purposes of simplification the arguments have been grouped into five major categories: the impact of peremptory challenges on judges, attorneys, the public and judicial administration, and the controversy over possible abuses of the system.

IMPACT ON JUDGES

Issue of Fairness. Opponents claim that peremptory challenges place unfair pressures on judges.[2/] To them, it is unreasonable to allow attorneys to challenge the competency and objectivity of a judge without offering him an opportunity to respond. This, they claim, leads to frustration and can have serious adverse effects.[3/] Indeed, the affronts suffered by judges may make it

---

1/ For various categorizations see, e.g., New York City Bar Association, Committee on Federal Courts, "A Proposal for Peremptory Challenges of Federal Judges in Civil and Criminal Cases," Record of the New York City Bar Association, 36 (April, 1981), 231, 236; and Edward G. Burg, "Meeting the Challenge: Rethinking Judicial Disqualification," California Law Review, 69 (Spring, 1981), 1445, 1470.

2/ See Burg, supra note 1, at 1474-77. See also Mark T. Coberly, "Caesars Wife Revisited - Judicial Disqualification After the 1974 Amendments," Washington and Lee Law Review, 34 (1977), 1201, 1218.

3/ Robert A. Levinson, "Peremptory Challenges of Judges in the Alaska Courts," UCLA-Alaska Law Review, 6(Spring, 1977), 269, 282.

difficult for them to remain objective about challenges. It is probable, opponents claim, that there will be subliminal reprisals in future cases involving the same parties or attorneys.[4/] Moreover, peremptory challenges may have an unfair and adverse affect on the reputations of particular judges.[5/]

Those who view peremptory challenges unfavorably also argue that the procedures subject judges to hardships associated with travel.[6/] The amount of time demanded of judges to hear cases is great enough, they claim, without requiring a judge to travel and spend time away from his family.

Proponents view the impact on judges quite differently. First, they believe that most judges are not insulted when a challenge is exercised.[7/] For example, in testimony before a Senate Subcommittee Judge Jonathan Robertson stated that in Indiana, "[m]ost judges really do not mind at all ... There are some prima donna types ... who take a personal affront to having a case taken away from them, but they are rare."[8/] Similarly, Senator Earnest Hollings has

---

4/ See Burg, supra note 1, at 1474-75; Alan J. Chaset, Disqualification of Federal Judges By Peremptory Challenge (Washington: Federal Judicial Center, 1981),at 58. See also Ernest J. Getto, "Peremptory Disqualification of the Trial Judge," Litigation, 1(Winter, 1975), 22.

5/ "Disqualification of Judges for Bias in the Federal Courts," Harvard Law Review, 79 (May, 1966), 1435, 1438.

6/ Coberly, supra note 2, at 1219.

7/ Ellen M. Martin, "Disqualification of Federal Judges for Bias Under 28 U.S.C. Section 144 and Revised Section 455," Fordham Law Review, 45(1976), 139, 160.

8/ Hearings on S. 1064, Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary 93d Cong., 1st. Sess. (1971-73 [hereinafter cited as Hearings on S. 1064], at 70.

testified before Congress that judicial peremptory challenges do not "hurt the judge's feelings ..."[9/] Others have suggested that a judge's feelings are not even an issue in many instances because the case is reassigned before he even becomes aware that it is on his calendar.[10/]

Second, proponents argue that peremptory challenge systems are more fair than those which require the establishment of cause, because they allow substitutions to be made without embarrassing accusations toward the judge.[11/] As Richard Coleman has written, the procedure avoids "publicizing acrimonious allega ions of bias or prejudice."[12/]

Third, proponents argue that peremptory challenges are actually helpful to judges rather than detrimental to them. This view is typified by a remark of former Minnesota Chief Justice Fred Struckmeyer. "When a judge is disqualified for bias or prejudice," he has written, "it gives him reason to examine his personal idiosyncrasies and attitudes."[13/] To Struckmeyer, "[d]isqualification has

---

9/ Ibid., at 27.

10/ Ibid., at 55.

11/ See Burg, supra note 1, at 1476; Hearings on H.R. 7473 and H.R. 7817 Before the Subcomm. on Criminal Justice of the House Committee on the Judiciary, 96th Cong., 2d Sess., June 6 and 9, 1980, at 32; Helena K. Kobrin, and "Disqualifiation of Federal District Judges--Problems and Proposals," Seton Hall Law Review, 7(Spring, 1976), 612, 635. But see Robert H. Aronson, "Disqualification of Judges for Bias or Prejudice--A New Approach," Utah Law Review, 1972 (Fall, 1972), 448, 458.

12/ Richard M. Coleman, "An Idea Whose Time Has Come," Los Angeles Lawyer, 4(September, 1981), 6. See also Chicago Bar Association, Judiciary Committee, Preliminary Report of the Subcommittee on the Peremptory Challenge Act of 1980 Relating to

13/ Hearings on S.B. 1064, supra note 8, at 66. See also Scott Slonim, "Bench-Bar Clash Looms Over Challenges to Judges," American Bar Association Journal, 66(December, 1980), 1503.

a salutary affect upon judges since it tends to restrain arbitrariness and intolerance ... ."[14/] Others have suggested that the procedure is helpful because it is a "[h]umane way of indicating to elderly judges that the time for retirement has arrived."[15/] One proponent has even suggested that judges actually enjoy the system because it allows them "to sit on another bench and hear new lawyers."[16/]

Judicial Independence. Those who view peremptory challenges unfavorably suggest that such provisions compromise judicial independence. To them "judges should be free to exercise their responsibilities without retaliatory action by litigants who may be displeased with the decisions of the court."[17/] Otherwise, the integrity of the judicial system is compromised.[18/] This view is perhaps best expressed by Alan J. Chaset in a study of peremptory challenges for the Federal Judicial Center:

> ... a special interest group's ability to in effect exclude a judge from sitting on any case affecting that group's interest could cause a judge to modify his stance on those issues if he wishes to continue addressing them at all. He may have a choice, consciously or unconsciously, between meliorating his true views or being effectively silenced.[19/]

14/ Hearings on S.B. 1064, supra 8, at 66. See also Peter A. Galbraith, "Disqualifying Federal District Judges Without Cause," Washington Law Review, 50(1974), 109, 141.

15/ Galbraith, supra note 14, at 141.

16/ Remarks of Judge Jonathan Robertson in Hearings on S.B. 1064, supra note 8, at 70.

17/ See New York City Bar Association, supra note 1, at 236, See also p. 237.

18/ See John R. Bartels, "Peremptory Challenge to Federal Judges: A Judge's View," American Bar Association Journal, 68(April, 1982), 449, 451

19/ Chaset, supra note 4, at 65.

Those who favor peremptory challenge procedures also recognize the need for a strong and independent judiciary, but to them peremptory challenges are not a threat.[20] Authors of a New York City Bar Association report, for example, have stated that "[w]e support the need for an independent federal judiciary and recognize the desirability of judges expressing diverse points of view and reflecting different value judgments. In our opinion, peremptory transfers would not compromise these important considerations."[21] A slightly different theory has been presented by Russell R. Iungerich:

> When one considers that the peremptory challenge merely substitutes one independent federal judge for another, it is hard to see any threat to judicial independence. The threat to judicial independence stems from the fact that the challenged judge, if challenged often enough, may ultimately change his or her mind about some pattern or conduct. If the challenged judge has indeed been abusing authority, but then corrects the mistakes, judicial independence surely has not been undermined.[22]

IMPACT ON ATTORNEYS

Those who oppose judicial peremptory challenges suggest that the procedure places attorneys in an awkward position. If the system is available, attorneys feel compelled to invoke the challenge for even the slightest of reasons, fearing that if they do not, they will be open to malpractice suits by clients who are unsuccessful in their litigation.[23]

20/ See, e.g., American Bar Association Recommendations, in Hearings on H.R. 7473 and H.R. 7817, supra note 11, at 53.

21/ New York City Bar Association, supra note 1, at 238.

22/ Russell R. Iungerich, "The Time Has Come," Los Angeles Lawyer (September, 1980) 16, 19.

23/ Chaset, supra note 4, at 63.

Opponents also claim that the peremptory challenge procedure strains relationships between attorneys and judges to a greater extent than procedures which require cause to be established before a substitution is allowed.

Those who support peremptory challenge procedures generally deny these allegations. First, they disagree with the suggestion that attorneys are quick to invoke challenges for fear of malpractice suits. Instead, they insist that challenges are exercised with great caution. Second, they believe that imbroglios over the sufficiency of a challenge in systems requiring the establishment of cause are far more likely to strain relationships between attorneys and judges than the relatively dispute-free process of peremptory challenges.[24/] For example, Senator Bayh has argued that the procedure does not create ill-feeling among judges because the allegations of bias are pro forma.[25/]

24/ "Disqualification of Judges for Prejudice or Bias-- Common Law Evolution, Current Status and the Oregon Experience," Oregon Law Review, 48(1969), 311, 401 [hereinafter cited as Oregon Study]. See also Chaset, supra note 4, at 58; and remarks of Senator Birch Bayh in Hearings on S.B. 1064, supra note 8, at 15. Cf. Martin, supra note 7, at 161.

25/ See Hearings on S. 1064, supra note 8, at 15.

IMPACT ON THE PUBLIC

Opponents suggest that peremptory challenges undermine public confidence in the judiciary.[26/] To them, any process which emphasizes variations in the judicial system is dangerous and may lead litigants to draw erroneous conclusions about it.[27/] They fear that litigants may perceive that justice varies according to the judge and that their chance for success is a function of which judge hears the case rather than upon the merits of their case.[28/] This belief is perhaps best expressed by Edward Burg. To him "[p]eremptory challenges are inadequate because they promote the view of the judicial process as one akin to roulette."[29/]

26/ See Chaset, supra note 4, at 62; Coberly, supra note 2, at 1221; Committee on Federal Courts, supra note 1, at 237; "Disqualification of Judges for Bias In the Federal Courts," supra note 5, at 1438; Brian P. Leitch, "Judicial Disqualification in the Federal Courts: A Proposal to Confirm Statutory Provisions to Underlying Policies," Iowa Law Review, 67 (March, 1982), 525, 545; and remarks of Assistant Attorney General Alan A. Parker in Hearings on H.R. 7473 and H.R. 7817, supra note 11, at 222 and 224. Workman and Arends have expressed this view as follows: "Far from increasing public confidence in the judicial system, enactment of a system of peremptory challenges would serve only to reinforce any existing belief that judges are not to be trusted and that the system, rather than being rational, is designed to allow full play for legal maneuvering and sharp practice." Thomas Workman and Vicky Arends, "A Tool For Abuse," Los Angeles Lawyer (September, 1980), 10, 15.

27/ See, e.g., Burg, supra note 1, at 1477.

28/ One opponent has expressed this view thusly: "To the extent that it disqualifies judges who might have appeared partial in a given case, the peremptory challenge approach would serve to improve the public image of the judiciary. When the challenge is exercised to avoid an unsatisfactory result, however, it would undermine public confidence in the courts by disparaging the impartiality of judges." Gary L. Karl, "Disqualification of Federal District Court Judges for Bias or Prejudice: Problems, Problematic Proposals and a Proposed Procedure," Albany Law Review, 46(Fall, 1981), 229, 244.

29/ Burg, supra note 1, at 1480.

Proponents do not accept this view. They claim that peremptory challenges enhance public confidence in the judiciary.[30/] Underscoring their belief is the philosophy that a trial must not only be fair but "appear" to be fair.[31/] To proponents, anyone who sincerely believes that a particular judge cannot give them a fair trial should not be required to try his case before that judge.[32/] Otherwise, the litigant, and ultimately the public at-large, will become disillusioned with, and distrustful of, the entire judicial process.

IMPACT ON JUDICIAL ADMINISTRATION

Frequency of Use. Those who view judicial peremptory challenge procedures unfavorably generally assume that they will be exercised with great regularity.[33/]

30/ See Aronson, supra note 11, at 458; Susan E. Barton, "Judicial Disqualification in the Federal Courts: Maintaining an Appearance of Justice Under 28 U.S.C. sec. 455," University of Illinois Law Forum, 4(1978), 863, 881; New York City Bar Association, supra note 1, at 234-35; "Disqualification of Judges for Bias in the Federal Courts," supra note 5, at 1437; Neal A. Jackson, "Allow Peremptory Challenge of Federal District Judges," Litigation News, 6(July, 1981), 3,4; Slonim, supra note 13.

31/ See, e.g., remarks of Chief Justice Fred Struckmeyer in Hearings on S. 1064, supra note 8, at 66.

32/ Coleman, supra note 12, at 6, quoting the American Bar Association Standards Relating to Trial Courts. See also Committee on Judicial Administration, Standards Relating to Trial Courts (Chicago, American Bar Association, 1976), sec. 2.32, at 51-52; Committee on Federal Courts, supra note 1, at 238, Iungerich, supra note 22, at 16 and 19; and remarks of Senator Birch Bayh in Congressional Record--Senate, 92d Cong., 1st sess. May 17, 1971, vol. 117, at 15268.

33/ See Committee on Federal Courts, supra note 1, at 237; and Federal Courts Committee, The State Bar of California, Report and Recommendations on Permissive Substitution of Federal District Judges, approved by the Board of Directors, May 1, 1984.

They believe this to be especially true in multi-judge courts where there is an impersonal setting and lawyers practice before the same judge infrequently.[34/] To opponents, large numbers of challenges will have dire consequences for the administration of justice including delay and excessive personnel and monetary costs.

A related concern is that certain judges will be singled out and challenged frequently. These "blanket challenges," opponents claim, render judges incapable of handling certain types of litigation "simply because of a position taken by the office of district attorney, or public defender, or by a law firm."[35/]

Those who view peremptory challenges favorably generally assume that the challenges will not be exercised with any degree of regularity.[36/] They believe that attorneys will not risk offending judges by callously exercising the challenge for fear of reprisal in subsequent cases before the same judge.[37/] Moreover, they believe that attorneys will refrain from exercising the challenge because of their respect for the judiciary and because of the uncertainty of who will be the replacement judge.[38/]

34/ See, e.g., Burg, supra note 1, at 1470.

35/ Workman and Arends, supra note 26, at 12. See also Burg, supra note 1, at 1472, and Coberly, supra note 2, at 1219.

36/ New York City Bar Association, supra note 1, at 239.

37/ See Solberg v. Superior Court, 561 P.2d 1148, 1157 (1977). See also Aronson supra note 11, at 458; and David C. Hjelmfelt, "Statutory Disqualification of Federal Judges," University of Kansas Law Review, 30(Winter, 1982), 255, 256. Cf Levinson, supra note 3, at 283 and n. 80.

38/ See Burg, supra note 1, at 1469; and Hjelmfelt, supra note 37.

Delay. There is considerable controversy about how much delay is caused in states using judicial peremptory challenges. Delay is often cited by opponents of the concept as one of its chief negative consequences.[39/] For example, Edward Burg speculates that "[e]specially in smaller counties, the filing of a peremptory challenge may result in ... excessive delay, because the trial is put off until a temporary out-of-county judge can be brought in to preside."[40/] He further notes that "[e]ven large counties may face similar problems when word gets around that only one judge is currently available for trial."[41/] Others take this reasoning a step further and hypothesize that even where many judges are available, delay will result. For example, Senator Edward J. Gurney has expressed the concern that cases finally working their way up the calendar will be placed at the bottom of other dockets after a peremptory challenge is exercised. To him "this would be a terrible hardship on the parties."[42/] To others, the resulting delay would be a threat to the broader concept of due process of law.[43/] For example, Alan J. Chaset writes that "the peremptory challenge is an end run that subverts rather than serves the ends of justice and due process."[44/]

39/ See Bartels, supra note 18, at 451; "Change of Venue and Change of Judge in a Civil Action in Indiana: Proposed Reforms," Indiana Law Journal, 38(1963), 289, 290 and 294; and Leitch, supra note 26, at 545. See also Aronson, supra note 11, at 457; Chaset, supra note 4 at 48; Jackson, supra 30, at 3; remarks of Senator Edward Gurney in Hearings on S.1064 supra note 8 at 19-20; and Don R. Sensabaugh, "Judicial Ethics --Recusal of Judges--The Need for Reform," West Virginia Law Review, 77(June, 1965), 763, 775.

40/ Burg, supra note 1, at 1472. See also "Disqualification of Judges for Bias in the Federal Courts," supra note 5, at 1438; and remarks of Senator Edward J. Gurney in Hearings on S. 1064, supra note 8, at 30.

41/ Burg, supra note 1, at 1472-73.

42/ Hearings on S. 1064, supra note 8, at 31. See also Karl, supra note 28, at 240.

43/ Coberly, supra note 2, at 1221.

44/ Chaset, supra note 4, at 57.

A related criticism is that judicial peremptory challenge procedures will disrupt calendaring practices, especially in those jurisdictions which use individual calendars.[45/] In these courts cases would either have to be incorporated into other judges' dockets or lose their priority of filing. Not only would it be confusing for the court clerks, but the attorneys and parties would have to juggle their schedules to comport with the substitute judge's docket. The resulting confusion and delay would outweigh any possible advantages.

Proponents of the concept argue that excessive delays will not result.[46/] Some even claim the converse, that peremptory challenges may actually facilitate litigation at several stages of the process. Senator Ernest Hollings, for example, argues that cases will be expedited because judicial peremptory challenge procedures are much more efficient than the disqualification procedures used in other states.[47/] Others, including Richard Coleman, suggest that peremptory challenges "encourage settlement in civil cases and plea bargaining in criminal cases" and "reduce appeals" in both.[48/] Similarly, United States

---

45/ Bartels, supra note 18, at 451; Karl, supra note 28, at 239,and 241; and Workman and Arends, supra note 26, at 14-15. See also letter of California Chief Justice Donald Wright in Hearings on S. 1064, supra note 8, at 57.

46/ Chicago Bar Association, supra note 12, at 10; Oregon Study, supra note 24, at 401 and n. 487; Federal Courts Committee, supra note 33, at 13; New York City Bar Association, supra note 1, at 236 quoting a position of the National Legal Aid and Defenders Association; Kobrin, supra note 11, at 634; and remarks of Senator Ernest Hollings, in Hearing on S. 1064, supra note 8, at 31.

47/ "Disqualification of Judges for Bias in the Federal Courts," supra note 5, at 1437.

48/ Coleman, supra note 12, at 6. See also Hearings on H.R. 7473 and H.R. 7817, supra note 11, at 200-01.

District Judge Edward Divitt has suggested that peremptory challenges may reduce the number of jury trials and thereby contribute to the efficient processing of cases.[49/]

Proponents also deny that delays will result from last minute challenges. Today, they claim, procedures in all states are designed to avoid this problem.[50/] Moreover, in the master calendar system there should be "simply no problems at all." John Frank explains why. "It was a fluke," he argues, that the case "went to judge A, and it could just as well have gone to judge B. You just swap them around. That presents no difficulties."[51/]

Costs. Those who oppose judicial peremptory challenges argue that such provisions will lead to "an unnecessary loss of time and expense."[52/] More bench time is lost than in systems which do not utilize the procedures because judges will be required to travel more frequently from one jurisdiction to another to hear cases, especially in one-judge counties.[53/] The loss of bench time may even result in a need to employ additional judges.[54/]

49/ Edward J. Devitt, "Federal Civil Jury Trials Should Be Abolished," "American Bar Association Journal, 60(May, 1974), 570, 572.

50/ See remarks of Senator Ernest Hollings in Hearings on S. 1064, supra note 8 at 31; and remarks of John Frank, in Hearings on S. 1064, supra note 8, at 40-41. See also New York City Bar Association, supra note 1, at 238; Iungerich,, supra note 22, at 19; and Kraig J. Marton, "Peremptory Challenges of Judges: The Arizona Experience," Law and The Social Order (1973), 95, 101.

51/ John Frank, Hearings on S. 1064, supra note 8, at 41.

52/ "Change of Venue and Change of Judge in a Civil Action in Indiana: Proposed Reforms," supra note 39, at 296. See also Burg, supra note 1 at 1473; and Aronson, supra note 11, at 458.

53/ Coberly, supra note 2, at 1219.

54/ See, e.g., Sensabaugh, supra note 39, at 776.

Opponents have also suggested several areas where monetary costs may escalate if peremptory challenges are used. First, judges must be compensated for their mileage when they travel from their home base. If they are assigned out of their district for any period of time, they must also be reimbursed for their lodging expenses. Moreover, if so much bench time is lost that additional judges must be seated, then the obvious costs of salary, retirement and fringe benefits will be incurred, not to mention the substantial costs in the legislative battle to obtain new judges.

Advocates of judicial peremptory challenge procedures generally do not address the subject of cost. However, most intimate that the expenses will not outweigh the benefits. Some have suggested that the "fear is unfounded because in multi-judge courts the change involves little more than transferring some paperwork next door or across the street."[55/] Others have even advanced the argument that costs will be less in peremptory challenge systems because procedures are simple and not time-consuming as in those systems requiring cause to be established at a judicial hearing.[56/]

ABUSES OF THE SYSTEM

One of the most frequently expressed concerns about peremptory challenge procedures is that they implicity allow "judge-shopping".[57/] The term has highly

---

55/ Marton, supra note 50, at 102.

56/ See Id.

57/ Judge-shopping is defined as changing a judge in an attempt to secure one more favorable toward the moving party. See Marton, supra note 50, at 103. The California Supreme Court has defined the purpose of judge-shopping as removing the assigned judge from the case on grounds other than a belief that he is personally prejudiced. Solberg v. Superior Court, 19 Cal.3d 182, 561 P.2d 1148, 1155, 137 Cal. Rptr. 460 (1977). Gary L. Karl has suggested that "judge-shopping occurs when a party attempts to disqualify a judge in an effort to avoid his expected adverse decision." Karl, supra note 28, at 241, n.98.

negative connotations in this country and nearly everyone, including proponents of the challenge, philosophically opposes the idea.[58] An unidentified writer in the Harvard Law Review summarizes this view:

> Some judges are more competent than others, and some may be thought to favor plaintiffs or defendants in particular types of actions. Fair administration would seem to require that the power of the litigant to choose his own judge on such grounds be minimized.[59]

Even opponents of peremptory challenges, however, do not uniformly condemn the idea of seeking a new judge if legitimate reasons are involved.[60] Thus, the debate does not actually focus on whether judge-shopping will occur, for by definition it will.[61] Rather, the fundamental controversy concern the reasons for which it will be invoked.

Proponents suggest that there are many legitimate reasons for exercising the challenge. To them it is a useful way of dealing with judges who are emotionally, physically or intellectually unable to handle certain cases.[62] It is

---

58/ Id.

59/ "Disqualification of Judges for Bias In the Federal Courts," supra note 5, at 1437-38.

60/ Karl, supra note 28, at 241.

61/ Some proponents argue that judge-shopping does not take place. To them calling the exercise of peremptory challenges judge-shopping is both technically wrong and a misnomer. Affiants, they claim, are not seeking a special judge. Rather, they are rejecting an assigned one. Hence they are judge-rejecting not judge-shopping. See, e.g., Chicago Bar Association, supra note 12, at 11-12. See also Iungerich, supra note 22, at 19.

62/ New York City Bar Association, supra note 1, at 234; and remarks of John Frank in Hearings on S. 1064. supra note 8, at 41.

also a useful way of coping with judges who have intolerable personal idiosyncrasies, hold extreme philosophical views or levy widely disparate sentences.[63/] In other words, they believe that judicial peremptory challenge procedures will have a moderating effect on judges.[64/] This view is well summarized by Richard Coleman:

> [They are useful] for coping with the judge who gives 20-year sentences in cases where his or her colleagues average five to 10 years for similar cases; or the judge who gives only one year probation in the same situation; or the judge who has a blind spot for one particular kind of case, such as not believing there is such a thing as a valid patent; or the judicial bully who so tyrannizes or so ridicules counsel that the litigant is not able to have his or her case fully presented or fairly received by the jury.[65/]

Proponents also point out that the system provides an indirect mechanism for the bar to evaluate judges. This, they claim, "could lead to salutary changes in judicial performance and behavior."[66/]

Those who oppose the peremptory challenge system offer two major rebuttals. First, they argue that the activities of extreme judges, especially sentencing practices, are best handled by appellate review or by other

---

63/ See, e.g., Chicago Bar Association, supra note 12, at 10-11; and Hearings on H.R. 7473 and H.R. 7817, supra note 11, at 52.

64/ Karl, supra note 28, at 243.

65/ Coleman, supra note 12, at 6.

66/ New York City Bar Association, supra note 1, at 238. See also pp. 235 and 236. See also Hearings on H.R. 7473 and H.R. 7817, supra note 11, at 200.

mechanisms.[67] Second, they point out that even if the aforementioned practices are legitimate, the system nonetheless allows several invidious practices to take place. Among the potential abuses are substituting judges because of their race, religion, sex or views on substantive issues.[68] For example, Edward Burg notes that Judge Higginbotham could have been excluded from hearing employment discrimination cases solely because he was black, Judge Motley could have been replaced in sex discrimination cases solely because she was female, and Judge Sirica could have been removed from the Watergate trials because of his interest in the publicity the case had brought him.[69] To Burg and other opponents of peremptory challenges, "[t]hese are not meritorious reasons for disqualification and any procedure which defers to them ought to be resisted."[70]

Another potential abuse is substituting judges because of their sentencing practices.[71] Unlike proponents, those who oppose peremptory challenges believe that the procedure unfairly allows defendants in criminal cases "to narrow the range of judicial discretion by disqualifying judges [who are] more likely to hand down a severe, but legal, sentence."[72] Similarly, opponents anticipate

---

67/ See Bartels, supra note 18, at 450; Karl, supra note 28, at 242-43; and remarks of Assistant Attorney General Alan A. Parker in Hearings on H.R. 7473 and H.R. 7817, supra note 11, at 255. See also New York City Bar Association, supra note 1, at 236.

68/ See Chaset, supra note 4, at 56; and Karl, supra note 28, at 242. See also Committee on Federal Courts, supra note 1, at 236 and 241; and remarks of Judge Walter Hoffman in Hearings on H.R. 7473 and H.R. 7817, supra note 11, at 112.

69/ Burg, supra note 1, at 1476.

70/ Ibid.

71/ See, e.g., Karl, supra note 28, at 241.

72/ Id., at 242.

that attorneys will abuse the system by making the challenge for "purely technical" reasons such as obtaining a postponement, avoiding assignment to a single judge branch court,[73] or removing a regularly sitting judge in the hope of benefiting from a less experienced substitute.[74]

SUMMARY

The use of judicial peremptory challenges remains highly controversial. In essence, those in favor of the idea are willing to tolerate some negative consequences and abuses of the system in order to preserve what they perceive to be an essential means of guaranteeing the fundamental right to a fair trial.[75] To them, the problems will be minor because peremptory challenges will be invoked only rarely. Indeed, when invoked, there will be very few additional costs and relatively little delay in the judicial process. Further, the impact of peremptory challenges will have a salutary effect on judges and will enhance public confidence in the administration of justice.

Conversely, opponents of the procedure believe that the administrative problems caused by peremptory challenges, the negative affect on attorneys, judges and the public, and the potential abuses of the system simply are too great to warrant their adoption. To them, systems which allow substitutions upon a showing of cause are adequate to guarantee the right to a fair trial.

73/ Workman and Arends, supra note 26, at 12.

74/ Solberg v. Superior Court, supra note 57, at 1156.

75/ See "Change of Venue and Change of Judge in a Civil Action in Indiana: Proposed Reforms," supra note 39, at 300; New York City Bar Association, supra note 1, at 239; and Oregon Study, supra note 24, at 401.

Both sides in the controversy have credible arguments. Many of the hypotheses, however, can only be resolved after a thorough investigation of how peremptory challenges are working in the states that use them. We now turn to a discussion of what has been learned about their operation to date.

Chapter V:

The Present State Of Knowledge About Peremptory Challenges

CHAPTER V

THE PRESENT STATE OF KNOWLEDGE ABOUT PEREMPTORY CHALLENGES

Very little is known about the impact and consequences of judicial peremptory challenges. Indeed, many, if not most, of the arguments advanced to support or oppose the concept are based on conjecture and speculation rather than solid empirical evidence. Moreover, there is considerable controversy about what the empirical studies actually reveal. Most scholars have concluded that the studies indicate peremptory challenge procedures are working well. For example, Gary L. Karl, referring to studies conducted in California and Oregon, has stated, "[b]oth of these projects reached favorable conclusions regarding the statute effective in their respective states."[1/] A few scholars, however, have rejected this idea. For example, Mark T. Coberly claims that "surveys conducted in states having such systems have produced statistics to the

---

1/ Gary L. Karl, "Disqualification of Federal District Court Judges for Bias or Prejudice: Problems Problematic Proposals and a Proposed Procedure," Albany Law Review, 48 (Fall, 1981), 229, 237. See also American Bar Association, Young Lawyers Division, Report to the House of Delegates, February, 1980, at 4; Robert H. Aronson, "Disqualification of Judges for Bias or Prejudice -- A New Approach," Utah Law Review, 1972 (Fall, 1972), 448, 458; "Disqualification of Judges for Bias in the Federal Courts," Harvard Law Review, 79 (May, 1966), 1435, 1438; Peter A. Galbraith, "Disqualifying Federal District Judges Without Cause," Washington Law Review, 50 (1974), 109, 139; Ernest J. Getto, "Peremptory Disqualification of the Trial Judge," Litigation, 1 (Winter, 1975), 22, 24-25; Remarks of John Frank in Hearings on S. 1064 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary, 93d Cong., 1st Sess. (1971-73), 40 [hereinafter cited as Hearings on S. 1064]; Don R. Sensabaugh, "Judicial Ethics -- Recusal of Judges -- The Need for Reform," West Virginia Law Review, 77 (June, 1965), 763, 775; "State Procedures for Disqualification of Judges for Bias and Prejudice," New York Law Review, 42 (May, 1967), 482, 502; Statement of John Cleary in Hearings on H.R. 7473 and H.R. 7817 Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary, 96th Cong., 2d Sess. (June 6 and 9, 1980), 204 [hereinafter cited as Hearings on H.R. 7473 and H.R. 7817]; and statement of Richard J. Wilson, Id., at 204.

contrary."[2/] To him, the studies indicate that the peremptory challenge procedure "seems to be used as a device to effect delay, to procure sympathetic judges, or perhaps to avoid judges whose attitudes are unknown."[3/]

A review of the literature reveals that only one major study about the frequency of peremptory challenges has been conducted, although five small-scale investigations have been undertaken. Other studies have been conducted to elicit perceptions held by judges and lawyers who reside in states using the procedure.

The following is a summary of those studies which were completed prior to 1985. They are arranged in order of thoroughness. Both specific and overall conclusions are presented. Findings which tend to support and those which tend to oppose the peremptory challenge concept are quoted directly. Hopefully, this will avoid a troublesome problem sometimes occurring in assessments of these studies. It is not unusual to find proponents and opponents of the concept selectively quoting from the same study to support their particular point of view.

STUDIES ABOUT THE FREQUENCY OF PEREMPTORY CHALLENGES

Several studies have been undertaken to determine the frequency with which peremptory challenges are exercised in the states. These studies also explore to varying degrees certain consequences of high and low rates of challenge.

2/ Mark T. Coberly, "Caesar's Wife Revisited -- Judicial Disqualification After the 1974 Amendments," Washington and Lee Law Review, 34 (1977), 1201, 1218.

3/ Id., at 1219. Other opponents of the peremptory challenge concept disagree with Coberly. For example, dissenters to the New York City Bar Association Report on peremptory challenges, a report which favors extending the idea to the federal level, have concluded: "It appears that the procedures have worked reasonably well in the states... ." New York City Bar Association, Committee on Federal Courts, "A Proposal for Peremptory Challenges of Federal Judges in Civil and Criminal Cases," Record of the New York City Bar Association, 36 (April, 1981), 231, 241.

CHAPTER V

THE PRESENT STATE OF KNOWLEDGE ABOUT PEREMPTORY CHALLENGES

Very little is known about the impact and consequences of judicial peremptory challenges. Indeed, many, if not most, of the arguments advanced to support or oppose the concept are based on conjecture and speculation rather than solid empirical evidence. Moreover, there is considerable controversy about what the empirical studies actually reveal. Most scholars have concluded that the studies indicate peremptory challenge procedures are working well. For example, Gary L. Karl, referring to studies conducted in California and Oregon, has stated, "[b]oth of these projects reached favorable conclusions regarding the statute effective in their respective states."[1/] A few scholars, however, have rejected this idea. For example, Mark T. Coberly claims that "surveys conducted in states having such systems have produced statistics to the

---

1/ Gary L. Karl, "Disqualification of Federal District Court Judges for Bias or Prejudice: Problems Problematic Proposals and a Proposed Procedure," Albany Law Review, 48 (Fall, 1981), 229, 237. See also American Bar Association, Young Lawyers Division, Report to the House of Delegates, February, 1980, at 4; Robert H. Aronson, "Disqualification of Judges for Bias or Prejudice -- A New Approach," Utah Law Review, 1972 (Fall, 1972), 448, 458; "Disqualification of Judges for Bias in the Federal Courts," Harvard Law Review, 79 (May, 1966), 1435, 1438; Peter A. Galbraith, "Disqualifying Federal District Judges Without Cause," Washington Law Review, 50 (1974), 109, 139; Ernest J. Getto, "Peremptory Disqualification of the Trial Judge," Litigation, 1 (Winter, 1975), 22, 24-25; Remarks of John Frank in Hearings on S. 1064 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary, 93d Cong., 1st Sess. (1971-73), 40 [hereinafter cited as Hearings on S. 1064]; Don R. Sensabaugh, "Judicial Ethics -- Recusal of Judges -- The Need for Reform," West Virginia Law Review, 77 (June, 1965), 763, 775; "State Procedures for Disqualification of Judges for Bias and Prejudice," New York Law Review, 42 (May, 1967), 482, 502; Statement of John Cleary in Hearings on H.R. 7473 and H.R. 7817 Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary, 96th Cong., 2d Sess. (June 6 and 9, 1980), 204 [hereinafter cited as Hearings on H.R. 7473 and H.R. 7817]; and statement of Richard J. Wilson, Id., at 204.

The Oregon Law Review Study (1969). The most extensive study to date was conducted by the staff of the Oregon Law Review in 1969.[4] Students analyzed the 259,000 cases filed in Oregon's circuit courts of general jurisdiction between May 2, 1955 and January 1, 1968. They found that 1,392 peremptory challenges were exercised within that time frame. Thus, in only 0.538% of the cases were judges disqualified. They concluded that "these do not appear to be alarming frequencies."[5] Other results are summarized below.

Filing by Firms. The staff claimed that the most striking finding of their study was the "inordinate frequency of filing by a very few firms."[6] One firm initiated 31.1% of the challenges. Almost 99% of these were directed toward a single judge. Unfortunately, the reason why the challenges were made was not presented. It was noted, however, that 94.5% of all challenges to this judge resulted in the assignment of a substitute judge from within the district where the motion was filed. Thus the largest number of possible substitutes from another district in this instance was 24 or 5.5% of the occasions.[7]

Five other firms accounted for 18.5% of the challenges.[8] Substitute judges from other districts were required 43 times. Again, the reasons why most of the firms exercised the challenge were not stated. In one instance, however, the staff found that the judge against whom a firm filed 66 of its 67 challenges

---

4/ "Disqualification of Judges for Prejudice or Bias -- Common Law Evolution, Current Status and the Oregon Experience," Oregon Law Review, 48 (1969), 311-410.

5/ Id., at 380.

6/ Id.

7/ Id., at 380-81.

8/ Id., at 381.

had cited one of its senior partners for contempt. This partner accounted for all of his firm's challenges.[9/]

Filing By Attorneys. Thirteen attorneys accounted for 701 or 50.3% of all challenges. In other words, only about one-half of one percent of all active attorneys in Oregon made one-half of the total disqualifications. Again, specific reasons why attorneys exercised the challenge were not investigated. However, some of the affidavits which were filed by the challenging party did contain the reasons for the challenge despite the fact that explanations are not required. A representative sample included allegations that the judge:

(1) was unduly harsh to persons convicted of marijuana violations;

(2) did not like post-conviction remedies and conspired to circumvent them;

(3) was bound to the defendant;

(4) played cards with the affiant's husband;

(5) did not like "out-of-town" people;

(6) did not like labor unions;

(7) did not like insurance companies;

(8) had previously tried an identical case;

(9) had informed affiant never to appear in court again;

(10) had informed affiant that he would "throw the book at him";

(11) would not permit jury views in personal injury actions; and

(12) was retiring.[10/]

It was further noted that many of the affidavits contained allegations that, if proven, would have resulted in disqualification for cause.[11/]

9/ Id., at 382.

10/ Id., at 397, n. 478.

11/ Id.

Type of Case. Of the challenges, 45.5% were made in actions at law, 32.5% in equity cases and 22.3% in criminal cases.[12] However, the rate of challenging in criminal cases was substantially higher than in the other two categories, being approximately one and one-half times greater than for all types of cases.[13]

Judges. Seventy-three (82%) of the 89 judges sitting during the thirteen-year period under study were challenged at least once. Two judges were challenged an average of 18 times per year. The remainder were challenged an average of one to four times per year. The staff concluded that the high frequency of challenges to the two judges provoked a "minimum of disruption to court administration, since not one of the 143 challenges necessitated the assignment of a judge pro tem or a judge from outside the district in which each challenge was made."[14]

Counties. The study also examined the distribution of challenges among counties. No challenges were made in five counties. Of the remaining 31 counties, thirteen had rates above the average and 16 had rates below the average. Two had rates which equalled the average rate. This led the students to conclude that "[i]t is fair to say that the challenges were well distributed throughout the 36 counties, if relative caseload adjustments are made."[15]

Size of District. Taking the analysis one step further, a specific attempt was made to assess the impact of peremptory challenges in two-judge

---

12/ Id., at 384.

13/ Id., at 400.

14/ Id., at 386-87.

15/ Id., at 391.

districts. At issue was whether attorneys in these districts would exercise a challenge to assure having the matter assigned to the remaining judge. They found that although 18.8% of the cases were filed in two-judge districts, only 12.3% of the challenges were invoked there. With the exception of four-judge districts, all other districts had frequencies "well in excess of the two-judge districts."[16/] These and other data led the staff to conclude "that there is precious little evidence of judge-shopping in those districts where the best opportunity for such practices exists...."[17/]

Delay. The staff also made an attempt to investigate whether peremptory challenges caused delays in the judicial system. They found this extremely difficult because "any number of factors could affect the time log."[18/] However, after examining the lapse time between the disqualification of a judge and the entry of an order by a substitute judge they found "a distinct increase in the time lag in one-judge districts when compared with multi-judge districts."[19/]

> In the former districts, a substitute judge had been appointed and had entered an order within 10 days of the disqualification in only 20% of the cases. In the multi-judge districts, a substitute judge had entered an order within 10 days in 60% of the cases.[20/]

These facts led the staff to conclude that "there is some indication that the statutes may be used as a delaying tactic in some counties...."[21/]

16/ Id., at 393.

17/ Id., at 394.

18/ Id., at 398, n. 483.

19/ Id.

20/ Id.

21/ Id., at 398.

Miscellaneous. A number of other conclusions were reported in the study. First, the rate of challenges to pro tem and visiting judges was approximately two and one-half times the rate of all challenges.[22/] Second, as the annual caseload of a judge increased, the rate of challenges increased disproportionately.[23/] Third, judges with 10 to 20 years of experience were challenged more frequently than judges with less than 10 or more than 20 years of experience.[24/] Finally, challenges were made on behalf of attorneys at a much greater rate than on behalf of parties.[25/]

Perceptual Information. In addition to the statistical analysis about how peremptory challenges were working in Oregon, the law review staff interviewed a number of judges and attorneys to elicit perceptual data. They reported that "[p]ractically without exception, each judge was satisfied with the system, had no major recommendations, and thought that the few abuses were far outweighed by the benefits derived."[26/] The responses of attorneys varied. Those who made a large number of challenges were "without exception" satisfied with the system. Other attorneys were "far more restrained in their enthusiasm for the statute."[27/]

On the basis of the statistical and perceptual data the staff drew the following overall conclusions:

22/ Id., at 400.

23/ Id.

24/ Id.

25/ Id.

26/ Id., at 399.

27/ Id.

> This study has revealed that the Oregon...[peremptory challenge] statutes are being used with restraint, and that they are responsible for a minimum of disruption to court administration. Most persons who invoke the statute with any degree of frequency have apparent bona fide reasons for doing so.28/

The Judicial Council of California Study (1962). Four years after California enacted its first peremptory challenge statute the Administrative Office of Courts was instructed by the Judicial Council to conduct an investigation of the procedure with a view toward recommending improvements.29/ The study covered the period January 1 through June 30, 1962 and included all challenges in superior, municipal and justice courts. The investigators found that 738 challenges were filed in 81 of the state's 428 trial courts.30/ Over one-half of all challenges were filed in two of the 428 courts. Only one challenge was filed in each of the 34 courts and two in 14 others. Only seven courts had more than ten peremptory challenges and all contained four or more judges.31/

A total of 111 superior court judges received peremptory challenges. Only ten received more than ten. The highest number of challenges directed toward a single judge was 80, and one firm accounted for 69 of those.32/ The second highest number of challenges to any one judge was 28. No reasons were offered for these higher rates of challenges.

28/ Id., at 398.

29/ Judicial Council of California, "Disqualification of Judges," 1962 Annual Report of the Administrative Office of the California Courts (January, 1963), 34-39.

30/ Id., at 36.

31/ Id., at 38.

32/ Id.

In municipal courts, 67 judges were challenged. Only six had ten or more. The highest number directed toward a municipal judge was 17.[33/]

It was anticipated that peremptory challenges might be a problem in one-judge courts because the chairman of the Judicial Council in Sacramento was required to replace locally disqualified judges. The researchers found, however, that the number of assignments "amounted to less than six percent of the total assignments in the period [being studied]."[34/] There were 67 challenges in 35 of the 343 one-judge courts. Three courts accounted for approximately one-third of the challenges and three law firms accounted for most of these.[35/]

The Council was also concerned about the impact of peremptory challenges in two-judge courts. They were given separate consideration in the study because of the premise that an attorney who exercises challenges in these jurisdictions "in effect, selects the judge to try the case."[36/] During the period studied, 48 challenges were filed in 22 of the 37 two-judge courts. One court accounted for one-sixth of the total.

Of the challenges, 84% (N=623) were made in courts with three or more judges.[37/] The 120-judge Los Angeles Superior Court accounted for 45% of these challenges and the 49-judge Los Angeles Municipal Court another 16%.[38/] The

---

33/ Id., at 39.

34/ Id., at 36.

35/ Id.

36/ Id., at 37.

37/ Id.

38/ Id., at 38.

22-judge San Francisco Municipal Court accounted for four percent of these challenges.

The researchers found an "indication" that the number of reported challenges in these courts might be misleading. They concluded that some multi-judge courts may "avert the filing of a peremptory challenge by not setting a case before a judge when it is known he will be peremptorily challenged."[39/]

Finally, the investigators found that about three out of four challenges were filed in civil cases.[40/] In superior courts 90% of all challenges were filed in civil matters. Slightly more than one-half of these challenges were exercised by the defense. In criminal cases defense attorneys accounted for 95% of the challenges.

After reviewing the above findings the investigators concluded that the use of peremptory challenges "did not cause any serious problems" during the period under study.[41/] They noted that "[c]hallenges were filed in a relatively small number of courts, and the great majority occurred in multiple-judge courts where judicial replacements are readily available and so did not require the assignment of an outside judge."[42/]

39/ Id., at 37.

40/ Id., at 39.

41/ Id., at 34. Apparently the study was subsequently continued through 1984 "with about the same results." See Hearings on S. 1064, supra note 1, at 52, n.2.

42/ Id.

The Arizona Study (1973). In 1973 a study was undertaken to examine the impact of a liberalization in Arizona's peremptory challenge provisions.[43/] Data for the study were gathered from two one-judge counties, two two-judge counties and two multi-judge counties. Two six-month periods were examined: March 1 - August 31, 1971 and the same six-month period for 1972. Careful attention was paid to whether the challenges were frequently invoked, caused delay, resulted in higher costs, were a poor reflection on the judiciary or led to judge-shopping.

Several conclusions emerged. First, the author found that the system did not bring "a flood of challenges" in Arizona.[44/] They were made in only 1.9 percent of the cases during 1971 and two percent of the cases during 1972. Stated another way, there was an average of one challenge for every 53 cases during 1971 and one per every 50 cases in 1972.

With one exception, the highest rate of challenges was found in the multi-judge counties. During 1971, there was a challenge for every 41 cases filed in Maricopa County (Phoenix) and one for every 159 cases in Pima County (Tucson). During 1972 there was one for every 40 cases in Maricopa County and one for every 88 cases in Pima County. In the single-judge and two-judge counties, challenges were infrequent.

Challenges were made at a greater rate in criminal cases than in civil litigation in all six counties during both periods studied. In 1971 they were

---

43/ Kraig Marton, "Peremptory Challenges of Judges: The Arizona Experience," Law and the Social Order (1973), 95-108.

44/ Id., at 108.

invoked more than twice as often in criminal cases. In 1972, challenges were invoked about once in every 56 civil cases and once in every 35 criminal cases.

Second, the author concluded that there was "little evidence that Arizona's system is used, or even can be used, as a dilatory tactic."[45/] This was primarily because of the requirement that the challenge had to be invoked at the early stages of litigation. "Accordingly, the possibility of delay is negligible, or nonexistent."[46/]

Third, it was concluded that the fear of higher costs as a result of liberalizing the procedure was "unfounded." The vast majority of challenges took place in multi-judge counties and this "involved little more than transferring some paperwork next door or across the street."[47/] The author noted that some travel was required in one-judge counties "but the frequency of judge changes in these counties. . . [was] small."[48/]

Fourth, the author found "some merit" to the contention that the peremptory challenge system might have an adverse effect on the reputations of particular judges and subvert public confidence in the judiciary. He reported that one newspaper had attempted to discredit an incumbent judge running for re-election by publishing the number of notices filed against him. In another

---

45/ Id.

46/ Id., at 101.

47/ Id., at 102.

48/ Id.

instance, a judge retired shortly after the number of notices filed against him was made public.[49/] The author concluded, however, that it seemed advisable to let the public know about the challenges so that it could "make a well informed choice in selecting its judges."[50/]

Fifth, the author concluded that there was "little evidence that peremptory challenges. . . [were] being used to select, rather than to disqualify, judges."[51/] Ironically, he found that in two-judge counties, where judge-shopping has the greatest potential, there was a much smaller frequency of challenges than in multi-judge counties.

Finally, the author noted that statistically a challenge was made an average of one time for every 49.7 cases filed during 1972. This was much higher than reported in Oregon where challenges were filed only once in every 202 cases. To him, the greater frequency of challenges in Arizona reflected "a lack of confidence held by those who appear before these judges" and that "such results clearly show the need to further improve the quality of the judiciary in Arizona."[52/]

The Wisconsin Study (1981). In 1981 the Wisconsin Supreme Court was called upon to decide two cases in which circuit court judges had refused to disqualify themselves under the peremptory challenge statute.[53/] It was asked to take

---

49/ Whether the judge resigned because of the notices was not a matter of public record but he did have more notices filed against him in the previous month than any other judge in the state.

50/ Marton, supra note 1, at 103.

51/ Id., at 108.

52/ Id.

53/ State v. Holmes, 106 Wis.2d 31, 315 N.W.2d 703 (1982).

cognizance of statistical information provided by the Office of the Director of State Courts. This information revealed that between January 1 and March 31, 1981 approximately 71,400 cases were filed.[54/] Slightly over 11,100 of these were for criminal matters and nearly 63,000 were for civil matters. During the period studied there were 1,224 challenges made, 496 in criminal cases and 728 in civil cases. Thus, challenges were exercised in less than two percent of all cases: they were invoked in less than five percent of the criminal cases and slightly more than one percent of the civil cases. The Court concluded: "Considered in terms of percentages of total cases, the substitution requests ...[did] not seem to play a role in the operations of the judicial system... ."[55/] It did indicate, however, that the statistical data might mask the degree to which substitution requests "materially impair or practically defeat the ability of the judicial system to dispose of the cases presented."[56/] Consequently, the court decided to review arguments that peremptory challenges caused delays, increased costs, produced inefficiencies and inconveniences, and permitted judge-shopping.

During its investigation the Court found "no hard statistical data on delay" but suggested that common sense indicated that there would be some. They also discovered "that chances for delay are greater in single-judge circuits than in multi-judge circuits."[57/] However, the Court held that it was up to the legislature to balance the costs of delay and the beneficial aspects of the

---

54/ Id., at 722.

55/ Id.

56/ Id.

57/ Id.

legislation unless the statute "practically defeats the exercise of the judicial power or materially impairs the operations of the judicial system."[58/] In this case the justices could not find such a circumstance.

Justice Abrahamson, writing for the Court, also suggested that common sense indicates that peremptory challenges do "cause inefficiencies, inconveniences and increased expenses...."[59/] Nonetheless, the cases in which challenges were exercised were being disposed of although "perhaps in some cases not as efficiently or conveniently or at minimum cost as they might be were there a more restrictive substitution procedure."[60/]

Finally, the Court discussed the argument that peremptory challenges allow judge-shopping. In a footnote it pointed out that if the term means judge selection, the argument is erroneous. The statute does not do that, the court insisted. It "simply gives a litigant the power to disqualify a judge. ...[It] does not allow a litigant to select the judge who shall hear the case."[61/]

Justice Coffey, concurring in the opinion of the Court, argued that the peremptory challenge statute had "a substantial impact on the effective and efficient administration of the courts."[62/] He urged the legislature to re-examine the procedure and take testimony from the judicial branch of government. Nonetheless, like the majority, he could not conclude beyond a reasonable doubt

---

58/ Id.

59/ Id., at 723.

60/ Id.

61/ Id., n. 33.

62/ Id., at 726.

the peremptory challenge statute so impaired the courts' function as to violate the separation of powers doctrine.

The Idaho Administrative Office of Courts Study (1982). In 1982 the Idaho Supreme Court requested the Administrative Office of Courts to undertake a study on the frequency of judicial disqualification.[63/] With the assistance of trial court administrators and administrative judges, the Office prepared a report on the six-month period between June 1 and November 30, 1982. The number of challenges varied from a low of 14 in one district to a high of 116 in another. Other districts had 25, 28, 67, 70 and 90 respectively. They found that high rates were accounted for by challenges to a relatively small number of judges. Indeed, 133 of the 410 challenges (32%) were invoked against three judges. One district magistrate was disqualified 76 times--14 times by one attorney, 26 times by another attorney (seven of those were in DWI cases), 16 times by a third attorney (13 of the 16 were DWI cases), and three times by a fourth attorney. Another district magistrate was disqualified 43 times but rarely more than once by the same attorney. Finally one district magistrate was challenged 14 times, nine of which were by one attorney. Of the 133 challenges to these three magistrates, 104 were invoked in criminal proceedings. Two of the magistrates were challenged about twice as often in criminal cases as in civil proceedings. One magistrate heard only criminal matters and thus was not challenged in civil cases.[64/]

63/ Administrative Office of Courts (Idaho), Disqualification Sample Study (memorandum from Kit Furey to Carl Bianchi, December 3, 1982.

64/ Telephone interview with Kit Furey, Assistant Director, Administrative Office of the Courts, Idaho, March 25, 1985.

The author of the report concluded that "with the three exceptions noted", use of the peremptory challenge did not "cause calendar management problems." However, caveats were offered. First, it was noted that some trial court administrators were scheduling around some of the judges when they knew that there would be a disqualification. Second, it was noted that problems were caused by routine disqualifications in one-judge counties when a substitute had to be brought in to cover for the disqualified judge.

In a memorandum to the Chief Justice accompanying the report, the Administrative Director of Courts offered his own assessment of the study. "It appears," he wrote, "that ...[peremptory challenges] do not cause a general scheduling problem, but that the Rule is most likely to cause problems in its application to individual judges, particularly in one-judge counties."[65/] He speculated about possible positive and negative ramifications which peremptory challenges might have in the future and concluded that "statistics alone" would not provide a definitive answer.

The Montana Attorney General's Report (1979). In January, 1979, the Montana Supreme Court ordered the attorney general to document the number of peremptory challenges between 1974 and 1978 and to make recommendations about any appropriate remedial action which should be taken by the Court.[66/] The study was ultimately confined to instances of "mass disqualification" which was

---

65/ Memorandum from Carl F. Bianchi, Administrative Director of Courts, to Chief Justice Robert E. Bakes, December 29, 1982.

66/ State ex rel. Greely v. District Court of the 4th Judicial District, 590 P.2d 1104, 1108 (Mont. 1979).

defined as situations where judges were challenged 25% or more of the time in criminal cases during any period between 1974 and 1978.[67/]

Information was received from all of Montana's 56 counties. No instances of mass peremptory disqualifications were reported in 46 of them. Ten counties reported frequent disqualifications or mass disqualifications. Carbon County reported that one judge had been challenged six times in 20 cases (30%).[68/] No explanation for the high rate was offered. In Lewis and Clark Counties, two defense attorneys challenged a judge 100% of the time.[69/] Again, no reasons were offered.

In Madison County one judge was challenged 14 times in 52 cases (27%).[70/] The disqualifications were not limited to a single attorney or firm. The challenges were filed because of a dispute about plea bargaining in criminal cases.[71/]

In Ravalli County a defense attorney challenged the local judge before whom he appeared 100% of the time between 1976 and 1978.[72/] Unfortunately, no explanation was offered. Similarly, no explanation was given for why the county

---

67/ Attorney General's Report Concerning the Mass Peremptory Disqualifications of Montana District Judges, 1974-1978, submitted to the Montana Supreme Court, June 11, 1979.

68/ Id., at 7.

69/ Id.

70/ Id.

71/ Id., at 8, and Exhibit D.

72/ Id., at 8.

attorney of Rosebud County consistently disqualified one judge before whom he appeared.[73/]

In several other counties, individual judges were challenged frequently. Unfortunately, the study provided no insight into possible explanations.[74/]

The attorney general made no recommendations for remedial action.[75/] Instead, he quoted with approval the American Bar Association Standards relating to trial courts. To him "the considerations reflected in the commentary create[d] both an expectation and justification for mass disqualification."[76/]

PERCEPTUAL STUDIES

Several studies have been undertaken to elicit perceptual information about the impact of judicial peremptory challenge procedures. They are summarized below.

The California Administrative Office of Courts Study (1969). In 1969 James Hayes, Chairman of the State House Judiciary Committee, asked the Judicial Council to examine how peremptory challenges were working in California, with special attention to the impact of blanket challenges.[77/] He had become interested in the procedure after his committee concluded that the need for additional judgeships in two counties was "in some part, the result of repeated

---

73/ Id.

74/ Id., at 9-10.

75/ Id., at 11.

76/ Id.

77/ Hearings on S. 1064 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary, 93d Cong., 1st Sess. (1971-73), 52.

disqualifications of two of the court's judges by the district attorney and the public defender...."[78/]

The Council asked Ralph Kleps, Director of the Administrative Office of Courts, to investigate the matter. In a letter of inquiry to all presiding superior and municipal court judges as well as all Los Angeles superior court judges, Mr. Kleps noted that there had been some instances where peremptory challenges had been abused, "principally by invoking it on a blanket basis" and asked them to respond to four questions: (1) Had peremptory challenges been used properly by counsel?; (2) In what ways, if any, had they been abused?; (3) Should the California statute be amended and if so, would it be appropriate to permit judges, in cases of repeated use, to submit the challenge to the presiding judge for a determination of whether it should be allowed?; and (4) Did the judges have any additional comments which might be helpful?[79/]

Responses were received from 134 individuals: 41 of the 75 chief judges in municipal courts, 70 of the approximately 200 superior court judges in Los Angeles, and 23 of the 57 chief judges in the superior courts outside of Los Angeles. Sixty-three percent of the municipal court judges indicated that peremptory challenges were "usually used properly by attorneys."[80/] Only eight or 20% of these judges indicated that challenges were "usually used improperly." Seven believed that they did not have sufficient experience to comment.

78/ Id.

79/ Id., at 56-57.

80/ Id., at 54.

Addressing the question about specific abuses of challenges, eleven municipal judges mentioned judge-shopping, three claimed that it was invoked to secure continuances, three acknowledged it was used in blanket fashion and one suggested it was used to retaliate against a judge for a prior ruling.

Ten municipal judges believed that the California statute should not be changed while five believed that it should be repealed. The remainder suggested amendments to improve the law. Of these, 12 thought the statute should be amended to outline a separate procedure in cases of repeated use. They supported the idea suggested in Klep's letter of inquiry that the chief judge, after a hearing, decide whether the challenge should be allowed.

Forty-six percent of the responding Los Angeles Superior Court judges believed that the peremptory challenge statute was usually used properly while 37% believed that it was usually used improperly. The remainder indicated that they had insufficient experience to comment.

Regarding the question about specific abuses of the statute, 24 of the Los Angeles Superior Court judges mentioned judge-shopping. Thirteen suggested that it was invoked to effect continuances and 11 indicated it was used because attorneys feared going before an unknown judge. Three judges believed that the statute was abused because it was used in retaliation against a judge for a prior ruling and three because blanket challenges were exercised.

Seventeen of the Los Angeles Superior Court judges believed that the statute should not be changed while eight thought it ought to be repealed. The remainder suggested amendments; 17 of whom believed that a hearing should be held in cases of repeated use.

Eleven chief judges in superior courts outside of Los Angeles reported that peremptory challenges were usually used properly by counsel while 12 believed that they were generally used improperly. These judges reported more abuses than did the municipal judges and Los Angeles Superior Court judges. Nine reported judge-shopping as an abuse, five reported dilatory practices, four reported that challenges were used to retaliate against a judge for a prior ruling, three reported that they were used to prevent attorneys from appearing before an unknown judge and four reported that challenges were used in blanket fashion. Only two superior court judges thought that the system ought not to be changed while nine believed that it should be repealed. The remainder supported amendments to improve the process. Only six, however, suggested that the statute be amended to provide a hearing for determination by the chief judge in cases of repeated use.

After a thorough review of the perceptual data the report concluded that:

> In view of the substantial number of replies stating that the peremptory challenge statute is usually used properly by attorneys and the fact that about one-half of the superior and municipal courts apparently are not faced with problems warranting a reply to the questionnaire, it would clearly seem there is no basis for recommending the repeal or drastic limitation of the peremptory challenge at this time."81/

Finally, after taking cognizance of the reported abuses, the Office concluded "that various amendments should be made which 'might eliminate'" them.

The California Judicial Council Review (1965). In 1965 the California Judicial Council reviewed the operation of peremptory challenges during previous

---

81/ Id., at 55.

years.[82] Several presiding judges reported that peremptory disqualifications were being made for reasons of trial strategy rather than a belief of prejudice. The Council also found that judges were concerned about the accumulation of challenges against them, particularly because they were not afforded an opportunity to respond to the allegations. Some judges were concerned that a few attorneys were "excessive and persistent" in their disqualification of judges. Still others were concerned about the "wide-spread practice" of circumventing the statute by notifying the assignment judge that if certain judges were assigned they would be challenged at the commencement of trial.

Noting these problems the Judicial Council suggested that it might be beneficial to consider amending the statute to require that the challenge be accompanied by a concise statement of the facts relied upon by the affiant in support of the charge of prejudice.[83] However, the Council was not suggesting that judges be allowed to rule on the adequacy of the allegations. Rather, the purpose of the statement was to draw to the attention of lawyers that the procedure "is not like the peremptory challenge to a juror, but is intended to be based upon cause."[84] The Council also suggested that the statute might be changed to allow the challenged judge an opportunity to file a counterstatement even though no procedure for determining the adequacy of the affidavit would be allowed.

82/ A summary of the proceedings is cited in Hearing on S. 1064, supra note 1, at 53.

83/ Id., n.4.

84/ Id.

The John Frank Study (1971). In preparation for testimony before a United States Senate Subcommittee hearing in 1971, John Frank, an eminent judicial scholar, mailed letters of inquiry to 19 chief justices in states employing judicial peremptory challenges.[85/] Eight of the nine responses were favorable. Orris Hamilton of the Washington Supreme Court reported that his experience with the procedure had been "extremely satisfactory" and that it was "very popular" among members of the bar.[86/] He noted that judges, too, were "happy and content" with the procedure and would oppose any repeal of it.[87/] Similarly, Wyoming's Chief Justice John McIntyre reported that he had "never heard a suggestion" that the system be dissolved.[88/] Chief Justice Oscar Knutson of Minnesota reiterated this view. "I know of no complaint with it," he wrote, "and I would not like to see it discarded."[89/]

Chief Justice Fred Henley reported that the system had "worked very well" in Missouri for many years[90/] and Justice Alvin Strutz of North Dakota recommended that peremptory challenges be adopted at the federal level.[91/] Chief

---

85/ Hearings on S. 1064, supra note 1, at 57-58, 66-68. His inclusion of Hawaii and Maryland was in error. See Alan J. Chaset, Disqualification of Federal Judges by Peremptory Challenge (Washington: Federal Judicial Center, 1981), 21-22, n.44.

86/ Id., at 57.

87/ Id.

88/ Id.

89/ Id., at 66.

90/ Id., at 67.

91/ Id., at 68.

Justice James Harrison of Montana concluded that "by and large" the system was "good" although he noted that it could be abused.[92/]

Chief Justice Fred Struckmyer noted that peremptory challenges were seldom used in Arizona but, nonetheless, detailed their virtues. In conclusion, he wrote, "I am a strong believer in the right to disqualify a judge."[93/] Sally Davis, responding for the Nevada Supreme Court, noted that peremptory challenges were "rarely used" in her state, but that "the general consensus of opinion among the justices" was that it "is an essential part" of Nevada's legal system.[94/]

The only respondent critical of peremptory challenges was Chief Justice Donald Wright of California. Although he did not suggest that the procedure be abolished, he claimed that it had been "a serious problem in court calendaring operations and...[had] often interfered with the judiciary's efforts to reduce court congestion and delay."[95/]

Upon perusing all of the responses Mr. Frank concluded that his survey indicated "great satisfaction" in the states with the operation of the peremptory challenge system.[96/]

The Ernest Getto Survey (1975). While preparing an article for Litigation in 1975, Ernest J. Getto, a member of the New York and California State Bar

---

92/ Id., at 67.

93/ Id., at 66.

94/ Id., at 67.

95/ Id., at 57.

96/ Id., at 40.

Associations, conducted interviews with approximately 30 attorneys and several judges to ascertain how peremptory challenges were working in California.[97] The sample was not scientifically selected but he claimed the results provided significant insights. Mr. Getto reported that "[a]s might be expected, the attorneys interviewed endorsed the...procedures."[98] They used the peremptory challenge "sparingly," and averaged one or two challenges a year.[99] Further, he found that the attorneys "generally agreed that most of the challenges were filed against a few judges."[100] Among the reasons offered for filing disqualifications included "prior conflict with the judge in question, the judge's prior decisions in similar cases, the judge's temperament, the judge's ability to conduct a trial, and the judge's competence in complex litigation."[101]

Mr. Getto also found that "[m]ost of the attorneys readily agreed that some of their challenges were not based strictly on 'prejudice' against them or their clients."[102] Others said that "... they were aware of abuses by other attorneys."[103] Finally, "none viewed the peremptory challenge as a dilatory device...."[104]

97/ Getto, supra note 1.

98/ Id., at 24.

99/ Id.

100/ Id.

101/ Id.

102/ Id.

103/ Id.

104/ Id., at 25.

In his discussions with judges, Mr. Getto found that opposition to peremptory challenges was "relatively mild."[105/] He discovered that the "strongest objection" was directed toward the use of the word "prejudice" in the California statute.[106/] All of the judges he interviewed "believed that the peremptory challenge was used primarily for 'judge-shopping'."[107/] However, he observed that the "judges generally agreed that attorneys usually were responsible in their use of the peremptory challenge."[108/] Only one judge favored repeal of the procedure.

Finally, Mr. Getto found that "[b]ecause counsel had generally acted responsibly... the judges noted that little administrative disruption had resulted."[109/] Among these respondents, "[t]here was a consensus that the judge controlling a master calendar can minimize abuse.[110/] After assessing all of the comments of attorneys and judges Mr. Getto drew the following conclusion:

> In the absence of current statistics, the results of these random interviews do not establish conclusively that California's experience with the peremptory challenge has been an unqualified success. Nevertheless, it has functioned well enough for 17 years that there has been neither rampant abuse or [sic] chaos. Counsel obviously favor it, and judicial opposition is relatively mild.[111/]

105/ Id.

106/ Id.

107/ Id.

108/ Id.

109/ Id.

110/ Id.

111/ Id.

SUMMARY

Three major conclusions may be drawn from this review of the studies on the frequency and perceived consequences of peremptory challenges. First, the information, although limited, seems to indicate that the system is working relatively well. Despite assertions to the contrary, it is perfectly clear that the authors of at least four studies on the frequency of peremptory challenges claim this to be true. A similar view is shared by the authors of the perceptual studies. Moreover, it appears that most chief justices in jurisdictions having peremptory challenge procedures speak highly of them.

Second, despite the generally positive conclusions of those studying peremptory challenges, the system is apparently not without its abuses. There is an indication that the exercise of challenges may result in delays, unjustifiable judge-shopping and unwarranted blanket challenges. Moreover, in some jurisdictions a number of challenges may go unrecorded and thus the frequency with which they are invoked may be higher than some studies indicate.

Finally, it should be evident that there are very few rigorous studies about the operation, impact and consequences of judicial peremptory challenges. Indeed, many of the studies which do exist have serious limitations. It is to this subject which we now turn.

Chapter VI:

Expanding Knowledge About Judicial Peremptory Challenges

CHAPTER VI

EXPANDING KNOWLEDGE ABOUT JUDICIAL PEREMPTORY CHALLENGES

The empirical studies discussed in Chapter V have contributed to our understanding about the impact of peremptory challenges on the judicial system. However, even the best among them is not without limitations and deficiencies.[1/]

LIMITATIONS OF THE EMPIRICAL STUDIES

Studies on the Frequency of Peremptory Challenges. Two problems are associated with the studies which have examined the frequency with which peremptory challenges are exercised. First, with one exception, the time period examined has usually been very short, approximately six months.[2/] Thus, it is possible that the data generated by these studies are atypical or distorted, especially if unusual short-term circumstances were present within the state at the time the studies were conducted.

Second, these studies have been conducted in only a few states. As a result, it is not known whether the frequencies reported are typical of a majority of the other states which use them. Indeed, the complete absence of cross-state comparisons makes generalizations about the frequency with which peremptory challenges are exercised marginal at best.

1/ See, e.g., Gary L. Karl, "Disqualification of Federal District Court Judges for Bias or Prejudice: Problems, Problematic Proposals and a Proposed Procedure," Albany Law Review, 46 (Fall, 1981), 229, 238.

2/ "Disqualification of Judges for Prejudice or Bias--Common Law Evolution, Current Status and the Oregon Experience," Oregon Law Review, 48 (1969) 311-410.

Perceptual Studies. Perceptual studies about the impact of peremptory challenges also have serious limitations. First, investigators generally have not followed scientifically accepted methods for selecting their audience.[3/] As a result, there is no way of knowing whether the responses are generally reflective of perceptions about how judicial peremptory challenges are working in the state being examined or whether they represent the views of a small minority who happen to have been asked questions about the process.

Second, investigators conducting perceptual studies have not collected data at regular intervals over time. This raises questions about whether the respondents are objective in their assessment or whether they are simply reacting to a particular set of short-term events which color their perceptions.

Third, respondents in the perceptual studies have been asked only general questions about the impact of judicial peremptory challenges. Thus, perceptual information about the specific consequences of peremptory challenges is generally lacking.

AN EXPANDED METHODOLOGICAL APPROACH

With these considerations in mind a methodological approach was developed to more thoroughly assess the frequency and impact of judicial peremptory challenge procedures.

3/ But see Hearings on S. 1064 before the Subcomm. on Improvements in Judicial Machinery of the Senate Subcomm. on the Judiciary, 93d Cong., 1st Sess. (1971-73), at 53-56 [hereinafter cited as Hearings on S. 1064].

Scope. First, it was determined that information would be gathered from 15 of the 16 jurisdictions using judicial peremptory challenges.[4/] Sampling techniques were not deemed necessary because only a few states are involved and the number of individuals to be contacted is relatively limited.

Second, it was decided that information would be gathered on both the number of challenges exercised and the perceived consequences of the procedure. Despite assertions to the contrary,[5/] it was found that a great deal of data about the frequency of peremptory challenges could be collected from these states. A preliminary survey indicated that district-wide or state-wide data are available from several states. Naturally, perceptual data from judges, administrators and lawyers could be elicited through telephone conversations and correspondence in all of the jurisdictions.

Third, it was determined that information about how frequently challenges are exercised would be gathered for more than a single point in time. Preliminary inquiries revealed that although serial data were not available in some jurisdictions, it was available in others for two or more years.

Fourth, it was determined that an attempt would be made to compare perceptual information about the consequences of peremptory challenges over time. This would be accomplished first by comparing current information obtained from

---

4/ After initial inquiries it was decided to exclude Indiana. In that state it is extremely difficult, if not impossible, to separate frequency data and perceptual information about peremptory challenges from that on change of venue.

5/ See Alan J. Chaset, Disqualification of Federal Judges by Peremptory Challenge (Washington: Federal Judicial Center, 1981), at 34-35.

the 15 state chief justices with John Frank's earlier survey.[6/] Second, current information from California judges would be compared with the California Judicial Council's study of 1962.[7/]

Finally, it was determined that California would be singled out for special inquiry. Apparently, there is considerable controversy there about peremptory challenges and the United States Justice Department is especially interested in an appraisal of how well they are working. Because California is isolated for separate consideration, data and information from that state are often not presented in Chapters VII, IX and X.

Method of Gathering Information. First, it was decided that data on the frequency of peremptory challenges would be gathered by telephone interviews and through written correspondence. Initially, it was believed that this information could only be collected during field trips to the states. However, during preliminary inquiries it was found that motions, affidavits or demands to substitute judges are generally filed in case jackets. Thus, investigators would have to examine each case handled by each judge in each jurisdiction if the requisite information was to be collected. This approach would be very expensive, time consuming and produce only limited results. Fortunately, it was found that a number of administrators and judges record information about peremptory challenges and are willing to share it with responsible investigators. Others indicated a willingness to collect such information to aid an investigation of this type.

6/ Hearings on S. 1064, supra note 3, at 40, 57-58, 66-68.

7/ Judicial Council of California, "Disqualification of Judges," 1962 Annual Report of the Administrative Office of the California Courts (January, 1963), 34-39.

Second, it was determined that perceptual information about the consequences of peremptory challenges would be gathered primarily through correspondence with several sets of target audiences. Consideration was given to eliciting the information during field trips using the direct interview technique. However, this approach was discarded because it is very expensive, time consuming, and would not yield the range and quantity of opinions which can be obtained through telephone interviews and correspondence.[8/]

Target Audiences. It was determined that several groups of individuals would be asked to provide information about the operation of judicial peremptory challenges in their states. First, it was decided that chief justices would be contacted. They are at the top of the judicial hierarchy and are generally charged with the responsibility of administering the entire state court system. In this capacity they are intimately aware of procedures which cause problems and are in a position to hear complaints from all segments of the judiciary and bar.

Second, it was decided that state court administrators would be asked for information. In most states they are the primary assistant to the chief justice and responsible for the managerial operation of the courts.[9/] In this capacity they gather statistical information, undertake research projects and solicit information from trial court judges about problems in the judicial system.[10/]

8/ Formal questionnaires would have been far more useful in this respect. However, government regulations require their review and approval by the Office of Budget Management before being administered. So doing would have delayed completion of the project beyond the one-year time limit.

9/ See Robert G. Nielard and Rachael N. Doan, State Court Administrative Offices (Chicago: American Judicature Society, 1979).

10/ Id.

Third, it was determined that chief judges of general jurisdiction trial courts would be contacted.[11/] In many states they are charged with the responsibility of assigning replacement judges for those who have been challenged. Further, they are generally the recipient of complaints from their colleagues about any problems which occur on the trial bench.

Fourth, it was further determined that chief judges in California would be contacted with a letter identical to the one used by the California Judicial Council in 1969 so that a comparison of responses over time could be made. Consequently, the letter of inquiry to California judges was different than the letter sent to judges in the 14 other states.

Fifth, it was decided that information would be elicited from trial court administrators. These individuals who work closely with chief judges act in much the same capacity as state court administrators but are limited in their responsibility to specific trial courts. Most importantly, initial contacts indicated that many of them keep statistical information on judicial peremptory challenges.

Sixth, it was determined that the views of practicing lawyers would be obtained since they are the primary group which exercises the challenge. Thus, it was decided to contact state and local bar presidents, state attorneys general, public prosecutors and public defenders in each of the states being studied.

Finally, because of allegations that peremptory challenges may be motivated by the gender or race of a judge, it was decided to obtain the views of black judges and women judges about the operation of peremptory challenges.

11/ In some states they are referred to as presiding or president judges.

Hypotheses. In order to focus on each of the potential consequences of peremptory challenges it was decided that several sets of testable hypotheses would be explored. The list was developed by examining assertions about the impact of challenges by proponents and opponents of the concept. The hypotheses served as a guide in forming the letters of inquiry to the various target audiences (see Appendix D) and are listed in Table VI-1.

RESPONSE RATES

Telephone contacts were made with all 15 state court administrators or their assistants to obtain information about how often peremptory challenges are exercised. Telephone interviews were also conducted with most of the trial court administrators in all but California, Idaho and Oregon.[12/] Contact rates are reported in Table VI-2.[13/]

Table VI-3 indicates which of the chief justices, attorneys general, court administrators and bar association presidents responded to the letters of inquiry. Table VI-4 summarizes the response rates of the chief judges, black judges and women judges. The exceptionally large number of returns from chief judges may indicate that there is considerable interest in the subject among judicial administrators.

Table VI-5 summarizes the response rates of local bar association presidents, trial court administrators, prosecuting attorneys and public defenders.

12/ The reasons for not contacting all administrators in these states are presented at the bottom of Table VI-2.

13/ In a few instances the information was obtained from an assistant to the administrator.

Table VI-1

TESTABLE HYPOTHESES ABOUT JUDICIAL PEREMPTORY CHALLENGES

IMPACT ON JUDGES:

(1) They cause extensive frustrations among judges.
(2) They subject judges to unreasonable hardships associated with travel.
(3) They are more likely to strain relationships between attorneys and judges than systems requiring cause to be established.
(4) They provide helpful information to judges about their demeanor, sentencing practices and perceived biases.
(5) They compromise judicial independence.

IMPACT ON ATTORNEYS:

(1) They are frequently made by attorneys to prevent the possibility of malpractice suits.
(2) They are more likely to strain relationships between attorneys and judges than systems requiring cause to be established.

IMPACT ON THE PUBLIC:

(1) They undermine public confidence in the judiciary.

IMPACT ON JUDICIAL ADMINISTRATION:

Frequency of Use:
(1) They are exercised frequently.
(2) They are often used in blanket fashion.

Delay:
(1) They are exercised just before trial to cause delay.
(2) They cause delay in jurisdictions with few judges.
(3) They cause delay in jurisdictions with several judges.

Calendar Management:
(1) They disrupt master calendar systems and cause delay.
(2) They disrupt individual calendar systems and cause delay.

Judicial Budgets:
(1) They require judges to travel frequently.
(2) They require judges to travel long distances.
(3) They require increases in judicial budgets.

The Need for More Judges:
(1) They result in the need to place additional judges on the bench.

The Number of Appeals:
(1) They reduce the number of appeals in criminal and civil cases.

Reasons Invoked:
(1) They are invoked to substitute judges because of race, sex or religion.
(2) They are invoked because of a judge's philosophy.
(3) They are invoked because of a judge's sentencing practices.
(4) They are invoked because of a judge's perceived bias.
(5) They are invoked because of a judge's intellectual mediocrity.
(6) They are invoked because of a judge's demeanor.
(7) They are invoked on grounds specified in statutes granting disqualification for cause.
(8) They are invoked to delay litigation.

Table VI-2

TELEPHONE CONTACTS WITH TRIAL COURT ADMINISTRATORS

State	Number in State	Contacts Made	Percent
Alaska	4	4	100%
Arizona	2	2	100
California[1/]	27	5	19
Idaho[2/]	7	--	0
Illinois[3/]	7	5	71
Minnesota	10	9	90
Missouri	7	7	100
Montana	--	--	0
Nevada	1	1	100
North Dakota	3	3	100
Oregon[4/]	14	--	0
South Dakota	2	2	100
Washington	13	13	100
Wisconsin	10	10	100
Wyoming	--	--	0
TOTAL	107	61	57%

1/ Five administrators were contacted in California. All stated that no such information is available and thus the inquiries were halted. Apparently statistics are purposefully not kept in that state at the insistence of judges.

2/ Information was provided by the state court administrator.

3/ Five administrators were contacted in Illinois and all stated that no such information is available at the trial court level. Thus inquiries were halted. Statistics on peremptory challenges are also not compiled by the state court administrator.

4/ Information was to be provided by the state court administrator's office but never arrived.

Table VI-3

STATE LEVEL RESPONDENTS

State	Chief Justice[1]	Attorney General[2]	Court Administrator[3]	Bar President[4]
Alaska	--	X[5]	--	--
Arizona	X	X	--	X
California	--	--	X	--
Idaho	X	--	--	X
Illinois	X	--	X	--
Minnesota	--	X	--	X
Missouri	X	--	--	--
Montana	--	X[5]	--	X
Nevada	--	--	--	--
North Dakota	--	X	X	X
Oregon	X	X[5]	--	--
South Dakota	--	--	X	--
Washington	X	X[5]	X	--
Wisconsin	--	X[5]	--	X
Wyoming	--	X	X	--
TOTAL (N=15)	6 (40%)	9 (60%)	6 (40%)	6 (40%)

1/ List supplied by the National Center for State Courts.

2/ List drawn from The 1984 National Director of Prosecuting Attorneys (Alexandria: The National District Attorneys Association, 1984), 85-86.

3/ List supplied by the National Center for State Courts.

4/ List drawn from American Bar Association 1984/85 Directory (Chicago: American Bar Association, n.d.), H-1--H-13.

5/ An assistant attorney general responded.

Table VI-4

RESPONSE RATES OF CHIEF JUDGES, BLACK JUDGES AND WOMEN JUDGES

State	Chief Judges[1]			Black Judges[2]			Women Judges[3]		
	No.	Resp.	%	No.	Resp.	%	No.	Resp.	%
Alaska	4	2	50	--	--	0	4	1	25
Arizona	13	8	62	1	--	0	5	2	40
California	--	--	0	25	4	16	47	12	26
Idaho	7	4	57	--	--	0	7	4	57
Illinois	21	13	62	18	2	11	19	3	16
Minnesota	10	6	60	2	--	0	7	5	71
Missouri	47	27	58	1	--	0	19	4	21
Montana	20	12	60	--	--	0	1	--	0
Nevada	12	6	50	1	--	0	1	--	0
North Dakota	7	5	71	--	--	0	--	--	0
Oregon	19	10	53	1	--	0	3	1	33
South Dakota	8	4	50	--	--	0	1	--	0
Washington	29	14	48	--	--	0	8	3	38
Wisconsin	10	5	50	--	--	0	9	2	22
Wyoming	17	12	71	--	--	0	1	--	0
TOTAL	224	128	57	49	6	12	132	37	28

1/ List supplied by state court administrator's office.

2/ It would have been preferable to elicit the views of hispanics and other minorities as well as blacks but the researchers were unable to obtain a list of their names. The list of black judges was drawn from George W. Crockett, Jr., et al., National Roster of Black Judicial Officers, 1980 (Chicago: American Judicature Society, 1980).

3/ List supplied by the National Center for State Courts in cooperation with the National Association of Women Judges.

Table VI-5

RESPONSE RATES OF LOCAL BAR PRESIDENTS, TRIAL COURT ADMINISTRATORS, PROSECUTING ATTORNEYS, AND PUBLIC DEFENDERS

State	Local Bar President[1]			Trial Court Administrators[2]			Prosecuting Attorneys[3]			Public Defenders[4]		
	No.	Resp.	%	No.	Resp.	%	No.	Resp.	%	No.	Resp.	%
Alaska	--	--	0	3	1	33	12	3	25	8	4	50
Arizona	1	--	0	2	--	0	17	8	47	4	3	75
California	9	2	22	27	7	26	58	28	48	41	19	46
Idaho	--	--	0	7	2	29	43	20	47	7	3	43
Illinois	2	--	0	7	2	29	101	36	36	44	20	46
Minnesota	1	1	100	9	4	44	87	41	47	8	4	50
Missouri	2	--	0	7	3	43	114	49	43	19	11	58
Montana	--	--	0	--	--	0	56	23	41	3	2	67
Nevada	--	--	0	1	--	0	17	4	24	8	--	0
North Dakota	--	--	0	3	--	0	52	18	35	--	--	0
Oregon	1	1	100	14	4	29	36	13	36	6	2	33
South Dakota	--	--	0	2	1	50	65	22	34	2	1	50
Washington	1	--	0	11	5	46	39	22	56	11	4	36
Wisconsin	1	--	0	10	5	50	71	39	55	27	7	26
Wyoming	--	--	0	--	--	0	25	13	52	13	2	15
TOTAL	19	4	21	103	34	33	793	339	43	201	82	41

1/ List drawn from American Bar Association 1984/85 Directory (Chicago: American Bar Association, n.d.), H-1--H-13.

2/ List supplied by state court administrator's office.

3/ List drawn from The 1984 National Directory of Prosecuting Attorneys (Alexandria: The National District Attorneys Association, 1984), 11-84.

4/ List drawn from The 1983 Directory of Legal Aid and Defender Offices (Washington: National Legal Aid and Defender Association, n.d.), 1-70.

The relatively low response rate among trial court administrators is perhaps in part due to the fact that most of them had already supplied a great deal of information about the frequency of peremptory challenges by telephone and thus did not believe there was a need to answer the written inquiry about their personal opinions as well. Again the relatively high response rates from prosecuting attorneys and public defenders may indicate a high level of interest in the subject under consideration.

Table VI-6 presents information about the separate survey of chief judges in California. As noted the overall response rate was 53%.

Table VI-6

RESPONSE RATES OF CALIFORNIA JUDGES

Group	Number	Response	Rate
Municipal Court Judges	79	48	61%
Los Angeles Superior Court Judges	183	83	45%
Other Superior Court Judges	49	35	71%
TOTAL	311	166	53%

Chapter VII:

An Overview Of How Peremptory Challenges Operate In The States

CHAPTER VII

AN OVERVIEW OF HOW PEREMPTORY CHALLENGES OPERATE IN THE STATES

The following four chapters comprise summaries of information about the operation of peremptory challenges in 15 states. The first is a presentation of data on how frequently they are exercised and an overview of how they are viewed by those working in the judicial system. Chapter VIII summarizes the operation of peremptory challenges within each state and Chapter IX summarizes the views of each group asked for information about peremptory challenges. Finally, Chapter X summarizes information about the specific consequences of peremptory challenges.

THE FREQUENCY OF PEREMPTORY CHALLENGES

The exact frequency with which peremptory challenges are exercised in each jurisdiction is very difficult to assess. First, in several jurisdictions information about the number of challenges exercised is unavailable. Second, where it is available, sometimes there are conflicting reports about the actual numbers. For example, figures obtained from the state court administrator's office in Wisconsin differ from those supplied by the various district administrators.[1/] Third, there is also conflicting information about the number of case filings in each jurisdiction. Despite these problems, however, it is possible to present a general picture about the frequency with which challenges are exercised in many states.

1/ In these instances figures supplied by trial court administrators were used because they are generally higher than those supplied by state offices.

The Rate of Filings. Table VII-1 presents two indicators of the frequency with which peremptory challenges are used: the number of filings per challenge and the percent of assignments challenged.[2/] The data are drawn from tables in Appendix B. It is clear that challenges, overall, are exercised very infrequently. In Idaho, South Dakota, and Washington during 1984, they were used in less than one percent of the filings.[3/] In Minnesota and Wisconsin, where the data are relatively reliable, challenges were exercised less than two percent of the time. It should be noted that frequencies in both of these states are artificially high because thousands of minor cases are excluded from the statistical computation.

The highest rate of challenge is found in North Dakota. If, however, county court filings would have been included in the statistical computation, the percentage would be much lower. In Alaska, the percentage is high because of unusually frequent challenges to six judges in that state.

Trends in the Frequency of Peremptory Challenges. Some observers suggest that there has been an alarming trend toward greater use of peremptory challenges in recent years. Tables VII-2 and VII-3, however, indicate that frequency rates did not greatly increase between 1983 and 1984. At the extremes are North Dakota, which increased one-half of one percent and South Dakota, which decreased four-tenths of one percent. The largest increases within districts

---

2/ Throughout this report the number of assignments made is equated with the number of case filings, a standard practice throughout the states. Thus, the percentage of assignments is calculated by dividing the number of challenges by the number of filings.

3/ The percentages are artificially high for South Dakota and Washington because many filings of a minor nature were excluded when the statistic was computed (see footnotes on Table VII-1). Filings of a minor nature were not excluded from Idaho because many, if not most, challenges are exercised in these cases.

Table VII-1

THE FREQUENCY OF PEREMPTORY CHALLENGES IN THE STATES, 1984

State	Number of Filings/Challenge	Percent of Filings
Alaska[1/]	33.8	3.0
Arizona[2/]	45.7	2.2
Idaho[3/]	361.8	0.3
Minnesota[4/]	94.7	1.1
Nevada[5/]	61.4	1.6
North Dakota[6/]	32.2	3.1
South Dakota[7/]	261.0	0.4
Washington[8/]	580.4	0.2
Wisconsin[9/]	59.1	1.7

1/ 1983 data. Filings exclude traffic cases.

2/ Maricopa County civil cases only.

3/ June 1, 1982 - November 30, 1982 data. Cases heard by magistrates are included because many, if not most, challenges are made to them.

4/ Six of ten districts. Excludes juvenile, conciliation, juvenile traffic, parking and traffic filings.

5/ Civil cases only.

6/ Excludes county court civil, criminal and traffic cases.

7/ Two of eight districts. Filings exclude probate, mental illness, guardianship, juvenile, termination of parental rights and adoption filings, and traffic filings.

8/ Ten of 29 districts. Filings exclude cases heard in district and municipal courts such as those involving misdemeanor, traffic and domestic relations.

9/ Seven of 10 districts. Filings exclude uncontested traffic, municipal and small claims cases.

Table VII-2

THE FREQUENCY OF PEREMPTORY CHALLENGES STATE-WIDE, 1983 - 1984

State	Percent of Filings	
	1983	1984
Minnesota[1/]	1.0	1.1
Nevada[2/]	1.4	1.6
North Dakota	2.6	3.1
South Dakota[3/]	0.8	0.4
Washington[4/]	0.2	0.2

1/ Six districts.

2/ In both 1981 and 1982 the percentage was 1.0.

3/ Two districts.

4/ Nine districts.

Table VII-3

THE FREQUENCY OF PEREMPTORY CHALLENGES BY DISTRICT, 1983 - 1984

District	Percent of Filings	
	1983	1984
Alaska (Anchorage)	5.8	5.5
Alaska 4th	3.7	5.8[1]/
Arizona[2]/ (Maricopa)	2.3[3]/	2.2
Arizona (Pima)	0.6	1.1
Arizona (Pinal)	0.1	0.2
Arizona (Coconina)	0.3	0.5
Arizona (Gila)	0.1	1.3
Arizona (Yavapai)	0.0	0.2
Minnesota 2nd	1.2	0.9
Minnesota 4th	0.2	0.3
Minnesota 5th	2.0	3.1
Minnesota 8th	3.4	3.3
Minnesota 9th	2.3	1.6
North Dakota (E.C.)	1.6	1.1

District	Percent of Filings	
	1983	1984
North Dakota (S.C.)	2.9	2.9
South Dakota 2nd	0.7	0.4
South Dakota 7th	1.2	0.5
Washington 6th	0.4	0.2
Washington 9th	6.8	3.9
Washington 10th	2.2	2.2
Washington 12th	0.1	0.1
Washington 13th	0.8	0.1
Washington 15th	2.2	2.9
Washington 21st	0.3	1.8
Washington 23rd	0.2	0.2
Washington 25th	0.6	0.9
Wisconsin 7th	2.2[4]/	2.3
Wisconsin 9th	1.8	2.9

1/ January 1 to July 30, 1985.

2/ Civil cases only.

3/ March 1, 1971 to August 27, 1971.

4/ 1982.

took place in Alaska's Fourth and Wisconsin's Ninth, while the largest decreases took place in Washington's Ninth and Thirteenth Districts.

Overall, there does appear to be a slight trend toward a greater use of peremptory challenges in 1984 than in 1983. Three of the five states for which there is data experienced an increase in frequency during the period while only one, South Dakota, experienced a decrease. Washington's rate remained the same.

Other data presented in Appendix B offer further evidence of this trend. For example, the rate of challenges in Maricopa County, Arizona, civil litigation increased from 1.9 in 1971, to 2.0 in 1972, to 2.2 in 1984. Minnesota's Fourth District increased from 0.1% in 1981 and 1982 to 0.3% in 1983 and 0.5% in 1984. Similarly, in Nevada the rate was one percent in 1981 and 1982, but increased to 1.4% in 1983 and 1.6% in 1984.

On the other hand, it is interesting to note that the frequency of challenges has consistently decreased in certain jurisdictions. For example, in Washington's Ninth District the rates have dropped from 5.5% in 1981, to 2.3% in 1982, to 2.2% in 1983 and to 0.9% in 1984. In South Dakota's District Two, the frequency rate peaked in 1980 when it reached two percent. In 1981 it dropped to 1.5%, in 1982 and 1983 to 0.7% and in 1984, 0.4%. Further, all of the statewide rates are below the 0.5% rate found for Oregon between 1955 and 1968.[4/]

Blanket Challenges. As observed in Chapter IV, there is concern among many analysts that peremptory challenges may be invoked in such a manner as to

---

4/ "Disqualification of Judges for Prejudice or Bias--Common Law Evolution, Current Status and the Oregon Experience," Oregon Law Review, 48 (1969), 311, 380.

effectively remove judges from hearing certain types of litigation. It has also been conjectured that challenges will be invoked in an attempt to remove judges from hearing all of the cases assigned to them. Indeed, challenges made by prosecuting attorneys, public defenders or large law firms as a matter of policy could cause serious problems for the judicial system. To determine the frequency and reasons for "blanket" challenges, trial court administrators were asked for instances of such activity.[5/] Their responses, supplemented by the statistical information compiled in Appendix B and information received from chief judges, prosecutors and defenders, revealed 58 instances of blanket challenges being used in the 15 states during the past few years.[6/] Unlike the Oregon experience, most of the judges were not challenged with "inordinate frequency" by large law firms.[7/] Rather, as Table VII-4 reveals, the primary source of most blanket challenges is the bar at large. In many instances, it was found that prosecutors and public defenders in criminal cases, and private attorneys in civil cases, whether they were sole practitioners or members of small or large law firms, all challenged these judges. Interestingly, prosecuting attorneys and public defenders were the primary source of challenges in an equal number of instances.

5/ Administrators in California were not asked because a different methodological approach was taken in that state.

6/ The term "blanket challenge" is used very broadly and is not defined in terms of the percentage of challenges received by a judge as in the Montana study. See Attorney General's Report Concerning the Mass Peremptory Disqualification of Montana District Judges, 1974-1978, submitted to the Montana Supreme Court, June 11, 1979. Rather, challenges are considered "blanket" if a prosecutor or defender routinely disqualifies the judge or if the judge is disqualified at a much greater rate than the other judges in his district or state.

7/ Oregon Study, supra note 4, at 380.

Table VII-4

THE SOURCE AND REASONS FOR BLANKET CHALLENGES

Judge	Primary Source of Challenge	Primary Reason(s) for Challenge							
		Harsh Sentences	Light Sentences	Lack of Competence	Bias/ Prejudice	Demeanor	Harsh on Attorneys	Political Opponents	Personality Clash
1	PA[1/], PD[2/]	X							
2	Attys.					X	X		
3	PA			X					
4	Attys.	X				X	X		
5	Attys.	X							
6	PA, Attys.		X						
7	PA						X		
8	Attys.							X	
9	N/I[3/]								
10	Attys.							X	
11	N/I								
12	1 Atty.	N/I							
13	4 Attys.					X			
14	Attys.			X					
15	Def. Attys.	X						X	
16	Attys.	X							X
17	N/I								
18	PA						X		
19	Attys.				X			X	
20	Attys.					X	X		X
21	Attys.	X							
22	Attys.	N/I							

Table VII-4

THE SOURCE AND REASONS FOR BLANKET CHALLENGES
(continued)

Judge	Primary Source of Challenge	Primary Reason(s) for Challenge							
		Harsh Sentences	Light Sentences	Lack of Competence	Bias/ Prejudice	Demeanor	Harsh on Attorneys	Political Opponents	Personality Clash
23	1 Firm							X	
24	PD	X							
25	PD								X
26	PA, PD, Attys.		X	X	X				
27	Attys.	N/I							
28	Attys.			X		X			
29	PD	X							
30	Attys.			X					
31	1 Firm	N/I							
32	Attys.	X			X	X	X		
33	Def. Attys.	X		X	X				
34	N/I								
35	PA						X		
36	Attys.			X				X	
37	Attys.	X			X	X		X	
38	Attys.			X					
39	PA		X						
40	Attys.			X					
41	PD			X					
42	PD	N/A							
43	Attys.					X			

Table VII-4

THE SOURCE AND REASONS FOR BLANKET CHALLENGES
(continued)

Judge	Primary Source of Challenge	Primary Reason(s) for Challenge							
		Harsh Sentences	Light Sentences	Lack of Competence	Bias/ Prejudice	Demeanor	Harsh on Attorneys	Political Opponents	Personality Clash
45	Attys.				X	X	X		
46	Attys.	X					X		
47	Attys.					X			
48	N/I	X							
49	N/I	X							
50	PD							X	
51	Attys.							X	
52	Attys.			X					
53	Def. Attys.	X							
54	Def. Attys.			X					
55	Attys.					X	X		
56	Def. Atty.	X					X		
57	Def. Atty.	X							
58	Attys.					X	X		
	TOTALS	17	3	12	6	12	12	9	3

1/ Prosecuting attorney.

2/ Public defender.

3/ No information.

In one district the prosecuting attorney made it "office policy" to blanket challenge a judge. He was a very experienced lawyer who had served for several years and had never peremptorily challenged another judge. It was his belief, as well as that of his colleagues, that the judge involved was thoroughly incompetent. Two public defenders apparently had similar policies for similar reasons.[8/]

A variety of reasons were reported as to why the challenges were made.[9/] Contrary to the expectations of some, sentencing practices did not account for a majority of the reasons. In only 20 of the instances were they a primary factor. Most of the challenges for this reason were initiated by public defenders or defense attorneys who perceived the judge to levy sentences which were much too severe. In several instances the prosecuting attorneys agreed with the actions of the defenders. In two cases judges had issued public statements about the sentences which they intended to impose on individuals convicted of certain crimes. One judge, for example, stated that he would levy a minimum of 15 days in jail for first offenders in DWI cases.

A primary reason for challenging judges in 13 instances was incompetency. In nearly all of these situations challenges came from the bar at-large. Among the typical characterizations of these judges are the following:

8/ In a few instances it was reported that private attorneys had specially prepared forms on which to challenge a certain judge if assigned to their cases.

9/ An assessment of the reasons was made after discussions with trial court administrators, chief judges, court clerks and the attorneys involved.

- did not demonstrate an understanding of the law;
- was too erratic;
- was only marginally competent;
- was only marginally qualified;
- was not knowledgeable;
- was generally inept;
- was too unpredictable;
- lacked experience;
- was not qualified;
- was not well-rounded; and
- was not competent.

In seven of the 12 instances involving incompetency, the judges were magistrates, judicial officers, court commissioners, or were not attorneys. In two other instances the judges were assigned to hear only limited jurisdiction court matters.

Six judges were challenged because of bias or prejudice. All but one was disqualified because of views about civil litigation. Two were believed to favor men in divorce cases; one was believed to favor women. Another judge was perceived to favor the petitioner in divorce cases. The judge perceived as prejudiced in criminal matters was accused of being "anti-Indian, anti-Black, anti-Hispanic, anti-public defender and anti-poor."

A primary reason for challenging 12 of the judges was their demeanor. In some instances the behavior was so bizarre that the judge involved had been brought before the state's judicial conduct commission and in one instance was forced to resign. Among the typical phrases used to describe these judges are the following:

- excessively rude;
- personality quirks;
- tough judge--not a tough sentencer;
- extremely poor temperament;
- full of arrogance;
- poor demeanor;
- poor manner;
- poor way of dealing with people;

- demeanor was horrible;
- personality problems; and
- emotional and inconsistent.

Twelve judges were perceived to be excessively harsh on attorneys. Generally they were perceived by many attorneys who practice before them as rude and abrupt in their dealings with lawyers. A frequent complaint is that these judges unfairly "dress down" attorneys in front of their clients. Indeed, these judges are widely perceived as belittling, berating, insulting and demeaning to attorneys in public, entirely without cause. In one instance, the judge, a former district attorney, was extremely harsh on prosecutors. He apparently abused them verbally in court and often took them into chambers and told them how to handle their cases. Allegedly he even went to the extreme of suggesting how their office should be run. In another instance a judge required the prosecutor to prepare his cases within 48 hours and would not grant continuances.

In nine instances judges were regularly challenged by political opponents. Six were the result of bitterly-fought election contests. In three, incumbents were defeated and in three they were reelected. In most instances those attorneys publicly supporting the losing candidate peremptorily challenged the winner because of fears of reprisals. In some instances it is clear that challenges were made to "punish" the winner. This is probably an important factor in one instance where a woman defeated a popular, highly-esteemed, senior judge.

Three judges were challenged by political opponents, but the reasons had nothing to do with election contests. In one instance tremendous animosity had developed between a judge and his former law firm colleagues and thus he was

regularly challenged.[10/] A similar situation occurred between a judge and his former colleagues in the public defender's office. In another instance the judge was regularly challenged after failing in an attempt to have the juvenile court administrator fired. Those attorneys supporting the administrator apparently feared reprisals from the judge in subsequent cases.

It is clear that blanket challenges are not a pervasive phenomenon. Using an extremely broad definition only 58 cases were found in 15 states during the past few years. In most instances there appear to be compelling reasons why the judge involved should be disqualified by the challenging attorney or litigant. These judges appeared to be extreme in their sentencing practices or personal behavior, clearly lacking in professional competence or so slanted in their views about individual attorneys, types of litigants or defendants, that they could not be impartial, or at least appear to be impartial, in their judicial role. In two instances these judges lost subsequent elections. In two others, judges chose not to run for reelection and in yet two others, judges were forced into resigning (one by the Judicial Conduct Commission). A few judges were reported as having altered their sentencing practices or behavior after frequent challenges were filed against them. In some instances, where political opponents were the source of challenges, the blanket disqualifications dissipated over time.

The Source of Challenges. Most of the information gathered about the source of judicial peremptory challenges during this study was presented in the previous section. It was found that prosecutors, plaintiff's attorneys and defenders are

---

10/ The firm had even gone to the extent of getting the state supreme court to sign an order permanently barring the judge from hearing their cases.

involved somewhat equally in exercising peremptory challenges on a blanket basis. Overall, however, responses to the letters of inquiry and the sketchy statistical data available seem to indicate that defenders exercise the challenge more frequently than prosecutors and plaintiffs.[11/] For example, during 1983 and 1984 in St. Paul Municipal Court criminal jury cases, the defense exercised challenges 37 times while the prosecution, only twice.[12/] Similarly, in Washington's Tenth District between July 1982 and July 1984, the defense exercised challenges 10 times while the plaintiff, only three times. Data from the East Central District of North Dakota for 1983-84 show that the defense exercised the right 12 times while the prosecutor, only three. In that district the frequency between civil defendants and plaintiffs was approximately the same: 21 and 20 respectively.

Challenges in Large and Small Courts. There is concern among those who speculate about the impact of peremptory challenges that one- and two-judge courts particularly lend themselves to judge-shopping.[13/] The only statistical information collected during this research came from Washington and it is uninstructive. Indeed, of the three two-judge courts reporting, one had the highest percentage of assignments challenged in the state, one nearly the lowest, and the third, approximately in the middle.

11/ No distinction is made here between whether an attorney or litigant invokes the challenge. Little such information is available. However, see the data in Minnesota's District Two, St. Paul Municipal Court Criminal Jury Cases 1983-1984 and North Dakota's East Central District 1983-1984 in Appendix B.

12/ The following data are drawn from Appendix B.

13/ Cf. Kraig Marton, "Peremptory Challenges of Judges: The Arizona Experience," Law and the Social Order (1973), 95, 104; and Judicial Council of California, "Disqualification of Judges," 1962 Annual Report of the Administrative Office of the California Courts (January, 1963), 34, 36.

Perceptual data in several of the states which have one- and two-judge districts indicate that peremptory challenges are generally used infrequently. For example, all five judges in Nevada, and all six judges in Wyoming serving in these courts reported challenges to be exercised infrequently.

These impressions generally confirm the findings of earlier studies in Arizona, California and Oregon.[14/] It will be recalled that in those states the challenge rates were relatively low. Those findings, however, somewhat contradict those of a very recent study in Wisconsin. Those researchers found "a higher rate of substitutions in more rural districts."[15/] This may, however, be due to unusual circumstances unique to Wisconsin, a state where challenges have become highly controversial and in certain districts are exceptionally frequent.

Challenges by Type of Case. It is generally believed that peremptory challenges are exercised more frequently in criminal cases than in civil litigation. Statistics from various jurisdictions in seven states confirm this observation. Table VII-5 indicates that in only a few districts is the percentage in civil filings greater than the percentage in criminal filings, and in these instances the rates vary only slightly.

Peremptory Challenges, Challenges for Cause and Self-Disqualifications. Very little data are available about the relationship between peremptory challenges, challenges for cause and self-disqualifications. Indeed, the only information

---

14/ See Chapter V.

15/ Director of State Court, Office of Court Operation, "Analysis of Substitution in Wisconsin Circuit Courts Prepared for the Wisconsin Judicial Conference," September 16, 1985, p. 9.

Table VII-5

CHALLENGES BY TYPE OF CASE

District	Percent of Challenges in Civil Filings	Percent of Challenges in Criminal Filings
Alaska 4[1/]	2.9	9.9
Arizona (Maricopa)[2/]	2.3	3.2
Arizona (Pima)[2/]	0.9	2.3
Arizona (Pinal)[2/]	0.0	1.1
Arizona (Coconina)[2/]	0.7	0.0
Arizona (Gila)[2/]	0.4	5.5
Arizona (Yavapai)[2/]	0.2	0.0
Minnesota 4[3/]	0.5	0.9
North Dakota (East Central)[3/]	0.6	3.1
South Dakota 7[3/]	0.3	1.8
Washington 4[3/]	0.5	1.1
Washington 6[3/]	0.2	0.2
Washington 9[3/]	2.8	11.5
Wisconsin 5[3/]	3.3	1.5
Wisconsin 6[3/]	0.5	1.6
Wisconsin 10[3/]	0.3	5.2

1/ January 1 to July 30, 1985.

2/ March 1, 1972 to August 27, 1972.

3/ 1984.

on this subject came from Wisconsin. Data supplied by the state court administrator are presented in Table VII-6. Overall, peremptory challenges are exercised about twice as frequently as self-disqualifications. There are very few substitutions for cause (mandatory disqualifications). Unfortunately, no data from other states are available to determine whether this is typical. Even more unfortunate is the fact that it is beyond the scope of this project to determine whether the combined challenge and disqualification rates are greater in states which permit judicial peremptory challenges than in states which do not. It is interesting to note that even where peremptory challenges and self-disqualifications are regularly exercised, challenges for cause are still exercised. One explanation was offered by a chief judge in Wyoming. "The reason he [an attorney] had challenged me for cause was obvious," wrote the judge, "because if I had granted it, he still would have a peremptory challenge he could use on the next judge if he didn't like him."

PERCEPTIONS ABOUT PEREMPTORY CHALLENGES

The frequency with which peremptory challenges are exercised reveals a great deal about their impact in states which currently have the procedure. Statistics alone, however, do not disclose a complete picture. The following is a summary of the perceptions of those working in the judicial system about how well peremptions are working.[16/]

16/ It should be reiterated that questionnaires were not used. See Appendix D for copies of the letters of inquiry. Because the questions were general in nature, not all respondents addressed all areas of inquiry and thus the number of responses varies in each category.

Table VII-6

PEREMPTORY CHALLENGES, SELF-DISQUALIFICATIONS AND MANDATORY DISQUALIFICATIONS IN WISCONSIN, 1984[1/]

District	Peremptory Challenges	Self-Disqualifications	Mandatory Disqualifications
2	255	258	0
3	348	262	0
4	180	63	2
5	453	136	5
6	287	153	1
7	399	208	1
8	293	163	9
9	424	146	11
10	448	126	40
TOTALS	3,087	1,515	69

1/ The table does not reflect substitutions in juvenile or post-judgment proceedings and contains no information on Milwaukee County. The information for Districts 2 and 5 is artificially low due to an unusual record-keeping technique.

The Operation of Peremptory Challenges. As can be observed in Table VII-7, it is clear that peremptory challenges are perceived to be working well in a majority of the states. Of the 460 individuals addressing this issue, 88% thought this to be the case. Indeed, in none of the groups surveyed did a majority of individuals believe that their system is not working well.

In Wisconsin there is a much greater percentage of individuals than in any other state who think that peremptory challenges are not functioning properly. Nine of the 12 are prosecuting attorneys.[17/] It should be noted, however, that under Wisconsin law, prosecutors are disadvantaged by the system because they are not allowed to invoke the challenge.[18/] Conversely, five of the six responding public defenders in Wisconsin believe the system to be working well. In Illinois, the only other state which prohibits prosecutors, but not defenders, from invoking the challenge, a similar pattern emerged. There, four of the five individuals who believe that the system is not working well are prosecutors.[19/] Conversely, both of the responding trial court administrators, all 19 of the public defenders, 10 of 11 chief judges, the chief justice and the state court administrator believe the system is working well.

17/ Prosecuting attorneys were nearly equally divided on this issue. Eleven believed challenges are working well and nine did not.

18/ Two of the nine suggested that prosecutors should have the right to a challenge. Overall, eight prosecutors favored extending the right to prosecutors while only one opposed the idea.

19/ Unlike their colleagues in Wisconsin, a vast majority of the Illinois prosecutors believe that their peremptory challenge is working well. Sixteen believe this is to be true while only four claim that it is not.

Table VII-7

PERCEPTIONS OF THE RESPONDENTS ABOUT THE OPERATION OF PEREMPTORY CHALLENGES[1/]

State	Working Well	Not Working Well
Alaska (N=9)	89%	11%
Arizona (N=20)	95	5
Idaho (N=28)	82	18
Illinois (N=54)	91	9
Minnesota (N=50)	94	6
Missouri (N=84)	89	11
Montana (N=32)	81	19
Nevada (N=11)	100	--
North Dakota (N=24)	88	12
Oregon (N=26)	85	15
South Dakota (N=27)	85	15
Washington (N=40)	95	5
Wisconsin (N=33)	64	36
Wyoming (N=24)	88	12
TOTAL (N=460)	88%	12%

1/ Includes responses from chief justices, state court administrators, attorneys general, prosecuting attorneys, public defenders, bar association presidents, chief judges and trial court administrators.

Perceptions About Why Peremptory Challenges are Invoked. There are a variety of reasons why peremptions are invoked, as observed in the summary of blanket challenges. The 11 most frequently mentioned by the respondents are presented in Table VII-8. Over one quarter indicated that challenges are exercised to avoid the sentencing practices of a judge. Both prosecutors and public defenders suggested that they exercise the right for this reason. Several explained their underlying motivation. Below are four examples:

- ...I have only filed one.... The judge had only recently been elevated to the Superior Court and was sentencing all convicted defendants to prison... [A]ny other judge would have imposed a sentence no longer than 60 or 90 days in the county jail. Public Defender, California

- [A]...local judge began imposing penalties far beyond the standard minimums for offenses of driving while intoxicated. Since any other judge assigned to the case would impose a jail sentence of less than one-third what the assigned judge would issue, peremptory disqualifications were uniformly issued against the judge. Public Defender, Alaska

- Our experience in the Public Defender's Office is that of the vast majority of substitutions that we take the primary reason is a judge recently increased the sentence of a defendant above the recommendation of the prosecution. (Once that prisoner gets into the county jail and discloses even to one cellmate that his sentencing judge gave him more than the prosecutor wanted, virtually every pre-trial detainee in jail whose case is assigned to that judge now wants to get away from him.) Public Defender, Illinois

- I have requested a change of judge on numerous occasions where I feel that a judge is too lenient.... Prosecuting Attorney, Missouri

Judges, too, believe that peremptory challenges are exercised because of their sentencing practices. One Montana judge offered an example:

> About four years ago, I sentenced a female who was actively selling marijuana. After careful consideration, I felt she should be confined for a short period of time. The reaction of the 'defense' bar was to substitute me from all drug cases from that time on. My 'sentence' has now become longer than that of the malefactor involved, but unlike her I get no probation! I would estimate I am being substituted out of fifteen to twenty drug cases per year.... It is uncommon for me to be substituted out of any of the other criminal cases.

Table VII-8

PERCEPTIONS ABOUT WHY PEREMPTORY CHALLENGES ARE INVOKED, BY STATE[1/]

(In absolute numbers)

	Interest in Case	Bias or Prejudice	Philosophy of Judge	Demeanor of Judge	Mediocrity of Judge	Sentencing Practices	Race of Judge	Gender of Judge	Religion of Judge	Attorney Dislikes Judge	Delay
Alaska (N=9)	1	2	2	4	4	5	--	--	--	--	2
Arizona (N=19)	1	4	4	2	4	4	2	1	1	2	4
Idaho (N=27)	1	7	5	3	3	8	1	--	1	5	1
Illinois (N=69)	5	16	15	6	5	27	2	2	2	12	5
Minnesota (N=51)	1	14	4	--	3	6	--	--	--	2	2
Missouri (N=87)	9	22	11	6	14	16	3	3	3	9	28
Montana (N=37)	3	9	8	3	3	10	1	1	1	7	5
Nevada (N=10)	--	3	3	1	1	3	1	1	1	1	1
North Dakota (N=23)	1	5	3	3	5	6	--	--	--	2	6
Oregon (N=25)	1	5	2	2	2	5	1	1	1	--	2
South Dakota (N=27)	3	6	3	3	4	7	1	1	1	2	--
Washington (N=40)	2	7	3	3	4	9	2	2	2	2	7
Wisconsin (N=51)	--	4	12	3	6	23	1	1	1	8	11
Wyoming (N=27)	2	4	--	1	2	3	--	--	--	2	2
TOTAL (N=502)	30	108	75	40	60	132	15	12	16	54	76

1/ Includes the views of chief judges, prosecutors and public defenders. The phrase "judge-shopping" was a reason stated by 84 of the 502 respondents. The rubric, however, marks other underlying reasons for exercising the peremptory challenge and thus is omitted from discussion here. For a further explanation see Chapter IV.

An Illinois judge explained a similar experience.

> I had a lawyer from another county who had never tried a case in my court forthrightly explain...that he had investigated me by calling friends in the local criminal bar and that my reputation for competency and in guaranteeing a just and fair trial were beyond reproach. However, he was warned that should his client be convicted, he would probably receive a severe sentence (heroin trafficking), so he would rather take his chances elsewhere.

A relatively high percentage of respondents indicated that judicial bias or prejudice is often a motivating factor behind the exercise of peremptory challenges. Below are a few selected examples:

- I had previously experienced obvious bias toward a particular opposing counsel in an earlier trial and had been warned of this by several other attorneys regularly practicing before that court. Having had the peremptory right...made my task much less onerous. Prosecuting Attorney, Montana

- We tend to use the challenge in...cases in which we know a particular judge has a...bias against the...type of case being prosecuted, e.g., welfare fraud, etc. Prosecuting Attorney, Minnesota

- Our prosecuting office has used the provision...once in the preceding ten years. This use involved a judge with a known bias against the prosecution, coupled with a known bias against female rape victims. Prosecuting Attorney, Minnesota

- I do know of instances where certain attorneys automatically disqualify certain judges in every case or dissolution matters where a certain judge is perceived as leaning in favor of the wife or the husband particularly with regard to custody or support orders. Chief Judge, Missouri

- [Peremptory challenges have been used] when it is known that a particular judge has demonstrated in the past a definite attitude toward a certain type of case, i.e., drugs, driving without a license, etc.... Public Defender, California

Fifteen percent of the judges, prosecutors and defenders indicated that a motivating force behind peremptory challenges is to delay litigation. Two public defenders, one in Alaska and one in California, specifically stated that they had exercised the right to "gain more time to prepare a defense." Both,

however, indicated that this was not a typical reason. One stated that there were only "rare occasions" when challenges were exercised for this purpose and the other suggested that there were "other more valid reasons for exercising the disqualification" in these instances as well.

None of the prosecutors stated that they personally used challenges to delay litigation in the normal sense of the term. One did, however, explain an unusual but related circumstance.

> ...I filed peremptory challenges against one of our judges in over ninety cases.... The reason...was that this particular judge called our criminal case for trial on very short notice (ranging from hours to three or fewer days). He insisted on trying criminal cases 'back-to-back.' My office has only two attorneys and we are a part-time prosecutor's office.... I attempted to speak to the judge to reach an understanding.... He told me that if I thought I was going to get any consideration from him, I was 'dreaming....' I told him he was leaving me with no choice.... I was going to have to file a Notice of Removal in all cases. He indicated that 'you will regret that,' but I have not yet. We have tried or disposed of more criminal cases since he is not assigned duty in our county.

Nearly 15% of the respondents indicated that peremptory challenges are exercised as a direct result of a judge's political philosophy. The most candid expression of this belief was offered by a California prosecutor. "Unfortunately...," he stated, "we have several ultra-liberal judges before whom it is almost impossible to get either a conviction or jail sentence. Without the peremptory challenge there would be a definite adverse impact upon the prosecution of criminals throughout the state." A fellow prosecutor from another part of the state addressed the issue from a different perspective.

> The reality, however, is that some judges do allow more lenient sentences or take a more liberal or conservative approach to interpretations of law.... I

> don't believe the argument could be made that a defendant should suffer because he was randomly assigned a judge who sentences more harshly while another defendant on precisely the same facts would receive a much more lenient sentence. The solution is not to punish defendants differently for the same crimes but rather to implement uniformity in treatment. Uniformity is another word for fairness. A tremendous tool in achieving this fairness and uniformity is the use of the peremptory challenge.

Sixty of the respondents suggested that challenges are sometimes exercised because of judicial mediocrity. Several specific situations were related by prosecutors and defenders. In Idaho one public defender implied that a magistrate was inept and was challenged in blanket fashion by the prosecutor. The matter was resolved after a meeting between the prosecutor, magistrate and administrative judge. The magistrate subsequently was required to attend continuing education courses. Several other instances in which judicial mediocrity is involved are related below:

- One particular judge here was disqualified a great deal because of his inability to understand and apply the law.... Both sides wanted to disqualify him but for political reasons the individual prosecutors were not allowed to. They were certainly happy when this side did. Public Defender, Alaska

- There is mediocrity in judges just as there is in attorneys and in important cases we want a judge who is going to guard the defendant's rights and not cause error forcing an appeal. In addition Judge A may have been an exceedingly competent contract attorney and yet be lost in the criminal law. Public Defender, Montana

- Unfortunately, almost all the judicial appointments that have been made since about 1961 have been based on political credentials rather than any other. This practice has not resulted in getting the best minds on the bench.... All too often the appointments went to lawyers with less than Grade 'A' qualifications.... Often they have been young and inexperienced.... I am sure that as the practice of appointing political judges continues, we will have more and more demands for change of judge. Prosecuting Attorney, North Dakota

- But there are thousands of judges in this country, and it is a simple fact that more than a few of them are duds. In fact, in several of the cases where the peremptory challenge has been used, both opposing lawyers wanted the judge off the case. I once saw opposing counsel meet in a hallway and flip a coin to decide which side would use its one peremptory challenge on the judge. Prosecuting Attorney, California

- There are some judges that become upset when the peremptory challenge is used but I generally have found these judges of lesser quality and this is the reason the peremptory challenge is used against them regularly. Prosecuting Attorney, Missouri

Unexpectedly, several chief judges agreed with the prosecutors and defenders and suggested that their colleagues are sometimes challenged because of judicial mediocrity. For example, one judge in Missouri stated that "[i]n our circuit some of the associate circuit judges are disqualified from handling all matters (and perhaps rightfully so) as they are close to being incompetent in any matter assigned to them." Other chief judges rejected this idea. In Oregon, one judge wrote, the "challenge is seldom used because of the quality of the judge." An Arizona judge was more emphatic. "The challenge by mediocrity," he wrote, "is more frequent than to mediocrity."

Relatively few of the respondents indicated that peremptory challenges are exercised because an attorney simply dislikes a judge. In Idaho, a public defender did note that "blanket disqualifications" in his jurisdiction "appear to be the result of strained relationships between a particular judge and a particular attorney or group of attorneys."

Even fewer of the respondents indicated that challenges are made because of a judge's demeanor. Among those who found this to be the case was an Illinois public defender who stated that it was his experience that peremptions were "used primarily against judges who consistently propounded fixed and

unalterable opinions on certain issues and who consistently exhibit non-judicial behavior on the bench." He continued, "[T]he substitution provision is...used against Judge 'B' who is consistently pompous, arrogant, short-tempered and rude to all who appear before him, whether they be attorney or litigant." A North Dakota chief judge also noted that one of the judges in his district is removed from many cases "primarily...because of his demeanor and sentencing practices."

Only six percent of the respondents suggested that the challenge is exercised because a judge had "an interest" in a case. The extremely low rate is perhaps due to the fact that judges frequently disqualify themselves for this reason and, if they do not, they may be challenged for cause. A few situations arise, however, which do not technically come within traditional definition of "an interest" in a case and thus attorneys exercise a peremptory challenge. A prosecutor in Missouri offered an example:

> A circuit judge I know recently had a hotly contested election for his position.... The particular circuit judge I have in mind is almost always fair and impartial. I do not disqualify him in 99% of the cases which are assigned to him. However, in perhaps 1% of the cases I am aware that my client may have worked against the judge or contributed large sums of money to his opponent in the last election. Even though the judge may try to be fair it becomes apparent after experience that there is still some animosity between the judge and the persons who contributed large sums of money or worked very hard for his opponent in his last contested election.

Almost none of the respondents suggested that peremptory challenges are exercised because of the religion, gender or race of a judge. Most of those who commented on the issue were emphatic. For example, a North Dakota prosecutor wrote, "I do not know of <u>any</u> cases where either race, sex, or religion...affected the decision whether a judge would sit on a case." [emphasis added.]

There were a few miscellaneous reasons offered by the respondents for invoking the challenge which could not be grouped into any of the categories discussed above. They are listed below:

- [O]ne attorney used a challenge because she did not want to try the case in a particular isolated courtroom which was not as convenient to her office as the others in the building. Public Defender, California

- I am...familiar with a situation in which the prosecutor filed a notice to remove the presiding judge...[because] it was apparent to all persons involved that the judge was not following and would not follow required court procedures. Public Defender, Minnesota

- Defense counsel have frequently substituted the 'unpredictable' District Court Judge. Prosecuting Attorney, Montana

- [T]his office had occasion to strike a justice of the peace from all cases for nearly six months.... This was done because he was being investigated for criminal conflict of interest and witness tampering. Prosecuting Attorney, Arizona

- I exercise one peremptory challenge almost as a matter of course with respect to the judge sitting in this judicial district. I do so because the judge is a member of a tightly knit community in which I do not reside and which revolves around a church of which I am not an active member. In addition, he is a member of the social political party and has frequently demonstrated a propensity to be moralistic and judgmental from the bench. Prosecuting Attorney, Montana

Table VII-9 makes it clear that there is a divergence of views among the three groups about why challenges are exercised. Indeed, 33% of the chief judges believe that delay is a primary reason for invoking the challenge while less than 10% of the prosecutors and defenders believe this is so.

Prosecutors tend to believe, to a much greater extent than defenders, that peremptory challenges are invoked because of bias or prejudice on the part of judges. Conversely, a greater percentage of public defenders believe that challenges are exercised to avoid mediocre judges and because attorneys dislike the assigned judge.

Table VII-9

PERCEPTIONS OF CHIEF JUDGES, PROSECUTORS AND DEFENDERS ABOUT WHY PEREMPTORY CHALLENGES ARE INVOKED[1/]

(in percentages)

	Interest in Case	Bias or Prejudice	Philosophy of Judge	Demeanor of Judge	Mediocrity of Judge	Sentencing Practices	Race of Judge	Gender of Judge	Religion of Judge	Attorney Dislikes Judge	Delay
Chief Judges (N=128)	8%	18%	17%	9%	10%	27%	4%	4%	4%	11%	33%
Prosecutors (N=311)	4	20	12	6	10	23	1	0.6	2	8	9
Defenders (N=63)	1	4	24	18	25	41	10	8	10	22	8
Overall (N=502)	6	22	15	8	12	26	3	2	3	11	15

1/ Excludes responses from California.

Abuses of Peremptory Challenge Systems. Forty-seven percent of the respondents indicated that their peremptory challenge system is abused (see Table VII-10). As Table VII-11 indicates, chief judges hold this belief to a much greater extent than do prosecutors and defenders. However, several judges specifically disagreed with their breathren. A few examples are recited below:

- In some cases some attorneys have filed frequent demands for a change of judge against a particular judge but, in all honesty, I must state that I feel that in most of these cases the requests are justified. Chief Judge, North Dakota

- In domestic relations cases, some judges are ultimately disqualified, and from my experience in practicing law, some of them should be. Chief Judge, Montana

- ...I have not found them to be abusive. Frankly, when they have recurred more frequently than usual, I have found underlying reasons which have, in fact, justified their use. Chief Judge, Missouri

Unfortunately, there is little consensus about what is abusive and what is not. The comments of Missouri Prosecutor Steven E. Raymond, are apropos. "I suspect that legitimacy, like beauty," he wrote, "is in the eye of the beholder." This view was reiterated by a colleague in Illinois. "What one person considers an abuse," wrote Craig DeArmond, "may be to another the realities of doing business in an understandably imperfect system." Other responses make it clear that to some, the challenge is abused if invoked for any reason other than those which would be permissible under a challenge for cause system. At the other extreme are those individuals who believe that no matter what the reasons for invoking it, there can be no abuse because the challenge is a matter of right. One Minnesota judge, for example, suggested that invoking it because of a judge's sex, race or religion is legitimate.

It is equally clear that prosecutors and defenders often view their counterparts in litigation as abusing the system, but not themselves or their

Table VII-10

PERCEPTIONS ABOUT WHETHER PEREMPTORY CHALLENGE SYSTEMS ARE ABUSED, BY STATE[1/]

State	System Is Abused	System Is Not Abused
Alaska (N=5)	80%	20%
Arizona (N=15)	40	60
Idaho (N=21)	62	38
Illinois (N=25)	40	60
Minnesota (N=32)	25	75
Missouri (N=54)	57	43
Montana (N=20)	60	40
Nevada (N=6)	33	67
North Dakota (N=12)	25	75
Oregon (N=19)	42	58
South Dakota (N=13)	39	61
Washington (N=22)	41	59
Wisconsin (N=23)	61	39
Wyoming (N=16)	44	56
TOTAL (N=283)	47	53

1/ Includes responses from chief justices, state court administrators, attorneys general, prosecuting attorneys, public defenders, bar association presidents, chief judges and trial court administrators.

Table VII-11

PERCEPTIONS ABOUT WHETHER PEREMPTORY CHALLENGE SYSTEMS ARE ABUSED, BY GROUP[1/]

Group		Percent Affirmative
Chief Judges	(N=83)	63%
Prosecuting Attorneys	(N=144)	38
Public Defenders	(N=30)	40

1/ Excludes responses from California.

colleagues. For example, a public defender in Arizona wrote that it was his "opinion" that "nearly all defense disqualifications are made for legitimate reasons. Prosecution disqualifications," he continued, "are often used to intimidate a lenient judge." Conversely, an Illinois prosecutor wrote that it was his "experience" that challenges are "truly abused." According to him, defense attorneys collectively challenged "an ex-prosecutor" in "an attempt to brow-beat shorter sentences...."

Despite the problems, charges and countercharges, discussions with judges, attorneys and administrators in the states where peremptory challenges are permitted indicate that there is a general consensus about some reasons for exercising the challenge which are considered legitimate and some which are not.

LEGITIMATE REASONS FOR EXERCISING THE CHALLENGE. Four reasons are generally considered legitimate. Two, a judge's interest in a case and bias or prejudice on the part of an assigned judge are reasons accepted in challenge for cause systems. Two others, a judge's demeanor and lack of competency are not. In challenge for cause systems outrageous behavior is handled by state judicial conduct commissions or by the supreme court on appeal. Similarly, when mistakes are made by incompetent judges they are corrected only on appeal.

ILLEGITIMATE REASONS FOR EXERCISING THE CHALLENGE. Five reasons for exercising peremptory challenges are often considered abuses of the system: to effect delay, dislike for a judge, and because of the race, gender or religion of a judge. It is clear that challenges are used, at least to some extent, to effect delay. Indeed, 15% of the respondents believe this to be the case (see Table VII-8). Similarly, it is perceived that challenges are exercised with some degree of regularity to avoid personality clashes.

Invoking a challenge merely to avoid a judge because of his or her race, gender or religion is apparently very uncommon. Indeed, it was rarely mentioned by the chief judges, prosecutors and defenders (see Table VII-8). To further explore these issues a general letter of inquiry was mailed to women and black judges in the 15 states under consideration. Unfortunately, only six of 49 black judges[20/] and 37 of 132 women judges[21/] responded. The relatively low response rate may indicate that these judges do not believe peremptory challenges are used in a discriminatory fashion.[22/]

Eleven, or nearly 30%, of the female respondents indicated that gender is or has been a motivating factor in the exercise of peremptory challenges. Two thought that gender is not a consideration while 24 offered no comment on this issue. Of the eleven who believe that gender is a motivating reason, two indicated that it is a seldom-used consideration. For example, one Missouri judge stated that "[i]n a few instances I have found that my sex has caused an attorney...to request a change of judge.... This has been extremely few and far between." Four of the eleven women judges indicated that gender was a motivating force when they first ascended the bench but is no longer a consideration. One California judge, for example, stated "[W]hen I came on the bench as a woman, challenges were made because I was a woman. That died down very quickly...."

20/ The responses were from only two states.

21/ The responses were from 10 states.

22/ Only one black judge suggested that race might be a factor but he offered no identifiable instances of when or where such challenges had occurred.

Four judges in three different states indicated that gender is regularly a motivating force behind the exercise of peremptory challenges.[23/] One woman judge in Illinois offered the following explanation. "In my particular case," she stated, "I know that the motion for substitution has been filed because I am a woman and either the litigant or the attorneys are afraid of my 'woman's intuition.'"

Several women judges indicated that gender-motivated challenges are restricted to certain types of litigation, especially domestic relations and rape cases. One woman, for example, stated that a motion was filed in a divorce case "because the husband indicated that he had listened to a woman for 20 years and he wasn't going to listen to another one for one minute."

CONTROVERSIAL REASONS FOR EXERCISING THE CHALLENGE. There does not appear to be any general consensus about legitimacy or illegitimacy of exercising peremptory challenge because of a judge's philosophy or sentencing practices. Some individuals believe that allowing challenges for these reasons seriously erodes judicial independence. Indeed, the argument is made that exercising challenges in this fashion ultimately allows attorneys to control the actions and decisions of judges. On the other hand there are those individuals who believe that it is perfectly legitimate to regulate the extreme views and sentencing practices of judges by the use of peremptory challenges. For example, a public defender in Wisconsin suggested that it would be "malpractice" not to challenge one particular judge because "he will give four times the penalty of any other judge."

23/ Three of the four were associate judges.

If one considers invoking the challenge to avoid the philosophy or sentencing practices of a judge illegitimate, these apparently are the most frequent types of abuse. Indeed, a substantial number of respondents believe that challenges are invoked for these reasons. Twenty-six percent suggested that challenges are invoked to avoid the sentencing practices of a judge and 17%, that they are exercised to avoid a judge's philosophy. If, on the other hand, these two reasons are perceived as legitimate, exercising the challenge to cause delay is probably the greatest type of abuse. As suggested above, 15% of the respondents believe that challenges are invoked for this reason.

The Future of Peremptory Challenges. Table VII-12 reveals that 85% of the respondents believe that their peremptory challenge system should be continued. As with the inquiry about how well peremptory challenge systems are working, respondents from Wisconsin tend to be more negative than those from other states. Again, however, the relatively high negative response rate is due to the views of public prosecutors. Indeed, 12 of the 14 individuals in Wisconsin who oppose continuance of their system are prosecutors. Conversely, all five of the public defender respondents believe that Wisconsin's system should be continued.

Extending Challenges to the Federal System. Unfortunately, relatively few of the respondents took a position on whether peremptory challenges should be extended to the federal level.[24/] Many stated that they had little or no experience in the federal system and thus hesitated to make a recommendation.

24/ None of the chief justices or attorneys general took a position; only one state court administrator took a position; and only two bar association presidents and two trial court administrators took a position.

Table VII-12

PERCEPTIONS OF THE RESPONDENTS ABOUT WHETHER THEIR PEREMPTORY CHALLENGE SYSTEM SHOULD BE CONTINUED[1/]

State	Should Be Continued	Should Not Be Continued
Alaska (N=9)	67%	33%
Arizona (N=20)	90	10
Idaho (N=26)	81	19
Illinois (N=55)	89	11
Minnesota (N=44)	91	9
Missouri (N=82)	89	11
Montana (N=32)	81	19
Nevada (N=11)	100	--
North Dakota (N=22)	86	14
Oregon (N=27)	74	26
South Dakota (N=26)	81	19
Washington (N=37)	95	5
Wisconsin (N=36)	61	39
Wyoming (N=23)	91	9
TOTAL (N=450)	85	15

1/ Includes responses from chief justices, state court administrators, attorneys general, prosecuting attorneys, public defenders, bar association presidents, chief judges and trial court administrators.

Of the 42 prosecutors who did take a position, 26 (62%) favored extension.[25/] Eleven of the 14 public defenders commenting on this issue favored extending peremptory challenges to the federal courts. Conversely, however, 16 of the 26 responding chief judges opposed extension.

Typical of the comments about why peremptory challenges should be extended to the federal system are the following:

- The absence of the ability to disqualify a judge, from my perspective of the federal bench, encourages judicial arrogance, insensitivity, and sloppy work habits. The presence of the ability to challenge a judge interjects a much needed element of humility, particularly in a judicial system which does not face reelection. Chief Judge, Washington

- I believe that the procedure should be extended to the federal judiciary. Partially because the procedure does not exist, federal judges are probably the most tyrannical in the country. In our particular District, the branch court which serves us has two Federal judges. One of them is so incredibly biased against the government that most district attorneys have abandoned the 'cross designation' program which allowed us to take certain particularly important criminal matters to Federal Court. The feeling is that we cannot ask our deputies to put up with the kind of abuse and viciously biased rulings that this judge dishes out. If we (and the U.S. Attorney) had the power to peremptorily challenge him, the problem would be solved. Prosecuting Attorney, California

- ...[F]ederal judges, especially, not being popularly appointed and not subject to retention elections, are ridiculously removed from and permanently insulated against personal accountability in any general public sense. For individual litigants to have at least some meaningful chance to bump one of these judges from deciding their fate is a point to democracy overwhelmingly desirable to infuse in the system. Prosecuting Attorney, Wyoming

- I would encourage the adoption of a system similar to Washington's for the federal courts. The cost of litigation is too great to have to wait for an appellate court's reversal of the decision of a biased district court judge who needn't answer to anyone for his errors. Prosecuting Attorney, Washington

---

25/ All five Wisconsin prosecutors commenting on this issue opposed extending the privilege to the federal courts as did four of the six Illinois prosecutors.

- My personal opinion is that the Federal system could benefit from a judicial peremptory challenge system similar to that used in South Dakota. I believe this is particularly true since federal judges sit for life and over time may develop personal 'quirks' which make it difficult for parties representing certain interests to feel that they have a fair and impartial tribunal in which to litigate these cases. Prosecuting Attorney, South Dakota

- My concluding opinion is that they would have an exceedingly salutary effect if they were extended to the federal judiciary. Federal judges are appointed for life, subject only to removal for the grossest of misconduct. While I frankly feel this is as it should be, . . .it does leave judges in a rather autocratic position. . . . The availability of a peremptory challenge. . . would. . . offer much needed and legitimate relief. Public Defender, Oregon

Several of the respondents who support the idea of extending peremptory challenges to the federal judiciary expressed some degree of hesitancy. For example, a prosecutor in North Dakota suggested that although he and his colleagues believe that such a system would be "advantageous" they had concerns about delay. He wrote, "in the cases that I am familiar with where you have three or four District Judges in the same courthouse, these cases are transferred to other judges rather quickly and there is little delay. However, the delay in the Federal system may be longer. . . ." Similarly, a prosecutor in neighboring South Dakota expressed concern about whether such a system would work there. "We have three Federal judges in the state," he wrote, "and I would think that it might be a little difficult substituting judges, particularly in view of the workload in Federal Court. . . ." Other particularly succinct comments on the subject are listed below.

- There are fewer Federal judges, and they are widely scattered in our United States of America, so it is plain that automatic substitution of judges will have a dreadfully bad effect on the U.S. District Court. Prosecuting Attorney, Illinois

- In the federal system in Idaho it will probably work a hardship because all of the judges sit in Boise and ride Circuit throughout the state. As you may be aware, Idaho is 700 miles long. I believe it has a potential to become a logistical problem. Prosecuting Attorney, Idaho

- In the federal situation, at least as is existing in North Dakota, the expenses might be substantially increased were there to be a requirement that Federal District Judges could be replaced on a peremptory basis. This is because in all such situations, the new judge would have to come from outside of the area with the exception of those situations where on occasion a senior judge is available to replace the District Judge. Prosecuting Attorney, North Dakota

- One hesitation I would have about bringing the peremptory challenge into the federal judiciary, is that the . . . [system] is called upon to make the hard decisions. I can imagine that Judge Johnson, for example, in Alabama would have been subjected to this challenge and a less courageous judge may have been called upon to rule on the very difficult decisions involving the desegregation of public schools. Public Defender, California

- I do not believe a change in the federal system is warranted, for two reasons:

  > [First]. . . I feel that this is a slur upon judicial character and integrity--any judge worth his salt, after all, who feels that he cannot maintain a disinterested stance throughout a proceeding, should voluntarily disqualify himself without being asked, and certainly when informally requested to do so.
  >
  > [Second]. . . if our system of justice is to get well, and indeed, survive, there should be no bargain basements where leniency can be found through judge-shopping. . . . [I do not] feel that we can tolerate perversion of justice by defense counsel, who would seek out the weak individual. The system is already tilted too far in favor of the defense; peremptory challenges for judges is merely another defense tool, and one which does not augur well for the quality of justice in this country. Prosecuting Attorney, South Dakota

- There are those one-judge district trial courts where the use of peremptory challenges could effectively prohibit that judge from trying the vast majority of the cases filed in that particular court. Trial Court Administrator, Washington

CONCLUSION

Overall, it is clear that peremptory challenges are exercised very infrequently in the states. There is some variation from jurisdiction to jurisdiction but if all cases in all states are counted it is likely that peremptions are used less than one or two percent of the time in which opportunities arise.

This rate apparently has been relatively stable during the past few years and is substantially reduced even further if the occasional disqualifications of judges who are subjected to blanket challenges are subtracted from the computation.

In most instances there appear to be legitimate reasons for exercising the challenge when judges are disqualified on a "blanket" basis. Often they are perceived widely as having unacceptable sentencing practices or injudicious personal behavior, clearly lacking in professional competence or judicial demeanor, or so slanted in their views that all concerned believe that the litigants involved cannot receive or appear to receive a fair trial.

The idea that peremptory challenges are a tool exclusively used by the defense in criminal cases is simply unfounded. Indeed, the data reveal that prosecutors in many jurisdictions use peremptions regularly as do plaintiff's attorneys and defenders in civil cases. Similarly, there is little evidence to support the notion that challenges are exercised more frequently in rural settings than urban areas. If anything, the reverse may be true in some states.

Peremptory challenges are generally exercised more frequently in criminal cases than in civil litigation. Although little data are available there is some indication that challenges for cause are still exercised where peremptory challenges are available.

Overall, perceptions about the operation of peremptory challenges are very positive. Eighty-eight percent of the respondents indicated that the procedure is working well in their states. Only in Wisconsin did an appreciable number express negative attitudes about its usage. Although there is considerable

disagreement about why challenges are exercised and whether or how often they are used abusively, a vast majority suggest that they should be continued. Indeed, 85% hold this view.

Unfortunately the data do not allow any firm generalizations about whether the respondents believe that the concept should be extended to the federal judiciary. It is relatively clear, however, that there is serious concern among many that, although working well at the state level, peremptory challenges may cause many difficulties in the federal system.

Chapter VIII:

A Brief Summary Of The Operation Of Peremptory Challenges In Each State

CHAPTER VIII

A BRIEF SUMMARY OF THE OPERATION OF PEREMPTORY CHALLENGES IN EACH STATE

The history, legal authority, frequency, and perceptions about peremptory challenges vary from state-to-state. Below are brief profiles of each state which uses the procedure today. They are arranged under two general categories: states with considerable controversy about their challenge system and states with little controversy about their system. A separate section is included on California because of special interest in that state by the United States Department of Justice.[1/]

STATES WITH CONSIDERABLE CONTROVERSY ABOUT PEREMPTORY CHALLENGES

Peremptory challenges are very controversial in four states: Alaska, Missouri, Wisconsin, and California. Below is a discussion of the first three while California is singled out for special consideration at the end of this Chapter.

Alaska. Alaska's current peremptory challenge statute was enacted in 1967.[2/] It allows challenges in both civil and criminal litigation. During 1976 the supreme court held that although the statute created a substantive right, its

---

1/ See Chapter VI.

2/ Much of the following information is adapted from a letter from Don C. Bauermeister, Court Rules Attorney, Alaska Court System, to Larry Berkson, September 16, 1985. The statutes and rules referred to in the chapter may be found in Appendix A. For a thorough analysis of Alaska's history and statutory provisions see Robert A. Levinson, "Peremptory Challenges of Judges in the Alaska Court," UCLA - Alaska Law Review, 6 (Spring, 1977), 269-300.

own criminal rule is the sole provision which controls the procedure.[3/] It seems probable that the court's civil rule pertaining to peremptory challenge procedures applies with equal force to peremptions in civil proceedings.

The present criminal rule has changed little since 1974. It provides that in both the superior and district courts the prosecution and defense are each entitled to one change of judge. If multiple defendants are unable to agree, the trial judge may allow more than one change. A judge may honor an informal request for his substitution. The challenge must be filed within five days after a judge is assigned the case. A party loses the right once a judge makes a ruling in the litigation.

The present civil rule is very similar but does have a few additional provisions. For example, it prohibits the specification of grounds for the change. It also requires attorneys to notify the parties, the presiding judge and the area court administrator of the challenge. The chief judge is responsible for locating replacement judges within the same judicial district before looking outside of it.

The frequency of peremptory challenges in Alaska has been very high in recent years. Indeed, the 3.0% overall rate in 1983 was surpassed only by North Dakota among the states for which there is information available.[4/] Peremptions were invoked in 4.5% of the filings in District 1, 1.8% in District 2, 2.4% in

---

3/ Gieffels v. State, 552 P.2d 661 (Alas. 1976).

4/ Comparative frequency rates reported in this chapter are drawn from Chapter VII.

District 3 and 3.7% in District 4.[5/] The high rates were caused by frequent challenges to a small number of judges. In fact, six judges accounted for 61% of all peremptions in 1983.[6/]

Although the response rate to the letters of inquiry was low in Alaska and thus the results are inconclusive (see Table VIII-1),[7/] it is clear that peremptory challenges have been very controversial in that state during recent years. Telephone interviews with personnel in the Judicial Council, State Court Administrator's Office, as well as with judges and attorneys reveal that there is considerable dispute about the propriety of the system. Indicative also is a January 1981 report of the Supreme Court Policy Advisory Committee. That month the Committee issued a report which stated that there was "virtually a unanimous consensus" among the state's judges "that the peremptory challenge rule should either be eliminated or curtailed in some fashion."[8/] The report further noted that the Committee believed "that the current system of peremptory challenges creates problems that outweigh the benefits."[9/]

Much of the controversy has been sparked by a very celebrated case involving Judge James C. Hornaday of rural Homer. In February, 1982, the judge

---

5/ Memorandum on "Peremptions of Judges," from Heidi Borson-Paine, Legislative Analyst, Research Agency, Alaska State Legislature, to Representative Milo Fritz, January 24, 1984 [hereinafter cited as Heidi Borson-Paine].

6/ Bauermeister, supra note 2.

7/ There are no entries in many of the horizontal columns in the tables in this chapter because not all respondents were asked for information on all of the topics.

8/ Quoted in Bauermeister, supra note 2.

9/ The Committee specifically did not recommend abandonment of the rule altogether.

Table VIII-1
RESPONSES FROM ALASKA[1/]

Topic	Chief Justice	State Administrator	Attorney General[2/]	State Bar Presidents	Local Bar Presidents (N=0)(R=0)[3/]		Chief Judges (N=4)(R=2)		Prosecutors (N=12)(R=3)		Defenders (N=8)(R=4)		Trial Administrators (N=3)(R=1)	
					Y	N	Y	N	Y	N	Y	N	Y	N
Working Well	-	-	Y	-	-	-	1	1	1	-	4	-	1	-
Abused	-	-	-	-	-	-	1	-	2	-	1	1	-	-
Should be Continued	-	-	-	-	-	-	-	2	1	-	4	-	-	1
Extend to Federal	-	-	-	-	-	-	-	1	-	-	1	1	-	-
Causes Delay	-	-	-	-	-	-	2	-	-	-	-	-	1	-
Disrupts Calendars	-	-	-	-	-	-	2	-	-	-	-	-	1	-
Increases Budgets	-	-	-	-	-	-	2	-	-	-	-	-	1	-
Reduces Appeals	-	-	-	-	-	-	-	1	-	-	-	-	-	-
Compromises Independence	-	-	N	-	-	-	1	1	-	1	2	1	-	-
Hardships for Judges	-	-	-	-	-	-	2	-	-	-	-	-	-	-
Frustration for Judges	-	-	-	-	-	-	2	-	-	-	-	-	-	-
Provides Helpful Feedback	-	-	-	-	-	-	-	1	-	-	-	-	-	-
Strains Relationships	-	-	N	-	-	-	2	-	-	2	-	3	-	-
Malpractice Suits	-	-	N	-	-	-	-	-	-	2	-	2	-	-
Enhances Public Confidence	-	-	N	-	-	-	-	1	-	-	1	-	-	-

1/ Telephone interviews were conducted with all four trial court administrators.

2/ An assistant attorney general responded.

3/ N = number in the state; R = number of responses.

announced that he would begin sentencing first time defendants convicted of drunk driving charges to a minimum of 15 days in jail.[10/] Subsequently, defense attorneys challenged him in virtually all of his criminal cases.[11/] A state representative from the area introduced legislation to abolish the procedure and the House Judiciary Committee held two days of hearings on the matter. Both prosecutors and defenders argued against the bill. Legislation did pass in the House which would have repealed peremptory challenges but the portion changing court rules did not receive the two-thirds vote constitutionally required in Alaska to overturn supreme court orders.[12/] In the Senate, a bill introduced would have eliminated peremptory challenges in courts with only one judge but it did not move from committee.[13/]

In December, 1982, Presiding Superior Court Judge Mark C. Rowland signed an order permanently transferring Judge Hornaday to the court in Anchorage. He noted that the transfer was "not predicated upon any conclusion that . . .[Judge Hornaday] had acted improperly or had failed in his responsibilities."[14/] Rather, it was because the peremption rate had effectively "crippled" the judge's ability to serve the district and the frequency of challenges had resulted in unwarranted expenses and disruption to calendar management.

10/ "Homer residents are rallying behind Hornaday," Anchorage Daily News, February 17, 1983.

11/ The actual rate of challenge was approximately 85%. See Jeff Berliner, "Pre-emption of judges 'disruptive,'" The Anchorage Times, February 6, 1983; and Hornaday v. Rowland, 674 P.2d 1333 (Alas. 1983), at 1335.

12/ Letter from Karla L. Forsythe, General Counsel, Alaska Court System, to Larry Berkson, June 14, 1985.

13/ Id.

14/ Hornaday v. Rowland, supra note 11, at 1336.

Judge Hornaday subsequently filed a complaint against his transfer. In the litigation he also asserted that the peremptory challenge provision was unconstitutional. Ultimately, the Alaska Supreme Court disallowed the permanent transfer but upheld the statute.[15/]

The controversy surrounding Judge Hornaday also led to the revelation that several other judges in Alaska were being challenged with relative frequency. For example, an article in The Anchorage Times revealed that a relatively large number of peremptions were directed against five other judges.[16/] In that article the state court administrator was quoted as saying that challenges cost the state an average of $30,000 per year.[17/] Once the Supreme Court's decision was rendered in the Hornaday Case, however, controversy surrounding the peremption of judges dissipated. No bills were introduced into the legislature in either of the 1984 or 1985 sessions.[18/]

Missouri. Peremptory challenges have been used in Missouri only since 1973. Today, the system is regulated by a state statute and six rules promulgated by the supreme court.[19/] The criminal rules provide that a written application for

---

15/ Id.

16/ Berliner supra note 11.

17/ Id. Cost is a considerable concern in Alaska. In many instances judges must be flown into rural areas by airplane to handle cases of challenged judges. The state fiscal officer estimated that peremptions cost the state about $25,000. See Heidi Borson-Paine, supra note 5.

18/ Forsythe, supra note 12.

19/ The statute is directed to change of venue but has implications for change of judge. It provides that when a judge in a multi-judge circuit is challenged because of prejudice or that the opposite party has undue influence over him, the case shall not be transferred to another circuit but to a division within his circuit.

"change of judge" must be made (1) not less than three days prior to a preliminary examination, (2) not later than 10 days before the date set for a misdemeanor trial, and (3) not later than 30 days after arraignment if the trial judge is designated at arraignment in felony cases. If the judge is not designated at that time, the application must be filed not later than 30 days after designation and notification to the parties involved.

Court rules provide that the application need not be verified and may be signed by any party or attorney. A copy must be forwarded by the challenger to all parties involved. Reassignments are made by the chief judge when transfers are within the circuit and by the supreme court when assignments must be made outside of the circuit. Both the state and the defendant are allowed only one change of judge with one exception: if an application for change of judge is made prior to the preliminary hearing and the defendant is held to answer the charge, a challenge may be made to the trial judge as well.

The civil rules are substantially the same with minor variations. Application must be made at least 30 days before the trial date or within five days after the trial setting date, whichever is later. If the trial judge has not been designated within that time, the application may be filed within 10 days after the trial judge has been designated or any time prior to trial, whichever date is earlier. It may be made by plaintiffs, defendants, third-party plaintiffs, third-party defendants, and intervenors. However, each class of individuals is limited to a single challenge. There is one exception: in condemnation cases involving multiple defendants and in which separate trials are to be held, each trial to determine damages must be treated as a separate case for purposes of change of judge.

Unfortunately, almost nothing is known about the frequency of peremptory challenges in Missouri. One administrator was able to provide the number of challenges in his circuit but not the number of case filings and thus the rates could not be computed. Other administrators were very circumspect when asked about the frequency and use of peremptions, perhaps more so than administrators in any other state.[20/]

Impressions supplied by chief judges suggest that, as in most states, the frequency of peremptory challenges varies from district-to-district. Several judges reported that they were "infrequent." At the other extreme some judges reported "frequent" challenges and in one instance the chief judge estimated that "it happens 10 to 15 percent of the time."

In a few instances blanket challenges have been invoked so frequently as to effectively remove judges from hearing criminal cases. In one instance the public defender and private law firms reportedly have pre-printed forms for removing a judge. In another, judges are regularly disqualified in dissolution cases where they are "perceived as leaning in favor of the wife or the husband particularly with regard to custody or support orders." There are also instances where associate circuit judges are disqualified from handling almost all matters.[21/]

The peremptory challenge system in Missouri is very controversial. It is clear that many judges oppose it. A large minority of those who responded to

---

20/ In fairness it should be pointed out that many circuits apparently do not keep any information on peremptory challenges. Data is available on the frequency of inter-circuit transfers but despite several assurances from the state court administrator they were not made available for this study.

21/ It should be noted that in at least two of these instances the chief judges report that the challenges are justified.

requests for information indicated that the system is not working well and that it should be discontinued (see Table VIII-2). Further, evidence of their displeasure with the system is reflected in a resolution of the March, 1985 meeting of the state's presiding judges. Its members urged the supreme court and/or legislature to do away with the present peremptory challenge provisions.

Recently, a state-wide, ten-person, executive committee appointed by the supreme court unanimously adopted a resolution to rewrite the rule. The depth of dissolusionment with peremptions among these judges is reflected in their new proposal. It provides that challenges be sustained only for cause and the person hearing and ruling on the motion must be the judge who is sought to be disqualified.

Judges who oppose the present system indicate that challenges are personally frustrating and cause them unnecessary hardships. The most frequently mentioned problem is travel. This complaint was mentioned most by rural judges.[22/] For example, one judge estimated that he spent 10 to 20 percent of his time outside of his own circuit handling cases for another judge who is frequently disqualified. Similarly, another member of the bench reported that peremption of judges in Northeast Missouri is so frequent that it requires "frequent and lengthy travel in many instances."

Not all rural judges, however, shared this view. Some noted that they travel very little, while others thought that the presiding judge keeps travel to a minimum. One who did travel frequently was philosophical about his

---

22/ Judges from large multi-judge courts reported that they encounter almost no travel as a result of challenges.

Table VIII-2
RESPONSES FROM MISSOURI[1]/

Topic	Chief Justice	State Administrator	Attorney General	State Bar President	Local Bar Presidents (N=2)(R=0)[2]		Chief Judges (N=47)(R=27)		Prosecutors (N=114)(R=49)		Defenders (N=19)(R=11)		Trial Administrators (N=7)(R=3)	
					Y	N	Y	N	Y	N	Y	N	Y	N
Working Well	Y	-	-	-	-	-	15	8	46	1	10	-	2	-
Abused	-	-	-	-	-	-	16	5	12	14	3	3	-	-
Should be Continued	Y	-	-	-	-	-	16	9	45	-	10	-	-	-
Extend to Federal	-	-	-	-	-	-	3	3	7	-	3	-	-	-
Causes Delay	-	-	-	-	-	-	14	8	-	-	-	-	-	1
Disrupts Calendars	-	-	-	-	-	-	12	9	-	-	-	-	1	2
Increases Budgets	-	-	-	-	-	-	8	7	-	-	-	-	-	1
Reduces Appeals	-	-	-	-	-	-	2	2	-	-	-	-	-	-
Compromises Independence	-	-	-	-	-	-	5	6	1	6	-	5	-	-
Hardships for Judges	-	-	-	-	-	-	8	10	-	-	-	-	-	-
Frustration for Judges	-	-	-	-	-	-	10	10	-	-	-	-	-	-
Provides Helpful Feedback	-	-	-	-	-	-	1	3	-	-	-	-	-	-
Strains Relationships	-	-	-	-	-	-	5	11	2	25	-	8	-	-
Malpractice Suits	-	-	-	-	-	-	-	-	1	18	-	7	-	-
Enhances Public Confidence	Y	-	-	-	-	-	3	4	7	2	2	1	-	-

1/ Telephone interviews were conducted with all seven trial court administrators.

2/ N = number in the state; R = number of responses.

situation. "It is not always what I would especially like to be doing at the time," he stated, "but I know of no job or occupation in which you could serve that there wouldn't be similar situations arising. On the other hand," he continued, "it has given me the opportunity to meet personnel in the judiciary and law enforcement throughout the State of Missouri and to observe and exchange ideas with them. . . ." One rural judge went even further. "I don't find it a hardship to periodically travel to other areas," he stated, "and as a matter of fact, do request out of circuit assignments."

Many judges oppose peremptory challenges because they allegedly cause delay.[23/] In fact, a large number suggested that this is the primary reason why attorneys invoke challenges. One chief judge reported that in his circuit "almost 100 percent of the time a change of judge is made for the purpose of delay and is generally made against a judge who has a current docket with the hope that the case will be assigned to some judge who cannot get to it for another 60 or 90 days." A related concern is the impact on calendar management. Typical of comments on both of these subjects are the following:

- It definitely delays justice, [and] does disrupt calendar management . . . particularly in a one judge circuit.
- One of the negative aspects of such a rule is the possible delay and disruption of court dockets. Even though we do not allow applications to be granted when made within a certain time before the case is to be heard, this restriction does not solve all of the docket disruption problems.
- [Peremptory challenges] make it very difficult to coordinate trial calendars to make use of a single courtroom in most rural counties.

23/ Two chief judges reported that they thought that delay could be controlled by local rules and informal agreements between the bench and bar.

Another concern expressed by the chief judges who oppose peremptory challenges is the additional expenses which are incurred as a result of the system. The most frequently mentioned are the costs associated with travel. Typical is the statement of one judge who wrote that "[t]here is considerable expense involved in having judges travel to other jurisdictions, there is a problem with follow-up, that is, motions for new trial, motions for modification, and other proceedings which are involved. . . ."

Unlike judges, prosecutors and defenders are overwhelmingly in favor of the peremptory challenge system. All 10 of the responding public defenders and 46 of the 47 responding prosecutors expressed the belief that the system is working well. Approximately one-half of each group believed that the procedure is abused but all of them suggested that it should be continued. Current attempts to persuade the Missouri Supreme Court to change its rules are likely to be met with strong resistance from these groups.

Wisconsin. Wisconsin first adopted a peremptory challenge statute in 1853. Initially it applied to only criminal litigation but it later was allowed in civil cases as well. A major change took place in 1969 when the affidavit of prejudice requirement was discarded for a "written request for substitution" procedure.[24/] It neither required that any grounds for substitution be given nor any allegation of prejudice be made. The statute was challenged in 1981 as unconstitutional but the following year the state supreme court rejected the

---

24/ See Linda De LaMora, "Statute Allowing Substitution of Judge Upon Peremptory Challenge Does Not Violate Separation of Powers Doctrine. State v. Holmes, 106 Wisc. 2d 31, 315 N.W.2d 703 (1982)," Marquette Law Review, 66 (1983), 414, 418-19.

claim.[25] Instead, the Court, unlike those in other states, declared that it did not violate the separation of powers doctrine nor was it an invalid exercise of legislative power.[26]

Wisconsin has five separate statutes regulating its peremptory challenge system. One applies exclusively to criminal litigation. This legislation outlines a simple form for requesting the substitution. It requires that the name of the case, the name of the judge to be substituted, the date and the signature of the defendant or defendant's attorney be stated. Only one request is allowed. However, if a new trial or sentencing proceeding has been ordered by an appellate court another challenge may be made. Judges assigned must be perempted at least five days before the preliminary hearing takes place unless the court makes an exception. If a new judge is assigned to try the case and the defendant has not yet exercised his right, he may file a motion with the clerk within 15 days of being notified of the name of the new judge. If the notification date occurs within 20 days of the date set for trial, the request must be made within 48 hours of being notified of the new judge. If the notification occurs within 48 hours of the trial or if there has been no notification, the defendant may request a substitution prior to commencement of the proceeding. In actions involving more than one defendant the motion must be made jointly unless severance is granted by the court. The clerk of court is responsible for contacting the challenged judge to determine whether the peremption is timely. If so, the clerk assigns another judge. If the challenged judge does

---

25/ State v. Holmes, 106 Wis.2d 31, 315 N.W.2d 703 (1982).

26/ For a detailed analysis see Chapter XIV.

not respond within seven days, the clerk refers the matter to the chief judge for a determination of timeliness. Unlike any other state except its southern neighbor, Illinois, Wisconsin does not allow prosecutors to invoke challenges in criminal litigation.

A second statute applies exclusively to civil actions. Plaintiffs must peremptory a judge not later than 60 days after the summons and complaint are filed. Defendants must file the motion not later than 60 days after service of a summons and complaint upon them. If a new judge is assigned to try the case, a request must be made within 10 days of being notified of the substitute. If notice is received less than 10 days before the trial, the request must be made within 24 hours. If the notice is received less than 24 hours before trial, the litigation can only proceed upon stipulation of the parties. Copies of requests for substitution must be served on all litigants involved. Parties united in interest may only file one challenge, but the consent of all parties united in interest need not be obtained for a challenge by an individual. The clerk follows the same administrative procedures as provided in the statute for criminal cases.

A third statute providing for peremptory challenges in Wisconsin is found in the Children's Code. The child, or the child's parent, guardian or legal custodian either before or during the plea hearing may file a request for substitution with the clerk. The challenged judge must immediately request assignment of a new judge.

The fourth statute applies to small claims litigation. Any party to such an action may file a challenge. It must be filed on the return date of the summons or within 10 days after the case is scheduled for trial. If a new judge is

assigned, a procedure identical to that outlined in the civil statute is followed.

The fifth statute involving peremptory challenges is found in the Vehicle Code. In traffic regulation and non-moving traffic violation cases a party may file a request for substitution not later than seven days after the initial appearance. If a new judge is assigned, a procedure identical to that found in the statute for civil cases is followed.

The frequency of peremptory challenges in Wisconsin is relatively low. Rough computations by the supreme court in 1982 suggested that they were exercised in less than two percent of the cases overall.[27/] A recent study by the Office of Court Operations in the state administrator's office computed the rate at less than one percent.[28/] The information gathered for the present study found the rate to be 1.1%. During 1984, only three of nine states for which there is information ranked lower.

Despite the overall relative infrequency of challenges in Wisconsin the number of blanket peremptions (loosely defined) in recent years is relatively high. Indeed, the state rivals Minnesota and Washington in this respect. Instances of this phenomenon are found in both rural and urban settings and have been invoked for a variety of reasons during the past few years. A judge's demeanor has been at issue in at least five instances. These judges are widely

---

27/ State v. Holmes, supra note 25, at 722.

28/ Director of State Court, Office of Court Operations, "Analysis of Substitution in Wisconsin Circuit Courts Prepared for the Wisconsin Judicial Conference," September 16, 1985, at 8 [hereinafter cited as Director of State Court].

perceived by prosecutors, defenders and private attorneys alike as gruff, unprofessional, insulting and intemperate in their conduct.

Harsh sentencing practices have been an issue in challenges made to at least seven judges. In three instances they have been perceived as particularly strict on individuals convicted of driving under the influence of alcohol. One judge apparently has the habit of accepting guilty pleas and subsequently imposing a sentence greater than that originally agreed upon. Another is accused of not accepting the sentencing recommendations of the public prosecutor. In one instance, the judge is perceived as biased, particularly toward men in divorce cases, while in another the judge is perceived as lacking experience. In still another instance a judge is challenged by his former colleagues in the public defender's office, apparently because of conflicts over policy. In at least two instances former public prosecutors have been challenged because of perceived ties to former colleagues. Finally, one judge has been challenged because of an internal dispute over the firing of a local administrator. Those who opposed the judge in this bitter dispute apparently fear reprisals. Two of the judges noted above have been defeated in recent elections. One has been disciplined by the Judicial Conduct Commission and one, accused of misconduct in office, has been forced from the bench.

Peremptory challenges in Wisconsin are perhaps more controversial than in any other state. In part this may be due to the large number of blanket challenges. It is clear that in some instances they have disrupted the smooth operation of the courts, especially in rural areas. Extended travel is another problem as well as the accompanying costs.

Although the response rate to the letters of inquiry among chief judges was relatively low and thus the results inconclusive (see Table VIII-3) it is clear that the judiciary in Wisconsin generally opposes peremptory challenges. Two judges challenged the constitutionality of the law in 1981.[29/] In 1983 a survey of all of the state's trial judges by the Judicial Council revealed that 61 of 76 supported a system which would allow challenges only upon a showing of cause.[30/] Only 11 expressed opposition to the idea. Telephone interviews conducted during 1985 generally confirm these views.[31/]

The reasons for opposition are varied. Most judges focus on the distance required to travel in rural areas. For example, one chief judge noted that the nearest county seat is 60 miles away and it is 176 miles to a county seat where he regularly exchanges judges. The travel required creates personal hardships for judges, wastes time and is costly. Some noted that delay is a result, and that calendar management is difficult. It is also clear that at least some judges oppose the system because they view challenges as a personal attack on their character, integrity and/or personal reputation.

Trial court administrators also generally oppose the system. Perhaps one of the most outspoken opponents is former Ninth District Administrator (Wausau) Norman Meyer. In 1981, in a series of newspaper interviews, he attacked the

---

29/ State v. Holmes, supra note 25.

30/ De La Mora, supra note 24, at 429, n.84.

31/ Not all of the chief judges oppose the system. Three in written responses to requests for information indicated that it should be continued as did another during a telephone interview.

Table VIII-3
RESPONSES FROM WISCONSIN[1/]

Topic	Chief Justice	State Administrator	Attorney General[2/]	State Bar President	Local Bar Presidents (N=1)(R=0)[3/]		Chief Judges (N=10)(R=5)		Prosecutors (N=71)(R=39)		Defenders (N=27)(R=7)		Trial Administrators (N=10)(R=5)	
					Y	N	Y	N	Y	N	Y	N	Y	N
Working Well	-	-	Y	-	-	-	2	2	11	9	5	1	2	-
Abused	-	-	Y	-	-	-	4	-	4	6	2	3	3	-
Should be Continued	-	-	Y	-	-	-	3	2	12	12	5	-	1	-
Extend to Federal	-	-	-	-	-	-	-	-	-	5	-	-	-	-
Causes Delay	-	-	-	-	-	-	2	1	-	-	-	-	5	-
Disrupts Calendars	-	-	-	-	-	-	3	2	-	-	-	-	2	1
Increases Budgets	-	-	-	-	-	-	1	3	-	-	-	-	2	-
Reduces Appeals	-	-	-	-	-	-	-	-	-	-	-	-	-	-
Compromises Independence	-	-	-	-	-	-	1	1	2	5	-	-	-	-
Hardships for Judges	-	-	-	-	-	-	2	1	-	-	-	-	-	-
Frustration for Judges	-	-	-	-	-	-	3	-	-	-	-	-	-	-
Provides Helpful Feedback	-	-	-	-	-	-	1	-	-	-	-	-	-	-
Strains Relationships	-	-	-	-	-	-	1	2	-	9	-	1	-	-
Malpractice Suits	-	-	-	-	-	-	-	-	-	11	1	4	-	-
Enhances Public Confidence	-	-	-	-	-	-	2	1	3	3	1	-	-	-

1/ Telephone interviews were conducted with all ten trial court administrators.

2/ An assistant attorney general responded.

3/ N = number in the state; R = number of responses.

system as "ridiculous," "very expensive" and as "an incredible waste of time."[32/] He estimated that substitutions were wasting about $175,000 per year in his district alone. Telephone conversations with all ten court administrators during 1985 confirm that a majority share Meyer's opposition to the system, especially those in rural areas where blanket challenges are relatively frequent and a considerable amount of travel is required. The view is not unanimous however. Two administrators responding to written requests for information indicated that the system is working well. Another, in a telephone interview, agreed. "Company policy would have us say," he stated, "that we are opposed to substitutions [but] my own opinion is that it doesn't make a gigantic difference."

State prosecutors are divided on the issue. Approximately one-half of those responding to requests for information indicated that the system is working well and should be continued. The other one-half did not. The percentage of negative views among prosecutors in Wisconsin is among the highest of any state. In part this is probably due to the fact that they are not allowed to exercise the challenge while defenders may do so. Eight of the responding prosecutors voluntarily suggested that they should be granted the privilege while only one was opposed to the idea. Few defenders responded to requests for information but those who did, support the Wisconsin system.

STATES WITH LITTLE CONTROVERSY ABOUT PEREMPTORY CHALLENGES

Peremptory challenges are relatively uncontroversial in eleven states: Arizona, Idaho, Illinois, Minnesota, Montana, Nevada, North Dakota, Oregon, South Dakota, Washington and Wyoming.

32/ Jim Elliott, "Substitution adds costs, delays to state justice," Daily Herald (Wausau), September 18, 1981.

Arizona. Since 1939, Arizona has allowed peremptory challenges in both civil and criminal litigation. Although there is a legislative statute pertaining to peremptions in civil cases a supreme court rule is apparently controlling.[33/] First promulgated in 1972, the current rule allows each side to change one judge or one court commissioner. When multiple parties are involved, the judge may allow additional challenges. Contrary to earlier practices, an affidavit of bias and prejudice is no longer required. Instead, a pleading entitled "Notice of Change of Judge" must be filed with the parties, presiding judge and court administrator. No grounds may be specified. Judges are allowed to grant informal requests for a change but these must be placed in the court record. The notice must be filed 60 days before the date set for trial. Challenges to replacement judges must be filed within 10 days. The right is waived if a judge makes any ruling in the litigation. In cases remanded from appellate courts the right runs anew.

The criminal rule is very similar. Time requirements, however, are different. A notice of change must be filed, or an informal request made, within 10 days after any of the following: (1) the arraignment, if the case is assigned to a judge at or prior to the arraignment, (2) the filing of the mandate from an appellate court with the clerk of the superior court, or in all other cases (3) the actual notice to the requesting party of the assignment of the case to a judge.

When the civil rule was first promulgated, there were fears on the part of some that the system would "open the door to the possibility of widespread

---

33/ For a history and analysis see Kraig J. Marton, "Peremptory Challenges of Judges: The Arizona Experience," Law and the Social Order (1973), 95.

judge changing in every case."[34/] A study conducted the following year, however, found this not to be the case.[35/] According to the investigation, there was no "flood" of litigation, there was little evidence that the system was used as a dilatory tactic, and the courts and administrative burdens were no higher than under the previous system.[36/]

A perusal of the frequency data presented in Appendix B suggests little has changed in the ensuing years. The rates for civil litigation in Maricopa County, for example, were approximately 2% in 1971, 2.3% in 1972 and 2.2% in 1984.

Peremptory challenges have been relatively uncontroversial in recent years. As can be observed in Table VIII-4, they are perceived as working well by judges, prosecutors and defenders alike. Although judges believe that peremptions are abused and have some negative aspects they, as well as both groups of attorneys, believe that the system should be continued. Even the trial court administrators and clerks who must constantly deal with the clerical aspects of challenges seem to accept the idea. For example, an administrator in Phoenix stated, "it would be nice if they [attorney] couldn't do this. It causes us extra work. But I understand why it is done and it's something we can get by with."

Despite the wide acceptance there have been isolated areas of difficulty. Most notably was a situation which arose in a rural county and involved a long-

---

34/ Id., at 96.

35/ Id., at 108

36/ Id.

Table VIII-4
RESPONSES FROM ARIZONA[1]

Topic	Chief Justice	State Administrator	Attorney General	State Bar President	Local Bar Presidents (N=1)(R=0)[2]		Chief Judges (N=13)(R=8)		Prosecutors (N=17)(R=8)		Defenders (N=4)(R=3)		Trial Administrators (N=2)(R=0)	
					Y	N	Y	N	Y	N	Y	N	Y	N
Working Well	-	-	Y	Y	-	-	6	1	8	-	3	-	-	-
Abused	-	-	N	N	-	-	5	-	1	4	-	2	-	-
Should be Continued	-	-	Y	Y	-	-	5	2	8	-	3	-	-	-
Extend to Federal	-	-	-	Y	-	-	-	1	-	-	-	-	-	-
Causes Delay	-	-	-	-	-	-	3	2	-	-	-	-	-	-
Disrupts Calendars	-	-	-	-	-	-	2	2	-	-	-	-	-	-
Increases Budgets	-	-	-	-	-	-	3	-	-	-	-	-	-	-
Reduces Appeals	-	-	-	-	-	-	-	2	-	-	-	-	-	-
Compromises Independence	-	-	N	Y	-	-	-	1	-	2	-	-	-	-
Hardships for Judges	-	-	-	-	-	-	1	2	-	-	-	-	-	-
Frustration for Judges	-	-	-	-	-	-	3	-	-	-	-	-	-	-
Provides Helpful Feedback	-	-	-	-	-	-	1	-	-	-	-	-	-	-
Strains Relationships	-	-	-	N	-	-	3	1	-	6	-	2	-	-
Malpractice Suits	-	-	-	N	-	-	-	-	-	1	-	3	-	-
Enhances Public Confidence	-	-	-	-	-	-	2	-	2	-	-	-	-	-

1/ Telephone interviews were conducted with both trial court administrators and several of their assistants.

2/ N = number in the state; R = number of responses.

running dispute between the prosecutor's office and an elderly judge who was a former prosecutor. The judge was challenged in almost every criminal case and was later defeated in a bitterly-fought election contest. A major controversy during the campaign was the large number of peremptions which the judge had received. Initially, the successful candidate was challenged frequently by political allies of the senior judge but according to the chief judge this has been "tapering off."

Another situation recently occurred in a similar locale. An attorney stood for election against an incumbent judge. One of his campaign tactics was to disclose that the judge had been disqualified an inordinate number of times. Statistics were paraded before the public attracting wide attention. The challenger ultimately won and now apparently his political opponents are challenging him frequently.

Idaho. Idaho first adopted a peremptory challenge system in 1933. Today it is regulated by two supreme court rules. The civil rule provides that any party may disqualify one judge or magistrate by filing a motion of disqualification. A specific provision prohibits the making of such a motion to "hinder, delay or obstruct the administration of justice." According to the state court administrator in one instance a judge refused to be disqualified because the "motion was strictly a delay mechanism." His decision was upheld by the supreme court on appeal.

The civil rule also requires motions to be filed not later than five days after service of notice that the action has been set for trial, pretrial or hearing. It must be made before any decision has been rendered by a judge in

the case. When multiple parties are involved, the judge may grant more than one disqualification.

The criminal rule is identical to the civil rule with one additional sentence. It provides that when defendants disqualify a judge, the time within which they may be given a speedy trial commences to run anew on the date of the disqualification.

The frequency of peremptory challenges in Idaho apparently has been very low in recent years. During a six month period in 1982, for example, peremptions were invoked in only .3% of the cases in which they were allowed.[37/] A large percentage of these challenges was directed to relatively few magistrates who serve in limited jurisdiction courts. Indeed, in one 14-judge district, 14 of 67 peremptions were to a single magistrate. In another 14-judge district, 76 of 90 peremptions were directed toward a single magistrate. Finally, in a 20-judge district, 43 of 116 peremptions were directed toward one magistrate. In effect, general jurisdiction trial court judges have been relatively immune from large numbers of challenges. Apparently there have been no newsworthy cases in Idaho nor, at least in recent years, have there been any "blanket challenges" at this level.

The relatively low frequency rate perhaps in large part accounts for the general support for the system. It is clear that some difficulties are presented for the administrators especially in districts where magistrates are frequently challenged. As one official stated, "From an administrator's point of

---

37/ Administrative Office of the Courts (Idaho), Disqualification Sample Study (memorandum from Kit Furey to Carl Bianchi) December 13, 1982.

view we don't like it." Judges, too, are somewhat concerned about the system and according to one member of the bench have "several times attempted to persuade the Idaho Supreme Court to eliminate the automatic disqualification."

Overall, however, there appears to be relatively strong support for the system. The chief justice, attorney general and state bar president are very supportive of it as were nearly all of the prosecutors and defenders who responded to requests for information (see Table VIII-5). Even administrators appear to be only mildly opposed to the idea. For example, one administrator stated that "From a lawyer's point of view it is good and I would want to use it if I were practicing. There are some judges who are not too competent." Perhaps their attitude is best characterized by the words of one administrator who stated that "it is an administrative difficulty but we can live with it."

Illinois. A peremptory challenge system was first adopted by the Illinois legislature in 1963. Unlike most states, challenges are not allowed in civil litigation and prosecutors are not allowed to invoke them in criminal cases. Moreover, although only one peremption per defendant is allowed in most cases, when serious "Class X" felonies are involved they are allowed two.

Presently the statute provides that challenges may be invoked (1) within 10 days after a case has been placed on the docket of a judge or (2) within 24 hours after a previous challenge has been exercised.[38/] The motion for substitution must allege that the judge is so prejudiced against the defendant that he cannot receive a fair trial. Upon receipt of the motion the judge is not allowed to proceed further and must transfer the case to a colleague.

38/ For a detailed analysis see Jeffrey R. Tone, "Substitution of Judges in Illinois Criminal Cases," University of Illinois Law Forum (1978), 519-39.

Table VIII-5
RESPONSES FROM IDAHO

Topic	Chief Justice	State Administrator	Attorney General	State Bar President	Local Bar Presidents (N=0)(R=0)[1]		Chief Judges (N=7)(R=4)		Prosecutors (N=43)(R=20)		Defenders (N=7)(R=3)		Trial Administrators (N=7)(R=2)	
					Y	N	Y	N	Y	N	Y	N	Y	N
Working Well	Y	-	Y	Y	-	-	1	1	16	2	3	-	-	2
Abused	N	-	-	Y	-	-	3	-	6	6	2	-	2	-
Should be Continued	-	-	Y	Y	-	-	1	1	15	2	3	-	-	2
Extend to Federal	-	-	-	-	-	-	-	2	3	2	-	-	-	1
Causes Delay	-	-	-	-	-	-	1	-	-	-	-	-	2	-
Disrupts Calendars	-	-	-	-	-	-	2	1	-	-	-	-	-	-
Increases Budgets	-	-	-	-	-	-	-	-	-	-	-	-	-	-
Reduces Appeals	-	-	-	-	-	-	-	-	-	-	-	-	-	-
Compromises Independence	-	-	-	-	-	-	-	-	-	1	2	-	-	-
Hardships for Judges	-	-	-	-	-	-	1	1	-	-	-	-	-	-
Frustration for Judges	-	-	-	-	-	-	2	-	-	-	-	-	-	-
Provides Helpful Feedback	-	-	-	-	-	-	-	-	-	-	-	-	-	-
Strains Relationships	-	-	N	N	-	-	1	1	1	7	-	1	-	-
Malpractice Suits	-	-	-	-	-	-	-	-	-	8	-	2	-	-
Enhances Public Confidence	-	-	-	-	-	-	-	1	4	-	-	-	-	-

1/ N = number in the state; R = number of responses.

Unfortunately there is no statistical data available on how frequently challenges are exercised.[39/] It appears to be the general consensus of opinion, however, that they are not used often. For example, Frank J. Bailey, Chief Deputy of the Criminal Courts in Cook County (Chicago) claims that challenges are "used rarely" there. Thomas Powell, Administrative Secretary for the rural Ninth Judicial Circuit, estimates that the 16 judges in his district are only challenged about 20 times a year.

Overall there appear to be fewer complaints about the peremptory challenge system in Illinois than in any other state. As Table VIII-6 indicates, the chief justice and the state court administrator think positively about the system as do the chief judges, district attorneys and public defenders.

The views of most judges are perhaps best summarized by the chief judges of the First and Seventh Judicial Districts. Henry Lewis of rural down-state Marion indicated that although challenges "may cause some hardship in travel. . . state judges generally are not too concerned about being substituted out of a case." Judge Richard J. Cadagin in the state capital of Springfield stated:

> There have been some occasions in which a substitution of judge has caused delays or inconvenience to

---

39/ Several trial court administrators were contacted for such information. None had any statistics. Several inquiries to various individuals in the state court administrator's office also proved fruitless. A committee of the Chicago Bar Association has estimated that of the 1,500 to 2,000 cases assigned for trial in the Law Division of Cook County Circuit Court, there are only three to five challenges each month. The Committee also estimated that in the Chancery Division, challenges occurred in fewer than one percent of the cases. See Chicago Bar Association, Federal Civil Procedure Committee, Report of the Subcommittee to Consider the Proposed "Peremptory Challenge Act of 1981" Providing for Peremptory Challenges of Federal Judges, 1985.

Table VIII-6
RESPONSES FROM ILLINOIS[1/]

Topic	Chief Justice	State Administrator	Attorney General	State Bar President	Local Bar Presidents (N=2)(R=0)[2/]		Chief Judges (N=21)(R=13)		Prosecutors (N=101)(R=36)		Defenders (N=44)(R=20)		Trial Administrators (N=7)(R=2)	
					Y	N	Y	N	Y	N	Y	N	Y	N
Working Well	Y	Y	-	-	-	-	10	1	16	4	19	-	2	-
Abused	N	-	-	-	-	-	2	3	6	8	2	4	-	-
Should be Continued	Y	Y	-	-	-	-	11	1	17	5	18	-	1	-
Extend to Federal	-	-	-	-	-	-	-	1	2	4	4	2	-	-
Causes Delay	-	N	-	-	-	-	4	5	-	-	-	-	-	-
Disrupts Calendars	-	N	-	-	-	-	3	4	-	-	-	-	-	2
Increases Budgets	-	N	-	-	-	-	1	5	-	-	-	-	-	-
Reduces Appeals	-	-	-	-	-	-	-	-	-	-	-	-	-	-
Compromises Independence	-	-	-	-	-	-	1	2	1	6	-	10	-	-
Hardships for Judges	-	-	-	-	-	-	2	4	-	-	-	-	-	-
Frustration for Judges	-	-	-	-	-	-	3	5	-	-	-	-	-	-
Provides Helpful Feedback	-	-	-	-	-	-	3	-	-	-	-	-	-	-
Strains Relationships	-	-	-	-	-	-	1	4	-	2	-	9	-	-
Malpractice Suits	-	-	-	-	-	-	-	-	1	5	2	13	-	-
Enhances Public Confidence	-	-	-	-	-	-	1	-	3	2	3	-	-	-

1/ Telephone interviews were conducted with five trial court administrators.

2/ N = number in the state; R = number of responses.

> some judges for travel and the like, however, I do not believe that this inconvenience should in any way affect the right of a party to seek a substitution of judge.

Naturally there are a few judges who dissent from this view. Some are annoyed by the fact that when multiple cases are filed against multiple defendants there can be so many challenges that the number of judges available in the circuit is exhausted. Consequently, the chief judge must look outside of his district for a replacement. A few other judges suggested that challenges waste time, cause delay and increase judicial budgets.

Telephone contacts with state and trial level administrators also reveal considerable support for the system. An administrator in the Chicago courts reported that there are no problems of which he is aware and that the system "is working well." The administrative secretary to the First Judicial Circuit also expressed the belief that the system "works well." "It can cause delay," she stated, "but is not problematic in that regard." Another administrator in a rural part of the state indicated that challenges are not filed frivolously in his district. When they are exercised, he stated, the attorneys "have real reasons for doing so."

The only major point of contention about peremptory challenges in Illinois is that prosecutors do not have the right to exercise them. A few district attorneys indicated displeasure with peremptions but an overwhelming majority suggested that the state should have the right as well. To them it is unfair to allow one side in the litigation to exercise a challenge and not the other. For example, Chicago's Richard M. Daley asserted that "[a]llowing the defense the unilateral right to a substitution of judge provides an unwarranted and unjust advantage to the defense. . . . This imbalance between the rights of the state

and the defense," he continued, "poses a serious threat to the administration of justice in any type of case. However, it is particularly threatening in complex or sensitive cases such as those involving organized crime or official corruption; and I believe it is most crucial in cases where attorneys or judges are charged with acts of misconduct."

For the past several years the State's Attorney's Association has attempted to lobby a bill through the legislature giving prosecutors the same right to a challenge that defendants currently retain. Thus far, they have been unsuccessful. Public defenders overwhelmingly support the concept of peremptory challenges and believe they should be continued in Illinois.

Minnesota. Peremptory challenges have had a long history in Minnesota. By 1983 there were no less than four statutes regulating the system.[40/] At that time there was some confusion about which procedures were controlling in the various levels of courts and a legal opinion on the subject was prepared by the Judicial Planning Committee.[41/] The Conference of Chief Judges and Assistant Chief Judges addressed the issue in March, 1984.[42/] They authorized the state court administrator to issue a policy statement regulating the use of challenges. Administrative Policy Number 10 affirms in part and supersedes in part the existing statutes. As was formerly the case, challenges are allowed in district, county and municipal courts in both civil and criminal cases.

40/ Disqualification of Judges, Memorandum from Michael B. Johnson, Judicial Planning Committee to Sue Dosal, State Court Administrator, Minnesota, October 29, 1983.

41/ Id.

42/ Administrative Policy No. 10, Office of State Court Administrator, 1984.

However, the filing of an "Affidavit of Prejudice," which applied to civil litigation in municipal and district courts, is no longer required. Instead, a "Notice to Remove" procedure is substituted. It provides that in civil cases any party or attorney may file one such notice. It must be given within one day after a judge is assigned to a hearing or trial. Once it is filed with the clerk of court, the chief judge of the district must assign another judge to the case. In criminal matters the defendant must file a notice not less than two days before the expiration of time allowed him by law to prepare for trial. The Administrative Policy specifically prohibits informal requests for a change of judge.

Overall, the frequency of peremptions in Minnesota in recent years has been relatively low. In 1983, only three of nine states for which data is available ranked lower. However, the overall frequency is somewhat misleading. In at least three rural districts during 1983 and 1984 the rates of challenge exceeded three percent. The high rates in these areas are the result of "blanket challenges" being filed against a few judges. Taken collectively there perhaps have been more of these types of challenges in Minnesota than in any other state.

An investigation of the motives behind the blanket challenges indicates that the reasons are varied. It is clear that in some instances preannounced sentencing decisions, especially in DWI cases, is the motive. In others, judges who issue harsh or lenient sentences are disqualified by the public defender or district attorney respectively. In still other cases it is clear that personality clashes between attorneys and judges is the paramount reason. One judge is challenged frequently because he calls cases on short notice and

attorneys allegedly can not be prepared within the short time frame. Another is perceived as being prejudiced against several groups of individuals. Still another is perceived as incompetent by many of the attorneys who appear before him.

Perhaps the most extreme case involved irreconcilable differences between a judge and his former law firm. The firm petitioned the Supreme Court and was granted an order permanently prohibiting the judge from hearing any of their cases. The judge filed charges against the attorneys with the lawyer discipline board and they in turn filed charges against the judge with the judicial conduct commission.

In several instances blanket challenges have ceased, due to the death or retirement of judges or a reconciliation between the parties involved. For example, in one district blanket challenges were levied against an incoming judge by the county prosecutor but after a few months the difficulty was resolved.

Despite the relatively high rates of challenge in certain districts and the unusually large number of blanket challenges, there appears to be very strong support for peremptions in Minnesota. Positive assessments were offered by five of the six responding judges (see Table VIII-7). This tends to confirm the views of an administrator who observed the discussion during the Conference of Chief Judges and Assistant Chief Judges alluded to earlier. It was his impression that "a majority. . . did not mind judicial peremptory challenges." According to him a few judges did not like the system but "there were more voices in favor of it than against it."

Table VIII-7
RESPONSES FROM MINNESOTA[1]

Topic	Chief Justice	State Administrator	Attorney General	State Bar President	Local Bar Presidents (N=1)(R=1)[2]		Chief Judges (N=10)(R=6)		Prosecutors (N=87)(R=41)		Defenders (N=8)(R=4)		Trial Administrators (N=9)(R=4)	
					Y	N	Y	N	Y	N	Y	N	Y	N
Working Well	-	-	Y	-	1	-	5	1	34	2	4	-	2	-
Abused	-	-	N	-	1	-	3	3	2	17	-	2	1	1
Should be Continued	-	-	Y	-	1	-	5	1	29	3	4	-	-	-
Extend to Federal	-	-	-	-	-	-	1	-	2	-	-	-	-	-
Causes Delay	-	-	-	-	-	-	1	4	-	-	-	-	-	3
Disrupts Calendars	-	-	-	-	-	-	2	4	-	-	-	-	2	1
Increases Budgets	-	-	-	-	-	-	-	2	-	-	-	-	-	2
Reduces Appeals	-	-	-	-	-	-	-	-	-	-	-	-	-	-
Compromises Independence	-	-	N	-	-	-	-	2	2	9	-	3	-	-
Hardships for Judges	-	-	-	-	-	-	-	4	-	-	-	-	-	-
Frustration for Judges	-	-	-	-	-	-	-	3	-	-	-	-	-	-
Provides Helpful Feedback	-	-	-	-	-	-	-	-	-	-	-	-	-	-
Strains Relationships	-	-	N	-	-	1	-	4	2	14	-	2	-	-
Malpractice Suits	-	-	N	-	-	1	-	-	1	14	-	2	-	-
Enhances Public Confidence	-	-	Y	-	1	-	-	-	8	2	1	-	-	-

1/ Telephone interviews were conducted with nine trial court administrators.

2/ N = number in the state; R = number of responses.

Surprisingly, there does not appear to be strong opposition from the administrators who are required to deal with the clerical aspects of peremptory challenges. Telephone conversations with nine of the 10 district administrators reveal that nearly all of them believe that few difficulties are created by peremptions. This is true even where blanket challenges have been exercised. Several administrators indicated that they believe many challenges are justified and are exercised for legitimate reasons.

Montana. Montana's peremptory challenge statute was first enacted in 1903 by a special session of the legislature.[43/] The action was prompted by a district judge who continually granted injunctions which allowed an individual to mine ore claimed by the Anaconda Company. The statute permitted any party in a civil case to challenge up to five judges. At the time, two-thirds of the state's judges could have been disqualified in the event that two parties exercised all of their challenges.[44/] In 1909, the act was amended to reduce the number of judges who could be disqualified from five to two.[45/] In 1959 the use of peremptory challenges was extended to criminal cases, but only one peremption was allowed.[46/] In 1976 the state's supreme court adopted a rule superseding the statute.[47/] During neither the 1977 nor 1979 legislative sessions was the

---

43/ Laws of Montana (1903), ch. 3, Second Extraordinary Session. For an excellent analyses see Douglas D. Dasinger, "Statute Providing for Disqualification of a Judge By Affidavit Without Proof of Bias or Prejudice Is Not a Legislative Infringement on Judicial Power," Montana Law Review, 27 (Fall, 1965), 79-84.

44/ Letter from William J. Speare, Chief Judge, to Larry Berkson, July 15, 1985.

45/ Laws of Montana (1909), ch. 114.

46/ Laws of Montana (1959), ch. 61.

47/ The Order of December 29, 1976 became effective March 1, 1977.

rule successfully challenged, as allowed by law, and thus it remained effective. However, in late November 1978, the state's attorney general filed an action in the supreme court seeking a ruling to "ensure prompt and speedy trials of criminal cases."[48/] One of his suggested remedies was the elimination of peremptory disqualifications. The court, however, denied this request. Chief Justice Haswell, writing the opinion, noted that the purpose of the rule is to guarantee both the prosecutor and defendant a fair trial before an impartial judge. He acknowledged that peremptions caused delays, calendaring problems, and interfered with the normal routine of the district courts. "Nonetheless," he stated, ". . . the paramount and overriding consideration is the right to a fair trial before an impartial district judge. We consider that improvements in the present system," continued the chief justice, "be in the area of correction of abuses in the exercise of peremptory disqualifications rather than elimination of the right."[49/]

The court was, nonetheless, concerned about abuse of the system. Its chief concern was in the area of mass disqualifications. To determine the extent of this problem it ordered the attorney general to conduct a study of these challenges during the five years, 1974-1978. In June, 1979, the findings were submitted to the court.[50/] After a county-by-county analysis of blanket peremptions the attorney general stated that short of eliminating the right he

---

48/ State, ex rel. Greeley v. The District Court of the Fourth District, 590 P.2d 1104, 1105 (Mont. 1979).

49/ Id., at 1108.

50/ Attorney General's Report Concerning Mass Peremptory Disqualifications of Montana District Judges, 1974-1978, Submitted to the Montana Supreme Court, June 11, 1979 [hereinafter cited as Attorney General's Report].

had no recommendations for remedial action.[51/] He quoted approvingly the commentary to the American Bar Association Standards Relating to Trial Courts which permits peremptions, noting that "[t]he considerations reflected in the commentary create both an expectation and justification for mass disqualification."

In June, 1981, the Supreme Court of Montana adopted the present rule regulating peremptory challenges. Unlike the 1976 rule it does not extend to justice, police or municipal courts, but only to district court proceedings. Challenges may be made by each adverse party. As in the past, two challenges are allowed in civil litigation and one in criminal cases. The individual filing the motion for substitution must notify all parties. Upon receiving the notice the named judges must arrange for another judge to hear the case.[52/] The motion must be filed within 10 days after the judge has been assigned the case. When a new trial is ordered by the district or supreme courts, each adverse party is entitled to one additional challenge.[53/]

Unfortunately, not a great deal is known about the frequency of peremptory challenges in Montana. The state court administrator was unable to supply any information and there are no trial court administrators from which to seek estimates. Only a few chief judges offered remarks about how often peremptions are exercised in their districts. Some reported that it is used frequently while others indicated that it is not. One judge reported that during his 22 years on the bench he had been disqualified only about two times a year.

51/ Id., at 11.

52/ Apparently a random system of rotation is now used at least in some districts.

53/ As with the 1976 rule, the 1981 rule was not disallowed by the subsequent legislative session and thus remains in effect.

The only other information on the frequency of challenges in Montana is found in the aforementioned report of the attorney general to the supreme court on blanket disqualifications in criminal cases.[54/] He found no instances of mass challenges in 46 of Montana's 56 counties.[55/] Ten counties reported frequent or mass disqualifications. Only Flathead County provided information which allows computation of an overall rate of challenge. There rates, which reveal an upward trend between 1974 and 1978, are considerably above the norm. In 1974 and 1975 the rate was 1.7%. It increased to 8.8% in 1976, decreased to 5.8% in 1977, increased again to a high of 10.2% in 1977 and subsequently decreased to 6.3% in 1978. The attorney general found that the judges involved were challenged by numerous attorneys rather than by a few individuals.

The peremptory challenge system in Montana is only moderately controversial. As in most states, there are some judges who oppose it (see Table VIII-8). Overall, however, the system has relatively high support. A majority of the chief judges responding to the letters of inquiry believed that it is working well as did several others who were contacted by telephone. An overwhelming percentage of prosecutors hold this belief.

The major point of contention in Montana appears to be the number of challenges allowed in civil cases. In April, 1982 a legislative Joint Committee on the Judiciary recommended that the number be reduced from two to one.[56/]

54/ Attorney General's Report, supra note 50. The details are presented in Chapter V.

55/ An unusually generous definition of mass disqualifications was employed: judges challenged in 25% or more cases during any period of time during 1974 and 1978.

56/ Joint Subcommittee on Judiciary, The District Courts, Indigent Defense, and Prosecutorial Services in Montana (Helena: Montana Legislative Council, 1982), at 15.

Table VIII-8
RESPONSES FROM MONTANA

Topic	Chief Justice	State Administrator	Attorney General[1]	State Bar President	Local Bar Presidents (N=0)(R=0)[2]		Chief Judges (N=20)(R=12)		Prosecutors (N=56)(R=23)		Defenders (N=3)(R=2)		Trial Administrators (N=0)(R=0)	
					Y	N	Y	N	Y	N	Y	N	Y	N
Working Well	-	-	Y	-	-	-	6	4	17	2	2	-	-	-
Abused	-	-	-	-	-	-	6	3	6	4	-	1	-	-
Should be Continued	-	-	Y	-	-	-	6	4	17	2	2	-	-	-
Extend to Federal	-	-	-	-	-	-	1	5	-	1	1	-	-	-
Causes Delay	-	-	-	-	-	-	8	2	-	-	-	-	-	-
Disrupts Calendars	-	-	-	-	-	-	8	2	-	-	-	-	-	-
Increases Budgets	-	-	-	-	-	-	4	2	-	-	-	-	-	-
Reduces Appeals	-	-	-	-	-	-	-	-	-	-	-	-	-	-
Compromises Independence	-	-	N	-	-	-	1	2	1	3	-	-	-	-
Hardships for Judges	-	-	-	-	-	-	3	6	-	-	-	-	-	-
Frustration for Judges	-	-	-	-	-	-	7	1	-	-	-	-	-	-
Provides Helpful Feedback	-	-	-	-	-	-	-	1	-	-	-	-	-	-
Strains Relationships	-	-	N	-	-	-	1	5	1	5	-	1	-	-
Malpractice Suits	-	-	Y	-	-	-	-	-	1	7	-	-	-	-
Enhances Public Confidence	-	-	-	-	-	-	1	1	2	1	-	-	-	-

1/ An assistant attorney general responded.

2/ N = number in the state; R = number of responses.

Thus far, their recommendation has not been acted upon. However, it is clear that there is support for it within the judiciary. The subject has been discussed at a recent meeting of state judges and Chief Judge William J. Speare of Billings has been appointed chairman of a committee to investigate the situation further. Arguments against allowing two challenges in civil cases are summarized in the words of Chief Judge Gorden Bennett.

> I don't believe any other state in the union provides two peremptory substitutions in civil cases and a single substitution in criminal cases. I have been concerned for quite some time that the system. . . deprives criminal defendants of the equal protection of the law for the reason that there is no rational reason for distinction between criminal and civil litigants. . . The double substitution. . . is simply an affront to the judiciary. It's a standing suggestion that judges in Montana are so bad that we need twice as many peremptory challenges as nearly every other state in the union.57/

Nevada. Nevada first adopted a peremptory challenge statute in 1931.58/ Today the system is governed by a rule of the supreme court. It allows challenges only in civil litigation. Each side (not party) is entitled to one. The notice may be signed by a party or an attorney and may not include the grounds for challenge. It must be filed in writing with the clerk of court and copies must be served on the opposing side. Most unusual about the procedure is the requirement that the notice be accompanied by a fee of $100.

Challenges must be filed not less than 30 days before the date set for trial or hearing of the case, or not less than three days before the date set for the hearing of any pretrial matter. If a case is not assigned to a judge

---

57/ Letter from Gorden Bennett, Chief Judge, to Larry Berkson, June 13, 1985.

58/ Nev. Stats. 1931, Ch. 153, secs. 45, 45a and 45b.

before the time required for filing the challenge, the peremption must be made within three days after the party or attorney is notified of the assignment, or before the jury is sworn, evidence taken, or any ruling is made in the trial or hearing, whichever occurs first. The challenged judge is responsible for transferring the case to another department of the court or if there is none he is responsible for requesting the chief justice to assign another judge from outside the district.

The frequency of challenges in Nevada, unlike most states, is fairly accurate. This is because records of the $100 filing fee are kept in the state's accounting office. In 1981 and 1982 the rate was 1% of the filings. This increased to 1.4% in 1983 and 1.6% in 1984. During the latter year Nevada ranked near the middle of the nine states for which there is information about the frequency of challenges.

Apparently there have not been any instances of blanket disqualifications within the state during the past few years. Detailed information about challenges to specific judges is generally unavailable. However, some chief judges offered estimates. One, for example, stated that he was challenged 12 times in 946 civil matters during 1984 (1.3%). He estimated that the rate was "slightly more than average" in his multi-judge court. Another judge estimated an average of seven challenges a year per judge in his two-judge court. The estimate in another two-judge court was four or five times a year per judge. In a telephone interview a judge in a single-judge district estimated that he was challenged about three times a year. Others reported "infrequent" challenges.

There is almost no controversy about peremptory challenges in Nevada. As can be observed in Table VIII-9, the chief judges are very supportive of the

Table VIII-9
RESPONSES FROM NEVADA[1/]

Topic	Chief Justice	State Administrator	Attorney General	State Bar President	Local Bar Presidents (N=0)(R=0)[2/]		Chief Judges (N=12)(R=6)		Prosecutors (N=17)(R=4)		Defenders (N=8)(R=0)		Trial Administrators (N=1)(R=0)	
					Y	N	Y	N	Y	N	Y	N	Y	N
Working Well	-	-	-	-	-	-	6	-	4	-	-	-	-	-
Abused	-	-	-	-	-	-	2	2	-	1	-	-	-	-
Should be Continued	-	-	-	-	-	-	6	-	4	-	-	-	-	-
Extend to Federal	-	-	-	-	-	-	1	-	-	-	-	-	-	-
Causes Delay	-	-	-	-	-	-	3	3	-	-	-	-	-	-
Disrupts Calendars	-	-	-	-	-	-	2	4	-	-	-	-	-	-
Increases Budgets	-	-	-	-	-	-	1	2	-	-	-	-	-	-
Reduces Appeals	-	-	-	-	-	-	-	-	-	-	-	-	-	-
Compromises Independence	-	-	-	-	-	-	-	3	-	-	-	-	-	-
Hardships for Judges	-	-	-	-	-	-	-	4	-	-	-	-	-	-
Frustration for Judges	-	-	-	-	-	-	-	2	-	-	-	-	-	-
Provides Helpful Feedback	-	-	-	-	-	-	-	1	-	-	-	-	-	-
Strains Relationships	-	-	-	-	-	-	-	2	-	2	-	-	-	-
Malpractice Suits	-	-	-	-	-	-	-	-	-	1	-	-	-	-
Enhances Public Confidence	-	-	-	-	-	-	2	-	2	-	-	-	-	-

1/ A telephone interview was conducted with the trial court administrator.

2/ N = number in the state; R = number of responses.

system. Others contacted by telephone also viewed the system as working very well.

There has been only limited activity surrounding peremptions in recent years. A short while ago certain members of the state bar did attempt to have the system extended to criminal cases. However, the Board of Bar Governors defeated the proposal and it was not recommended to the Nevada Supreme Court. The only other recent activity involving peremptions was a request by certain judges that the filing fee be increased to $500. To date the court has not acted on the proposal.

North Dakota. Peremptory challenges were allowed in North Dakota while it was a United States territory. Upon entering the Union in 1839 the state continued its procedure.[59/] Several changes have been made since that time, the most recent of which is to provide that the demand be filed very early in the process. Currently, a challenge must be invoked not later than 10 days after the date the parties are notified that a judge has been assigned a case, or the date the parties are notified that a trial has been scheduled, or the date of service of an ex parte order signed by the judge, whichever occurs first. Parties added to the action after these dates may file a demand within 10 days after either of these occurrences or within 10 days after the party has been added. No change of judge may be made after a judge has ruled upon any matter pertaining to the action. The procedure allows one challenge to any party (or attorney with permission of the party) in both civil and criminal litigation. If any attorney invokes the challenge, he must file with the demand a certificate stating that

---

59/ State ex rel. Johnson v. Thomson, 34 N.W.2d 80 (N.D. 1948), citing N.D. Const. Schedule, sec. 2. See sec. 29-15-21 NDCC and Administrative Rule 17.

he has mailed a copy of it to his client. Unlike the procedure in many states, the statute requires that the demand enumerate that it is filed in good faith and not for the purposes of delay. The challenged judge may submit comments to the presiding judge about his disqualification.

The frequency of peremptory challenges in North Dakota is perhaps somewhat higher than in most states, although this is difficult to establish with certainty. In 1984 the rate of challenges was 3.1%, the highest of those states for which information is available. However, the statistic may be misleading. Excluded from the computation are county court filings and challenges. Were these to be included the rate might drop closer to the norm because of the large number of cases heard in these courts.

Blanket challenges have been invoked against at least three judges in recent years. Two are county judges who handle cases coming within their limited jurisdiction. In one instance it is perceived that the judge has a horrible demeanor. In another, the judge is perceived as a "tough sentencer" in criminal cases and "unpredictable" in civil matters. One chief judge indicated that frequent challenges to a judge in his district are "justified."

Peremptory challenges in North Dakota are relatively free from controversy. Although telephone conversations with chief judges make it clear that there is more dissatisfaction among members of the bench than replies to the letters of inquiry would suggest, overall the judiciary appears to be generally supportive of the system. Prosecutors overwhelmingly favor it and the chief justice, state court administrator and attorney general report that it is working well (see Table VIII-10).

Table VIII-10
RESPONSES FROM NORTH DAKOTA[1/]

Topic	Chief Justice	State Administrator	Attorney General	State Bar President	Local Bar Presidents (N=0)(R=0)[2/]		Chief Judges (N=7)(R=5)		Prosecutors (N=52)(R=18)		Defenders (N=0)(R=0)		Trial Administrators (N=3)(R=0)	
					Y	N	Y	N	Y	N	Y	N	Y	N
Working Well	Y	Y	Y	-	-	-	3	1	15	2	-	-	-	-
Abused	-	-	N	-	-	-	1	1	3	7	-	-	-	-
Should be Continued	-	-	Y	-	-	-	3	1	15	2	-	-	-	-
Extend to Federal	-	-	-	-	-	-	1	1	2	1	-	-	-	-
Causes Delay	-	N	-	-	-	-	2	3	-	-	-	-	-	-
Disrupts Calendars	-	N	-	-	-	-	2	3	-	-	-	-	-	-
Increases Budgets	-	N	-	-	-	-	1	3	-	-	-	-	-	-
Reduces Appeals	-	-	-	-	-	-	-	2	-	-	-	-	-	-
Compromises Independence	-	-	N	-	-	-	1	2	1	1	-	-	-	-
Hardships for Judges	-	-	-	-	-	-	1	3	-	-	-	-	-	-
Frustration for Judges	-	-	-	-	-	-	2	3	-	-	-	-	-	-
Provides Helpful Feedback	-	-	-	-	-	-	-	-	-	-	-	-	-	-
Strains Relationships	-	-	-	-	-	-	1	2	2	8	-	-	-	-
Malpractice Suits	-	-	-	-	-	-	-	-	1	4	-	-	-	-
Enhances Public Confidence	-	-	-	-	-	-	3	1	-	1	-	-	-	-

1/ Telephone interviews were conducted with all three trial court administrators.

2/ N = number in the state; R = number of responses.

Oregon. A peremptory challenge statute was first enacted in Oregon in 1919.[60/] Except for a brief period during 1955 when the Supreme Court declared one of its revisions unconstitutional, the state has not been without such a system. Whether it is truly peremptory in nature is open to some question because challenged judges are allowed to have a hearing on the motion.[61/] However, this practice is apparently very limited and only happens occasionally.[62/] Further, according to one chief judge, Supreme Court opinions make it almost impossible for a judge to successfully quash the motion. Thus, in practice the statutes, court opinions and judicial attitudes combine to provide a peremptory challenge procedure in most instances.

The present procedure is available in municipal and city recorder's courts, district courts and circuit courts but not in tax, justice and county courts or the supreme court.[63/] Any party or any attorney may file a motion to perempt a judge. It must be accompanied by an affidavit of prejudice stating that the party or attorney believes that he cannot receive a fair trial from the challenged individual. It must further state that the motion is made in good faith and not for the purpose of delay.

60/ Ore. Laws 1919, ch. 160, cited in "Disqualification of Judges for Prejudice or Bias--Common Law Evolution, Current Status and the Oregon Experience," Oregon Law Review, 48 (1969), 311, 361 [hereinafter cited as Oregon Study].

61/ See Oregon Study, supra note 60, at 346. See also State ex rel. Lovell v. Weiss, 250 Ore. 252, 430 P.2d 357, 442 P.2d 241 (1968), and State v. Hilborn, 71 Ore. App. 534, 537 (1984).

62/ Letter from Richard L. Barron, Chief Judge, to Larry Berkson, May 6, 1985. See also Oregon Study, supra note 60, at 348.

63/ The present Oregon statutes are very ambiguous and confusing. For a more detailed analysis see Oregon Study, supra note 60, at 364ff.

There are three provisions establishing the time of filing. First, in uncontested cases, the challenge may be made any time prior to the final determination of a case. Second, in contested cases with jurisdictions of less than 100,000 population, it must be made before or within five days after the cause is at issue or within 10 days after the assignment of a judge. In contested cases in jurisdictions with more than 100,000 population it must be made at the time the case is assigned to a judge for trial or hearing. In contested cases no motion to disqualify a judge may be made after a judge has ruled on any matter in the litigation. Unlike any other state, Oregon allows each party in both criminal and civil litigation to make two challenges.

Relatively little is known about the frequency of peremptions in Oregon during recent years.64/ Both the telephone interviews and responses to the letters of inquiry, however, suggest that they are relatively infrequent in most jurisdictions. For example one judge serving in a very large court reported that in his 22 years on the bench he had been challenged only about five times. Another serving in a three-judge court stated that challenges "are not filed very often." Still another serving in a single-judge district reported that he had been disqualified only about 10 times during his 24 years on the bench. A colleague sitting on another single-judge bench reported that challenges had been used "very infrequently" during his eight years in office.

In a few jurisdictions challenges are more frequent. In one multi-judge court the chief judge reported that a few colleagues in his jurisdiction were

---

64/ Trial court administrators were not asked about the frequency of peremptions because initial contacts with the state court administrator suggested that all such information was kept in his office. Despite repeated assurances that the researchers would receive the information, it was never forthcoming.

challenged with more regularity than the others. Another chief judge stated that he was challenged frequently but did not offer any statistics. Yet another reported that his district has a long history of challenges and that all three judges on his bench are regularly perempted.

Despite these exceptions, the information about the frequency of peremptory challenges in Oregon today tend to confirm the findings of the study conducted in 1969.[65/] It will be recalled that researchers found that challenges were invoked only .538% of the time in circuit courts between May 2, 1955 and January 1, 1968.[66/]

There appears to be relatively little controversy about peremptory challenges in Oregon. The perceptual data indicate that although there are perceived abuses most individuals believe that the system is working well and should be continued (see Table VIII-11). This is true of the chief justice, state court administrator, and assistant attorney general and most of the prosecutors and defenders. A majority of the judges responding to written requests for information and all of those interviewed by telephone agreed.

Unlike in Montana, where two challenges are allowed in civil cases, there appears to be little concern in Oregon that each party is allowed more than one challenge. Indeed, none of the chief judges suggested reducing the number. The only change recommended was by one chief judge who thought it would "make some sense" to abolish the affidavit of prejudice aspect of the procedure. To him it seems "rather pointless to require that a sworn statement be filed in the public

---

65/ See Oregon Study, supra note 60.

66/ For a detailed summary see Chapter V.

Table VIII-11
RESPONSES FROM OREGON

Topic	Chief Justice	State Administrator	Attorney General[1]	State Bar President	Local Bar Presidents (N=1)(R=1)[2]		Chief Judges (N=19)(R=10)		Prosecutors (N=36)(R=13)		Defenders (N=6)(R=2)		Trial Administrators (N=14)(R=4)	
					Y	N	Y	N	Y	N	Y	N	Y	N
Working Well	Y	-	Y	Y	1	-	6	3	8	-	2	-	1	1
Abused	N	-	N	-	-	1	3	2	5	5	-	1	-	-
Should be Continued	Y	-	Y	Y	1	-	5	4	8	2	2	-	-	1
Extend to Federal	-	-	-	-	-	-	1	1	-	1	-	-	-	-
Causes Delay	-	-	-	-	-	-	4	3	-	-	-	-	2	1
Disrupts Calendars	-	-	-	-	-	-	5	3	-	-	-	-	2	1
Increases Budgets	-	-	-	-	-	-	-	2	-	-	-	-	-	1
Reduces Appeals	-	-	-	-	-	-	-	2	-	-	-	-	-	-
Compromises Independence	N	-	-	-	-	1	-	2	-	2	-	2	-	-
Hardships for Judges	-	-	-	-	-	-	2	5	-	-	-	-	-	-
Frustration for Judges	-	-	-	-	-	-	2	3	-	-	-	-	-	-
Provides Helpful Feedback	-	-	-	-	-	-	2	3	-	-	-	-	-	-
Strains Relationships	-	-	N	-	-	1	-	5	-	6	-	1	-	-
Malpractice Suits	-	-	-	N	-	1	-	-	1	2	-	2	-	-
Enhances Public Confidence	Y	-	-	-	-	-	-	2	1	1	-	-	-	-

1/ An assistant attorney general responded.

2/ N = number in the state; R = number of responses.

record. . . which necessarily demeans the appearance of judicial impartiality when the circumstances of such claim need not be proven. It also strikes me," he continued, "as a bit unfair to the judge involved."

South Dakota. South Dakota has had a peremptory challenge procedure for over 100 years. It has undergone numerous revisions throughout the state's history. Most recently a procedure was added which mandates that the attorneys and litigants use an informal procedure before filing a formal request for change of judge.

Today the provisions governing peremptory challenges in South Dakota are among the most detailed of any state. Initially litigants or attorneys invoking the challenge must informally request a change of judge. They may state their reasons but are not required to do so. Opposing parties must be apprised of the request but may not contest it. If the judge grants the request, he notifies the chief judge who reassigns the case. If he denies the request, he must notify the parties in writing. Attorneys and litigants may then file a formal affidavit for change of judge.

Affidavits may be filed in either civil or criminal litigation in any trial court in the state. All parties who are united in interest or representation must unite in the filing of an affidavit. Only one change of judge is allowed. The affidavit must state that the challenge is made in good faith and not for the purposes of delay, and that the party making the challenge has good reason to believe and does actually believe that he cannot have a fair and impartial trial before the named judge.

Challenges are governed by precise time guidelines. If there is a motion to be ruled upon, the challenge must be filed not less than two days before the

hearing. If the action is triable in circuit court without a jury, the challenge must be made not less than five days before the date set for trial. If the action is triable in circuit court before a jury, it must be filed at least 10 days before the trial date is scheduled. If the action is pending in a magistrate's court, the challenge must be made not less than five days before trial. Finally, if there has been a prior disqualification by the opposite side the challenge must be made within two days of receiving notice of the replacement judge. Exceptions to all of these rules are allowed in special circumstances.

The challenging party must file triplicate copies of the affidavit with the clerk of court and notify, on the same day, all adverse parties or their attorneys. The clerk must transmit one copy of the affidavit to the chief judge who then reassigns the case. If the chief judge is the challenged individual, the senior circuit judge reassigns the case. If all judges within the circuit are unable to act, the Supreme Court handles the reassignment procedure.

It is clear that peremptions in South Dakota are relatively infrequent. Statistical data are available from the two districts employing court administrators. District Two, which includes Sioux Falls, the center of population in the Eastern part of the state, reported challenges in only .7% of its cases during 1983 and .4% of its cases during 1984. District Seven, which includes Rapid City, the center of population in the Western part of the state, had challenges in 1.2% of its cases during 1983 and .5% of its cases during 1984. These low rates apparently persist in the more rural areas as well. For example, the chief judge of a nine-county circuit reported that challenges occurred "very seldom" on his five-judge bench. A colleague in another rural

part of the state voiced the same sentiment. Still another chief judge serving in a rural area estimated that challenges were made an average of only two to five times a year in his district.

There has been at least one instance when a judge has received blanket challenges in South Dakota. Because the individual sat in a multi-judge urban court, the high challenge rate apparently did not cause an excessive amount of difficulty. Eventually, the judge was transferred to another division of the bench where the public prosecutor, who regularly challenged him, did not practice.

Prior to 1982 there was some controversy about peremptory challenges in South Dakota. According to Judge George W. Wuest, writing on behalf of the chief justice, before that year some affidavits were very uncomplimentary to the judges involved. In certain celebrated cases the news media broadcast the uncomplimentary statements which naturally damaged the reputation of the judges involved. Further, peremptions were used in some cases "for intimidation purposes." As a result, the aforementioned informal procedure was developed and adopted. Today, there appears to be almost no controversy about the subject. Judge Wuest reports that the new rule has eliminated hard feelings between the attorneys and judges. His view is supported by the data obtained from the letters of inquiry (see Table VIII-12). The four chief judges responding to the written requests and the two chief judges interviewed via telephone all agreed that the system is working well and should be continued. Similar responses were obtained from the vast majority of prosecutors. Only the state court administrator had serious reservations about the procedure.

Table VIII-12
RESPONSES FROM SOUTH DAKOTA[1/]

Topic	Chief Justice	State Administrator	Attorney General	State Bar President	Local Bar Presidents (N=0)(R=0)[2/]		Chief Judges (N=8)(R=8)		Prosecutors (N=65)(R=22)		Defenders (N=2)(R=1)		Trial Administrators (N=2)(R=1)	
					Y	N	Y	N	Y	N	Y	N	Y	N
Working Well	-	-	-	Y	-	-	4	-	17	4	1	-	-	-
Abused	-	-	-	-	-	-	1	2	3	6	1	-	-	-
Should be Continued	-	-	-	Y	-	-	4	-	15	4	1	-	-	1
Extend to Federal	-	N	-	-	-	-	-	-	4	2	-	-	-	-
Causes Delay	-	Y	-	-	-	-	-	3	-	-	-	-	1	-
Disrupts Calendars	-	Y	-	-	-	-	-	3	-	-	-	-	1	-
Increases Budgets	-	Y	-	-	-	-	-	1	-	-	-	-	1	-
Reduces Appeals	-	-	-	-	-	-	1	-	-	-	-	-	-	-
Compromises Independence	-	-	-	-	-	-	-	2	1	6	-	-	-	-
Hardships for Judges	-	-	-	-	-	-	-	1	-	-	-	-	-	-
Frustration for Judges	-	-	-	-	-	-	-	1	-	-	-	-	-	-
Provides Helpful Feedback	-	-	-	-	-	-	1	-	-	-	-	-	-	-
Strains Relationships	-	-	-	N	-	-	-	3	-	11	-	1	-	-
Malpractice Suits	-	-	-	N	-	-	-	-	1	5	-	1	-	-
Enhances Public Confidence	-	-	-	-	-	-	1	-	5	2	-	-	-	-

1/ Telephone interviews were conducted with both trial court administrators.

2/ N = number in the state; R = number of responses.

Washington. The state of Washington has had a peremptory challenge statute since 1911. Today the system is governed by two provisions. Peremptions may be filed by any party or attorney in both civil and criminal litigation. The motion must be accompanied by an affidavit stating that the individual believes that he cannot have a fair and impartial trial before the named judge. In counties where there is only one resident judge, the motion and affidavit must be filed not later than the day on which the case is called to be set for trial. In other counties, the motion must be filed before the judge has made any ruling in the case. Excepted are actions arranging the calendar, setting a case, motion or proceeding for trial, arraigning an accused in criminal cases or setting of bail. In multi-judge jurisdictions the presiding judge transfers the case to another department. In single-judge districts the chief justice of the supreme court makes the assignment. Apparently, there are also local "rules" (or perhaps customs) which also regulate the process in certain areas. For example, one chief judge reports that his court requires the challenger to sign the affidavit. Thus, if an attorney makes the challenge he must sign it and if a client makes the challenge he must sign it.

The overall frequency of challenges in Washington is exceptionally low despite an unusually large number of blanket challenges. Indeed, in 1984, of the nine states for which there is information, Washington ranked lowest. The average rate for 10 of 29 districts which supplied complete information was .2%.[67/] In only one of those districts was the rate unusually high. There the rates have been exceptional for at least the past four years. In 1981 the rate was 6.0%, in 1982, 4.7%, in 1983, 6.8% and in 1984, 3.9%. Unfortunately, no

---

67/ The rate was identical for nine districts in 1983.

information could be obtained on why the rates are so high. The clerks and administrators claimed not to know the reasons and neither judge in the district responded to requests for information.

Rates outside of the 10 districts for which there is complete information apparently are also low. For example, the rates are reported to be infrequent in Pierce (Tacoma), Snohomish (near Seattle) and Yakima Counties, all of which have populations exceeding 100,000 individuals (and multi-judge benches). Conversely, several judges and administrators in one-and two-judge counties reported infrequent challenges.

Washington apparently rivals Minnesota in the unusually large number of blanket challenges exercised in its various jurisdictions. Two cases have drawn wide attention from the press and public. One involved an incumbent judge who was challenged by a deputy prosecutor. A main issue of the campaign was the frequency with which the incumbent judge had been perempted.[68/] In a campaign interview the challenger alleged that during the previous two months alone, the judge had received 19 of the 21 affidavits filed in his district.[69/] A local newspaper reported that between 1978 and 1984, 741 of 802 affidavits filed

---

68/ Jean Hilde, "Judge to face write-in candidate," Sunpress, September 27, 1984, at 1 and 5.

69/ Mack Walker, "Promises a positive campaign," Yakima Herald-Republic, September 28, 1984, at 3A. The judge had narrowly won renomination in a primary election the same month. One of the main issues of that campaign was the high rate of challenges to the judge. The challenger in that contest had the support of the local county bar association. See Walker above.

against the five local superior court judges were to the incumbent.[70] During 1984, allegedly 100 of 101 affidavits had been directed against him.[71]

Charges and countercharges were made in the press.[72] The challenger won overwhelming support of the county bar association[73] and was endorsed by a former judge on the same bench, the local sheriff, and prosecutor. The judge argued that the challenges had been made because he was a strong judge and that a small group of lawyers was trying to control the local judiciary. He was supported by the county's more established law firms, by three of the superior court judges in his district, and by the local police patrolman's association.[74] In the end, the incumbent won.[75]

Although no reliable statistics are available it is reported that the frequency of challenges to the judge increased after the election. This is apparently due to the fact that these who vocally opposed him now automatically invoke challenges. It is also reported that the result has been that he has a great deal of unproductive time awaiting assignments.

The second case to draw wide attention involved the defeat of a senior judge by a female candidate. Unlike the above situation, peremptory challenges

---

70/ "Hettinger vs. Hacket," Yakima Herald-Republic, November 4, 1984, at 1A.

71/ Id., at 8A.

72/ Id.

73/ Peter Menzier, "Attorneys favor Hackett over Hettinger," Yakima Herald-Republican, October 18, 1984, at 1A.

74/ See Yakima Herald-Republican, September 17, 1984, at 9A.

75/ Mack Walker, "Hettinger holds on," Yakima Herald-Republican, November 7, 1984.

were not an issue during the campaign but became one after the challenger's victory. Upon taking the bench she was peremptied at an unusually high rate.[76/] The reasons are unclear. Some argue that it is because she is a woman while others vehemently deny this.[77/] Some suggest that it is because the local bar does not yet have confidence in the new judge while others claim that it is because she is not qualified.

Besides these two well-known cases there have been other instances of blanket challenges. In one, the judge is perceived as "not strong enough on drug cases" by the county prosecutor. A local attorney believes that he is prejudiced against women but many of his peremptions are apparently the result of having practiced in the area for many years and knowing large numbers of people.

Another judge received 30 of 36 peremptions in her court during 1983 resulting in an unusually high challenge rate.[78/] Some believe that this is because she was the first woman on that bench. Others claim that she is "not well-rounded" because her practice focused mainly in domestic relations before ascending the bench. Still others claim that she is inconsistent in her decisions and not legally sound.

Another instance of blanket challenges involved a court commissioner. During 1983 approximately one-half of the peremptions in one county's domestic relations court were filed against him. He was perceived as incompetent and biased. Eventually the commissioner was replaced.

76/ Exact statistics are not available but all agree that the rate is very high compared to other superior court judges.

77/ There are other women judges who are not frequently challenged.

78/ The exact frequency is not available but it probably exceeded 10%.

Blanket challenges were also levied at a group of new judges during 1980. That year seven judges ascended the bench and accounted for most of the affidavits filed in their court. Many challenges came from the prosecutor's office reportedly because they wanted seasoned judges to hear their important cases.

Despite the unusually large number of blanket challenges there is relatively little controversy about peremptory challenges in Washington. The system has wide support from all elements involved with the judiciary. The chief justice, state court administrator and attorney general believe it to be working well and think it should be continued (see Table VIII-13). This is the overwhelming view of nearly all of the responding chief judges, prosecutors and defenders, even those residing in areas where blanket challenges are invoked. It is also the belief of the administrators who must rearrange calendars and judges who must travel long distances to substitute for perempted colleagues. Indeed, judges seem resigned to the fact that being a member of the bench requires travel. For example, James R. Thomas suggested it is "unrealistic for a judge in the central part of the state . . . to take the job without recognition of the fact that he will spend some time traveling." Perhaps the low level of complaints about traveling are also due to informal procedures which pose restrictions on the amount required. For example, in one locale a chief judge reports that he has established his own guidelines and they have always been honored. He is always consulted about his assignments and has the opportunity to refuse them. The overall perception of those most affected by challenges--the judges--is perhaps reflected in the statement of a member of the judiciary in Spokane. "A very general over-all observation of the judges within the . . . District, in my opinion," he wrote, "is that they consider the enforced (sic)

Table VIII-13
RESPONSES FROM WASHINGTON[1]

Topic	Chief Justice	State Administrator	Attorney General[2]	State Bar President	Local Bar Presidents (N=1)(R=0)[3]		Chief Judges (N=29)(R=14)		Prosecutors (N=39)(R=22)		Defenders (N=11)(R=4)		Trial Administrators (N=11)(R=5)	
					Y	N	Y	N	Y	N	Y	N	Y	N
Working Well	Y	Y	Y	-	-	-	12	1	17	1	4	-	2	-
Abused	-	N	-	-	-	-	4	4	2	7	-	1	3	-
Should be Continued	-	Y	Y	-	-	-	12	1	17	1	3	-	1	-
Extend to Federal	-	-	-	-	-	-	1	1	4	1	-	-	-	1
Causes Delay	-	Y	-	-	-	-	4	5	-	-	-	-	2	2
Disrupts Calendars	-	Y	-	-	-	-	4	5	-	-	-	-	3	1
Increases Budgets	-	-	-	-	-	-	4	4	-	-	-	-	1	2
Reduces Appeals	-	-	-	-	-	-	-	3	-	-	-	-	-	-
Compromises Independence	N	-	-	-	-	-	1	5	-	5	-	1	-	-
Hardships for Judges	-	-	-	-	-	-	3	5	-	-	-	-	-	-
Frustration for Judges	-	-	-	-	-	-	4	3	-	-	-	-	-	-
Provides Helpful Feedback	-	-	-	-	-	-	2	2	-	-	-	-	-	-
Strains Relationships	-	-	N	-	-	-	2	4	-	7	-	-	-	-
Malpractice Suits	-	-	N	-	-	-	-	-	-	8	-	1	-	-
Enhances Public Confidence	Y	-	Y	-	-	-	4	3	3	-	1	-	-	-

1/ Telephone interviews were conducted with all 13 trial court administrators.

2/ An assistant attorney general responded.

3/ N = number in the state; R = number of responses.

disqualification . . . as something inherent in the position and office of Judge."

Wyoming. Peremptory challenges have been used in Wyoming for over 100 years.[79/] By 1971, a supreme court rule regulated peremptions in civil cases and a legislative statute governed peremptions in civil litigation. The rule provided that the state or defendant, within 15 days prior to the date set for trial, could move for a change of judge on the ground that he was biased or prejudiced against them.[80/] Only one challenge per party was allowed and no affidavit of prejudice was required.[81/]

The statute provided that individuals in civil litigation could file an affidavit challenging a judge if they believed that on account of bias, prejudice or interest of the assigned judge they could not obtain a fair trial.[82/] Reassignment was mandatory within 10 days after the affidavit was filed.[83/] The statute did not include a limit on the number of judges that could be disqualified[84/] nor a time filing requirement. Another statute did provide, however, that the affidavit had to be filed not less than five days before

---

79/ For an analysis see John S. Evans, "Civil and Criminal Procedure - Disqualification of District Judges for Prejudice in Wyoming," Land and Water Law Review, 6 (1971), 743-52.

80/ Wyo. R. Crim. p. 23(d).

81/ Evans, supra note 79, at 744.

82/ Wyo. Stat., sec 1-53 (1957).

83/ Disqualification of a judge was automatic upon the filing of an affidavit. See Huhn v. Quinn, 21 Wyo. 51, 128 p. 514 (1912).

84/ A former statute stated that only one change was allowed but the restriction was apparently unintentionally omitted in a change during 1968. See Evans, supra note 79, at 750.

trial.[85] This statute was later superseded by Supreme Court Rule 40.1 which provided that a motion for change of judge had to be filed at least 15 days before the date set for a pretrial hearing or trial.[86] Only one motion could be filed by each side in the litigation.

Considerable controversy surrounded both the criminal and civil rules. A law review article called for sweeping changes.[87] District judges complained of numerous instances of abuse.[88] They argued that peremptions were being used for purposes of delay rather than for legitimate reasons. As a result, the supreme court abolished peremptory challenge procedures in both criminal and civil litigation effective June 13, 1983. The response among the bar was loud and clear. They strongly opposed the court's action and urged reinstatement. Upon recommendation of its Permanent Rules Committee, the Supreme Court reversed its decision and adopted new rules effective October 31, 1984.

The civil rule provides that a motion for disqualification must be made by a plaintiff at the time the complaint is filed.[89] The motion must be filed by a defendant at or before the time the first responsive pleading is filed by him or within 30 days after the service of the complaint. A party added to the litigation at a later date cannot peremptorily disqualify a judge. Only one peremption is allowed.

85/ Wyo. Stat. sec. 1-56 (1957).

86/ Wyoming Rules of Civil Procedure, Rule 40.1.

87/ Evans, supra note 79, at 751.

88/ "Change in Peremptory Challenge Rules 40.1(b)(i), W.R.C.P. and 23(d), W.R. Cr. P." Memorandum from Rooney, Chief Justice, to Members of the Wyoming Bar Association, March 14, 1983.

89/ Wyo. R. Civ. P. 40.1(b)(1) (1984).

The criminal rule provides that the motion must be filed by the state at the time the information or indictment is filed.[90/] It must be filed by the defendant at the time of his arraignment and following the entry of his plea. Again, only one peremption is allowed.

The effect of the two new rules is to make the procedure in civil and criminal litigation very similar. Affidavits are not required. Both limit the number of challenges to one and peremptions must be exercised very early in the judicial process.

The frequency of challenges in Wyoming was apparently relatively low before the recent change in rules and is even less frequent today.[91/] Interviews and correspondence with six of the state's 17 judges confirm this observation. One stated he had been challenged two times during the past six years and another that he had been challenged two or three times during his eleven and one-half years on the bench. Two judges reported that they had been challenged in less than one percent of their cases in recent years. Another judge reported "infrequent" challenges while still another claimed to have been challenged only two or three times since the new rules went into effect.

There have been isolated instances of blanket challenges and it is perhaps these which created the earlier controversy. One judge, who was "pushed" into

---

90/ Wyo. R. Crim. P. 23 (1984).

91/ The state is not unified and has no trial court administrators. Thus, no state-wide information is available. Local data is, likewise, unavailable because clerks of court and judges do not keep records on peremptory challenges.

resigning, apparently had a habit of holding court all night and consequently was peremptied with regularity. He had a reputation for setting cases quickly and without consulting the attorney. When a continuance was requested, it was regularly denied. Another judge was regularly challenged by an attorney with whom he had a personality conflict. The "feud" lasted for many years and only ceased when the judge retired.

Today peremptory challenges are relatively uncontroversial. Since the rule changes in 1984 they have been employed even less frequently than before and according to several chief judges have been all but eliminated. Costs are perceived as minimal and extended travel is accepted by most judges as part of their job. One judge noted, for example, that they "are accustomed to long travel." Moreover, he continued, ". . . travel occurs more frequently because of other circumstances than as a reaction to this [the peremptory challenge] rule."

All but one of the 10 judges responding to requests for information indicated that the system is working well and should be continued (see Table VIII-14). Nearly all of the responding prosecutors and defenders agreed as did the state's attorney general.

A SPECIAL EXAMINATION OF CALIFORNIA

Among all the states which have a procedure governing the use of peremptory challenges, California is considered to be one of the most controversial. Since the time of its initial enactment in 1937, the fate of the statute has found itself in the center of a battleground between court administrators, lawyers, judges, state and local bar associations, and others. According to

Table VIII-14
RESPONSES FROM WYOMING

Topic	Chief Justice	State Administrator	Attorney General	State Bar President	Local Bar Presidents (N=0)(R=0)[1]		Chief Judges (N=17)(R=12)		Prosecutors (N=25)(R=13)		Defenders (N=13)(R=2)		Trial Administrators (N=0)(R=0)	
					Y	N	Y	N	Y	N	Y	N	Y	N
Working Well	-	-	Y	-	-	-	9	1	9	2	2	-	-	-
Abused	-	-	Y	-	-	-	2	5	3	4	1	-	-	-
Should be Continued	-	-	Y	-	-	-	9	1	8	1	2	-	-	-
Extend to Federal	-	-	-	-	-	-	2	-	1	-	1	-	-	-
Causes Delay	-	-	-	-	-	-	1	8	-	-	-	-	-	-
Disrupts Calendars	-	-	-	-	-	-	1	7	-	-	-	-	-	-
Increases Budgets	-	-	-	-	-	-	1	5	-	-	-	-	-	-
Reduces Appeals	-	-	-	-	-	-	-	-	-	-	-	-	-	-
Compromises Independence	-	-	N	-	-	-	-	2	-	4	-	-	-	-
Hardships for Judges	-	-	-	-	-	-	4	6	-	-	-	-	-	-
Frustration for Judges	-	-	-	-	-	-	2	4	-	-	-	-	-	-
Provides Helpful Feedback	-	-	-	-	-	-	2	-	-	-	-	-	-	-
Strains Relationships	-	-	N	-	-	-	2	6	2	6	-	1	-	-
Malpractice Suits	-	-	-	-	-	-	-	-	-	3	-	-	-	-
Enhances Public Confidence	-	-	-	-	-	-	2	-	-	1		-	-	-

1/ N = number in the state; R = number of responses.

Thomas E. Workman, Jr. and Vickie Arends, "Any assertion that Section 170.6 works well in California ignores the continuing struggle the procedure has engendered between lawyers acting on behalf of their clients and judges who are responsible for the operation of the judicial system."[92/] One major thrust of the debate centers around the issue of abuse. Opponents of the statute in California have consistently argued that it is a tool manipulated by attorneys for strategic purposes, rather than that for which it was designed: that is, to remove a judge because a belief that bias or prejudice exists. The statute has endured many tests--through the introduction of legislation, case litigation, and surveys regarding its operation--yet it still remains in use today.

History. The California State Legislature enacted its first challenge statute in 1937. At that time, Section 170.6 permitted any party or attorney, except the people or the district attorney in a criminal case, to peremptorily challenge a trial judge, effecting automatic removal. No grounds of prejudice or declaration of good faith were required. Later that year, the District Court of Appeals, Third District, declared Section 170.5 unconstitutional.[93/] It held that the statute violated the privileges and the immunities clause of the state constitution, was an illegal delegation of legislative power to citizens and their attorneys, and contravened the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution in that it allowed the defendant, but not the prosecutor, to invoke the challenge.[94/]

92/ Workman, Thomas and Vickie Arends, "A Tool for Abuse," Los Angeles Lawyer (September, 1980), 10-16.

93/ Daigh v. Schaffer, 23 Cal. App. 2d 449, 73 P.2d 927 (1937).

94/ Id., at 934.

In 1938, the Supreme Court of California upheld the Daigh decision.[95] The major infirmity of the statute was that some substantial showing, under oath, did not have to be made before a judge could be disqualified. The Court found section 170.5 to be an "unwarranted and unlawful interference with the constitutional powers and duties of the respondent judge and orderly processes of the courts."[96] Concurring with the Court of Appeals, Third District, it stated that the statute violated the separation of powers and was "ineffective for the purpose for which it was intended."[97]

During the next eighteen years, four legislative measures to adopt a disqualification procedure similar to 170.5 were introduced into the legislature. Two of the measures would have provided for a peremptory challenge in both civil and criminal cases. The measures were passed by the Legislature, but all four were vetoed by the Governor.

It was not until 1957 that efforts to reenact a peremptory challenge statute were successful. Section 170.6 was passed that year by an "overwhelming vote of both houses of the legislature and approved by the Governor."[98] The new statute provided for one peremptory challenge in civil cases,[99] and required a showing of good faith by the party or attorney in a declaration under

---

95/ Austin v. Lambert, 11 Cal. 2d 73, 77 P.2d 849 (1938).

96/ Id., at 853.

97/ Id., at 854.

98/ Johnson v. Superior Court. So Cal. 2d 693, 329 P.2d 5, 7(1958).

99/ A provision for criminal cases was originally included in Section 170.6; however, the Senate decided to limit its use at that time to civil proceedings (34 S. Bar J. 626 (1959)).

oath stating the judge is prejudiced. The validity of section 170.6 was upheld by the California Supreme Court in Johnson v. Superior Court.[100/] In doing so, the Court claimed that the new section "differed materially" from its predecessor in that it required a declaration of prejudice or bias under oath. The Court held that the new peremptory challenge statute was not in violation of the separation of powers doctrine nor did it impair the independence of the judiciary. Further, the provision "contained safeguards designed to minimize abuses".[101/] Potential delays and forum shopping, the court noted, "was a matter to be balanced by the Legislature against the desirability of the objective of the statute."[102/]

Section 170.6 was amended several times over the next two decades. Two years after Johnson, the statute became applicable to criminal actions and also required that the affidavit be stated in writing. In 1961, the statute was again amended, this time liberalized to permit an oral statement under oath.

In 1962, the first recorded study of peremptory challenges was conducted through the Administrative Office of the Courts. The researchers concluded that the use of peremptory challenges had "not cause[d] any serious problems."[103/] The Judicial Council offered no recommendations for legislation at that time. In 1965, a new provision was added to Section 170.6. It read:

100/ Johnson v. Superior Court, supra note 98.

101/ Id., at 8.

102/ Id.

103/ Judicial Council of California, "Disqualification of Judges," 1962 Annual Report of the Administrative Office of the California Courts (January, 1963), at 34. For a thorough analysis, see Chapter V.

> The fact that the judge has presided at a pretrial conference or other proceeding before trial, not involving the merits, does not preclude the making of the motion for disqualification of the judge as prescribed.

That same year, the use of peremptory challenges was again reviewed by the Judicial Council.[104/] The Council noted that:

- in some instances attorneys were using the challenges for tactical purposes, rather than a belief that prejudice existed;
- judges were concerned over the high frequency of challenges, particularly in relation to: the judge's lack of opportunity to contest the charges; the fact that certain attorneys were selectively challenging the same judges; and concerns about replacing judges in single-judge counties.

No suggestions for reform of the statute were proposed by the Council. However, they did stress the need for a more comprehensive look at the use of peremptory challenges.

Two provisions were added to section 170.6 in 1967. The peremptory challenge was made applicable to court commissioners and referees. In addition, all declarations had to be made "under penalty of perjury."

In 1969, Chairman James Hayes of the Assembly Judiciary Committee asked the Judicial Council to again study the use of peremptory challenges, with the intention of introducing "corrective legislation" if it was found that abuse of the statute was widespread. The Council, in surveying the superior and municipal court judges, concluded that although most judges believed the statute was usually used properly, abuse was prevalent in the courts.[105/] Upon completion

---

104/ See Hearings on S.1064 Before the Subcom. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary, 93d Cong. 1st sess. (1971-73), at 53.

105/ Id., at 53-56.

of the study, the Judicial Council recommended that the statute be modified to include a declaration of certification that the challenge "was not made for purposes of delay." However, no action was ever taken.

Between 1969 and 1981, section 170.6 remained untouched, although there was an "astonishing volume of continuous litigation arising from [its] operation."[106/] One such case, Solberg v. Superior Court of City and County of San Francisco,[107/] decided by the Supreme Court of California in 1977, reaffirmed the constitutionality of section 170.6. The case involved the challenge of a judge who had previously dismissed a case regarding charges of solicitation. The attorney for the judge appealed by insisting that the motion was a "blanket challenge motivated by prosecutorial discontent with her prior ruling of law."[108/] The court expressed its disapproval of blanket challenges, but concluded that "to the extent that abuses persist, they do not 'substantially impair' or 'practically defeat' the exercise of the constitutional jurisdiction of trial courts."[109/] The Court further viewed abuse as "an inconsequential price to be paid for the efficiency and discreet procedure provided in 170.6."[110/] It also cautioned that the Johnson case should not be misread by assuming that "actual prejudice is a prerequisite for involving the

---

106/ Workman, and Arends, supra note 92, at 12.

107/ 19 Cal.3d 182, 561 P.2d 1148, 137 Cal. Rptr., 460 (1977).

108/ Id., at 1152.

109/ Id., at 1162.

110/ Id.

statute."[111/] Instead, Justice Mosk, writing for the court, held that "the belief [of prejudice] alone will justify disqualification."[112/]

In 1981, the phrase "Peremptory Challenge" was inserted as the title in the formal affidavit. The most recent amendment came in 1982 and required that peremptory challenges invoked in single-judge courts be made within 30 days of the initial appearance.

Section 170.6 Today. California Code of Civil Procedure Section 170.6 (1982) provides that any party or attorney appearing in a criminal or civil action may peremptorily challenge a judge, court commissioner or referee, effecting an automic removal. Peremptory challenges are permitted in superior, municipal and justice courts. Only one motion per side is allowed in any action. The motion may be either written, accompanied by an affidavit or declaration under penalty of perjury, or oral under oath. The party or attorney must allege prejudice. They must also assert that they believe they cannot receive a fair and impartial trial or hearing.

When a judge is challenged under a master calendar system, it is the responsibility of the supervising judge of the calendar to assign a substitute to hear the case. If no judge is available, the Chairman of the Judiciary Committee (Chief Justice of the Supreme Court) must make the assignment. When the name of the presiding judge is known at least 10 days before the trial or hearing date is set, the motion must be made 5 days prior to that date. In

---

111/ Id., at 1155.

112/ Id.

single-judge counties, the motion must be made within 30 days from the initial appearance before the court. The motion cannot be made after:

- the drawing of the first juror;
- the opening statement by plaintiff's counsel in a jury trial;
- the swearing in of the first witness;
- evidence is presented;
- commencement of trial; or
- commencement of a hearing.

However, a motion may be initiated if, in the course of a pretrial conference or other hearing, proceeding, or motion prior to trial, there has been no determination of contested fact issues relating to the merits of the case.

Perceptions of Judges About Peremptory Challenges in California. To determine how members of the bench perceive the peremptory challenge system in California today, a questionnaire was mailed to the 311 municipal and superior court judges throughout the state.[113/] One hundred sixty-six responses were received for a rate of 53%.

Almost one-half of the judges indicated that the peremptory challenge statute is usually used properly (see Table VIII-15). Of the three groups identified, the responses were most favorable among Los Angeles superior court judges.

113/ The study replicated the 1969 Judicial Council Survey. For further discussion see Chapter VI.

Table VIII-15

BELIEFS ABOUT THE USE OF PEREMPTORY CHALLENGES IN CALIFORNIA

Judges	Usually Used Properly	Usually Not Used Properly	Insufficient Experience to Comment
Municipal Court Judges (N = 48)	48%	44%	8%
Superior Court Judges Outside of Los Angeles (N = 83)	43	40	17
Los Angeles Superior Court Judges (N = 35)	66	26	9
Total	49%	38%	13%

Thirty-eight percent of the judges indicated that the peremptory challenge statute is usually used improperly. Municipal court judges were most likely to hold this belief.

Not surprisingly, 68% of the judges suggested that 170.6 is abused (see Table VIII-16). Judges in municipal courts were more likely to report abuse than judges elsewhere. Very few judges in any category reported that the statute is not abused.

The most frequently reported abuse was judge-shopping (see Table VIII-17). As suggested earlier, this phrase is a surrogate for more fundamental reasons for challenging judges such as bias, prejudice, dislike of a judge and effecting delay.[114/] Thus, it is not very helpful. Interesting to note, however, is that relatively few Los Angeles superior court judges believe that challenges are invoked for this reason, while most superior court judges elsewhere believe this to be the case.

Sixty-two percent of the respondents who believe there is abuse indicated that attorneys use the statute to effect continuances. Most of these were concentrated in the superior courts and in particular the Los Angeles superior courts.

A relatively small number of judges suggested that peremptory challenges are used for purposes of retaliating against a judge for a prior ruling. This was most prevalent in the municipal courts, where 23% of the judges indicated that it was a concern. Fourteen percent of the respondents who believe there is

---

114/ For a discussion see Chapter IV.

Table VIII-16

BELIEFS ABOUT THE ABUSE OF PEREMPTORY CHALLENGES IN CALIFORNIA

Judges	Abused	Not Abused	No Knowledge No Comment
Municipal Court Judges (N = 48)	73%	13%	15%
Superior Court Judges Outside of Los Angeles (N = 83)	69	8	23
Los Angeles Superior Court Judges (N = 35)	60	31	9
Total	68%	15%	18%

Table VIII-17

TYPES OF ABUSE IN CALIFORNIA

Type of Abuse	Municipal Court Judges (N=35)	Superior Court Judges Outside Los Angeles (N=57)	Los Angeles Superior Court Judges (N=21)	Total[1/] (N=113)
Judge-Shopping	51%	63%	29%	53%
Effecting Continuances	37	67	90	62
Retaliating Against a Judge for a Prior Ruling	23	9	14	14
Blanket Challenges	9	19	10	14
Other/No Reason Given	29	7	10	14

1/ A number of judges cited more than one type of abuse. Thus, totals do not add to 100%.

abuse indicated that blanket challenges are a problem in their court. The highest concentration in this category came from the Los Angeles superior courts where 19% indicated prevalence of this type of abuse. A few judges suggested that challenges were used to "harass the court," "clog the system," effect pressure on judges to change their policy, obtain a dismissal or to completely avoid trial. Others suggested that challenges are used because of personality conflicts between the bench and bar.

Although a majority of the judges indicated that the statute is usually properly used, only 34% favored retention of 170.6 in its present form (see Table VIII-18). Forty percent indicated that the statute should be amended. Of the 67 judges, 25 (37%) indicated agreement with a proposal that judges subjected to repeated peremptions be allowed to challenge them. Under this system, the chief judge in cases of repeated use would be empowered to disallow peremptions if he found them to be abusive. Fourteen judges preferred a factual statement alleging prejudice, 10 suggested that only a limited number of challenges should be allowed during a certain time period, and seven indicated that the allegation of prejudice should be eliminated. Nineteen judges either gave no reason or offered other alternatives, such as: requiring a hearing on challenges to be held by a disinterested judge; requiring a statement of good faith and/or that the challenge is not made for purposes of delay; limiting the procedure to courts where a minimum of four judges preside; limiting the procedure to non-public officials; initiating disciplinary action if misuse can be demonstrated; precluding a challenge after a judge has made a ruling on a contested question of law or facts or following consideration of a negotiated disposition; deleting the section from the civil code; or allowing the judge to strike a challenge without having to refer it to another judge.

Table VIII-18

BELIEFS ABOUT THE RETENTION OF THE
PEREMPTORY CHALLENGE STATUTE IN CALIFORNIA

Judges	Retain Statute	Repeal Statute	Amend Statute	No Comment
Municipal Court Judges (N = 48)	35%	19%	48%	6%
Superior Court Judges Outside of Los Angeles (N = 83)	29	29	37	12
Los Angeles Superior Court Judges (N = 35)	43	11	37	11
Total[1/]	34%	22%	40%	10%

1/ A number of judges offered more than one recommendation, thus, the totals do not add to 100%.

A Comparison of the 1969 and 1985 Studies. A comparison of the overall responses to the 1969 and 1985 surveys reveals a remarkable similarity (see Table VIII-19). Approximately the same percentage of judges indicate that it is usually used properly, abused and should be repealed. There are differences however. A much greater percentage today believe that peremptions are invoked to effect a continuance in the case than during 1969. Further, today a much smaller percentage of judges believe that the statute should be amended than did the respondents in 1969.

Clearly the most dramatic differences between the 1969 and 1985 surveys is within the three groups of judges. For example, far fewer municipal court judges today believe that peremptions are usually used properly than did those in 1969. Conversely, far more Los Angeles Superior Court judges believe that challenges are usually used properly than did those in 1969. Perceptions about abuse are also dramatically different. In 1969 approximately one-half of the municipal court judges thought that the system was abused. Today nearly three-fourths believe this to be the case. Conversely, in 1969 nearly three-quarters of the Los Angeles Superior Court judges thought the system was abused while today only 60% believe this to be the case.

Another major shift in attitudes is found in views about changing the statute. A greater percentage of respondents in all three groups indicated the belief that the statute should not be changed. Far fewer respondents in all three groups thought that it ought to be amended.

Perceptions of Attorneys and Administrators. The attorneys surveyed in California were overwhelmingly in favor of the peremptory challenge (see Table VIII-20). All of the public defenders, both local bar association presidents,

Table VIII-19

SURVEY OF CALIFORNIA JUDGES
(by percentage)

	Survey							
	Municipal Courts		Superior Courts		LA Superior Courts		Total	
	1969	1985	1969	1985	1969	1985	1969	1985
Number of judges	--	79	--	49	--	183	--	311
Number of replies	41	48	23	83	70	35	134	166
1. The peremptory challenge statute usually is:								
(a) Used properly	63%	48%	48%	43%	46%	66%	51%	49%
(b) Used improperly	20	44	52	40	37	26	34	36
(c) Insufficient experience to comment	17	8	0	17	17	9	14	13
2. Specifically, the peremptory challenge statute is:								
(a) Not abused	49	13	4	8	9	31	20	14
(b) No knowledge of abuse or no comment	5	15	0	23	19	9	11	17
*(c) Abused: (for the purpose of:)	46	73	96	69	73	60	69	68
(1) "Judge shopping"	58	51	41	63	47	29	48	53
(2) Effecting a continuance	16	37	23	67	25	90	23	62
(3) Retaliating against a judge for a prior ruling	5	23	18	9	6	14	9	14
(4) Not going before unknown judge particularly when he is challenged by a local attorney	0	0	14	0	22	0	15	0
(5) Blanket challenge	16	9	18	19	6	10	11	14
(6) Other or no reason given	--	29	--	7	--	10	--	14
3. The peremptory statute should:								
(a) Not be changed	24	35	9	29	24	43	22	34
(b) Be repealed	12	19	39	29	11	11	16	22
(c) No comment	--	6	--	12	--	11	--	10
**(d) Be amended: (to provided for:)	63	48	52	37	64	37	62	40
(1) A hearing as outlined in questionnaire	46	48	50	35	38	23	42	37
(2) A hearing by an outside judge	15	0	25	3	2	8	10	3
(3) A factual statement by counsel showing any alleged prejudice	4	22	17	23	2	15	14	21
(4) An optional reply by the judge	0	0	8	0	2	0	2	0
(e) Be amended to limit its use:								
(1) To non-public officials	0	0	8	3	2	0	2	1
(2) To clients	0	0	8	0	7	0	5	0
(3) To non-jury trials	4	0	17	0	2	0	5	0
(4) To civil cases	0	0	0	0	2	0	1	0
(5) To a given number within a certain period	0	4	8	16	11	31	7	15
(f) Be amended to eliminate the allegation of prejudice	0	9	17	13	16	8	11	10
(g) Be amended:								
(1) Other or no reason given	--	22	--	26	--	23	--	24

* Numbers for these categories were not presented in the 1969 survey. They were derived from the total number of replies minus the totals in the "Not abused" and "No knowledge of abuse" columns.

** Numbers for these categories were not presented in the 1969 survey. They were derived from the total number of replies minus the totals in the "Not be changed" and "Be repealed" columns.

Table VIII-20
RESPONSES FROM CALIFORNIA[1/]

Topic	Chief Justice	State Administrator	Attorney General	State Bar President	Local Bar Presidents (N=9)(R=2)[2/]		Prosecutors (N=58)(R=28)		Defenders (N=41)(R=19)		Trial Administrators (N=27)(R=7)	
					Y	N	Y	N	Y	N	Y	N
Working	-	-	-	-	2	-	24	1	19	0	2	2
Abused	-	-	-	-	-	-	7	9	3	3	4	-
Should be Continued	Y	-	-	-	2	-	23	2	19	0	2	1
Extend to Federal	-	-	-	-	1	1	11	2	4	1	-	-
Causes Delay	-	-	-	-	-	-	6	0	2	0	5	1
Disrupts Calendars	-	-	-	-	-	-	-	-	-	-	2	4
Increases Budgets	-	N	-	-	-	-	-	-	-	-	1	-
Reduces Appeals	-	-	-	-	-	-	-	-	-	-	-	-
Results in Need for More Judges	-	N	-	-	-	-	-	-	-	-	1	1
Compromises Independence	-	-	-	-	-	1	2	12	3	6	-	-
Hardships for Judges	-	-	-	-	-	-	-	-	-	-	-	-
Frustrations for Judges	-	-	-	-	-	-	-	-	-	-	-	-
Provides Helpful Feedback	-	-	-	-	-	-	-	-	-	-	-	-
Strains Relationships	-	-	-	-	-	1	1	13	-	7	-	-
Malpractice Suits	-	-	-	-	-	1	-	14	1	12	-	-
Enhances Public Confidence	-	-	-	-	-	-	3	3	4	-	-	-

1/ Telephone interviews were conducted with five trial court administrators.

2/ N = number in the state; R = number of responses.

and 96% of the district attorneys who responded believed that the statute is working in their jurisdiction. According to the attorneys, the peremptory challenge provides for the maintenance of judicial accountability, helps to eliminate arbitrary conduct of certain judges, and aids in achieving a more uniform application of the laws. One district attorney summarized his thoughts by declaring that the use of the peremptory challenge "injects a balancing into the justice system that works to ensure that justice is dispensed fairly impartially and evenhandedly."

Although the majority of the attorneys reported success with the statute, 50% of the public defenders and 44% of the district attorneys who commented on the issue indicated it has been abused. Judge shopping and dilatory tactics were mentioned most frequently. Blanket challenges were also cited as a recurring abuse. Although the attorneys indicated the statute has been misused, the majority noted that it has been used infrequently, and thus, has not caused any serious concerns. Nearly all of the public defenders and district attorneys who mentioned the subject recommended implementation of the procedure for the federal judiciary.

Relatively few trial court administrators responded to requests for information. All claimed that the statute is being abused. Again, judge shopping and use of the procedure to effect delay were the two primary forms of abuse noted. Blanket challenges were also cited, particularly by court administrators in small jurisdictions who expressed frustration over the calendar disruption resulting from such practices. The court administrators in the larger courts related fewer concerns. One administrator in a large metropolitan area stated that adjustments were easily made without any significant impact on calendar

management or delay. However, one major consequence of the use of peremptory challenges reported was the shift of control and "dictatorial influence" from the administrators to the attorneys exercising the challenges, according to the administrators.

CONCLUSION

The profiles outlined above do not reveal why peremptory challenges are controversial in some states and not in others. Controversies are not restricted to geographically large or small states, nor are they restricted to states with large or small populations. The extent of controversy is not associated with court structures or management systems. Indeed, controversy over peremptory challenges is found in both centralized (unified) and decentralized (nonunified) states. Finally, controversy is not associated with any one type of peremptory challenge system. It is found in states which allow prosecutors to exercise peremptions and those which do not. It is also found in states with varying time restrictions and administrative procedures.

The only variable found in states with high rates of controversy and absent in others is a willingness on the part of trial judges to actively voice opposition to their peremptory challenge system. What gives rise to this impetus is unclear. Blanket challenges might be considered a factor. Numerous challenges of this type are found in the states where controversies exist but they are found in other states as well. The rates of challenge might also be considered a factor. However, they are relatively high in some of the controversial states but relatively low in others. Other explanations might focus on

the personality and/or backgrounds of the individual judges involved. Still others might focus on local legal culture. However, an assessment of these latter possibilities is beyond the scope of this research.

Chapter IX:

Perceptions Of Judicial System Participants About The Operation Of Peremptory Challenges In Their States

CHAPTER IX

PERCEPTIONS OF JUDICIAL SYSTEM PARTICIPANTS ABOUT THE OPERATION OF PEREMPTORY CHALLENGES IN THEIR STATES

As observed in Chapter VII, perceptions among the targeted groups regarding the operation of peremptory challenge provisions vary among the states. As one might expect, trial court judges and administrators tend to hold less positive views about the process than practicing attorneys. Below are brief summaries of the perceptions held by each group.

CHIEF JUSTICES

All six chief justices who responded to the letters of inquiry wrote favorably about their judicial peremptory challenge system.[1/] Their reasons varied. Those in Missouri, Oregon and Washington argued that peremptory challenges promote public confidence in the judiciary. For example, Justice Edwin J. Peterson of Oregon wrote:

> It is my opinion that a procedure to disqualify a judge for prejudice or bias is essential to the operation of the judiciary. It assures litigants that they will have an impartial legal tribunal and maintains public confidence in courts and judges. A perception of bias or prejudice, not matter how remote, can seriously undermine the public's perception of the fairness and integrity of the judicial system.

1/ Eleven of 15 chief justices responded to the inquiries. The letters of inquiry may be found on Appendix D. Five referred the letters to other parties. Chief Justice Springer of Nevada solicited the views of district court judges. All 10 who offered views favored the use of peremptory challenges.

Idaho Chief Justice Charles R. Donaldson offered a more pragmatic rationale in support of peremptory challenges. To him the procedure is "a workable escape valve for the unusual case where either the lawyer or client wants to disqualify a judge, without setting forth specific reasons." Similarly, Chief Justice William G. Clark of Illinois suggested that "The automatic substitution right" is "an important safeguard in our system of justice."

Chief Justices in Idaho, Illinois, Missouri, Oregon and Washington expressly stated that the procedure works well in their states.[2/] Chief Justice William Holohan intimated this to be the case in Arizona. According to him there is no desire in his state to change the procedure. He suggested that the "procedure . . . has become so ingrained that it would be virtually unthinkable to attempt to change what has now become viewed as a right."

Some abuses of the system were noted by Idaho Chief Justice Donaldson. For example, he asserted that occasionally disgruntled lawyers used them "after having lost a previous case." This practice is apparently only temporary, however, for after a couple of disqualifications, explained the chief justice, the lawyer "has forgotten or changed his mind and no longer files them." Chief Justice Peterson, while recognizing the "potential for abuse," stated his belief that the Oregon system is not abused. Similarly, Chief Justice William Clark wrote that the potential problems of forum shopping and delay in Illinois "are effectively checked by strict time limitations that govern a party's right to seek automatic substitution.

2/ Luella Dunn, Clerk of the North Dakota Supreme Court stated that the procedure "works quite well" in her state. In South Dakota Judge George Wuest writing on behalf of Chief Justice Fosheim stated that the procedure is "working better than in the past" now that an informal procedure has been implemented.

None of the justices suggested that peremptory challenges compromise judicial independence. This is particularly surprising because the letter of inquiry specifically made reference to this possibility. Indeed, Chief Justice Peterson rejected the idea and suggested that most judges in Oregon shared his view. Washington Chief Justice Dolliver also maintained that judicial independence is not impeded as a result of peremptory challenges.

Overall, the views of the chief justices paralleled those obtained by John Frank in 1971.[3/] Of the nine responses he received, eight favored the use of peremptory challenges.[4/] Only Chief Justice Wright of California was seriously concerned about the procedure. According to him, at the time it was causing serious problems in court calendaring and interfered with the judiciary"s efforts to reduce congestion and delay. The overall comparison of the groups revealed that, for the most part, the views of the chief justices have not radically changed over fourteen years' time.

STATE COURT ADMINISTRATORS

State court administrators conveyed mixed reactions to the use of judicial peremptory challenges in the states.[5/] Administrators in Illinois, North Dakota

---

3/ See Chapter V for a detailed analysis.

4/ Favorable responses came from Arizona, Minnesota, Missouri, Montana, Nevada, North Dakota, Washington and Wyoming.

5/ Ten of 15 state court administrators responded to the letters of inquiry. Three letters were referred to other parties for review. State Court Administrator Bob Duncan of Wyoming responded, but offered no opinions. He stated that since the modified peremptory disqualification statute has only been in existence for a year, it is too early to draw any conclusions on the system's effectiveness.

and Washington clearly favored their use. The Honorable Roy Gulley of Illinois attributed the smooth operation of his procedure to the state's unified court system. According to him the procedure has not created any problems there, and, as a result, has worked very well. James Larsen of Washington also expressed a favorable opinion regarding his state's peremptory challenge system. Based on his personal experiences, he maintained, that they generally are not abused, and should be retained.

Although Administrator Ralph Gampell in California did not state whether he was in favor of the system, he acknowledged that the California Supreme Court found the procedure, despite some allegation of abuse, to be "a reasonable accommodation of the competing interests of bench, bar and public..." The only administrator who stated that he was not in favor of peremptory challenges was Mark Geddes of South Dakota. He attributed his negative view to problems caused by challenges in his state discussed below.

Only one respondent commented on abuse of the procedure. James Larsen asserted that in Washington, attorneys sometimes use the system as a dilatory tactic. According to him, the problem is found primarily in one judge counties, where it is difficult to find replacements for judges who have been disqualified. Fortunately, he noted, the abuse that occurs in these situations in infrequent.

Administrators in South Dakota and Washington considered delay to be a serious consequence of peremptory challenges in their state. According to Administrator Geddes, cases are delayed in South Dakota because replacement judges are required to travel long distances to substitute for perempted colleagues. Similarly, Administrator Larsen noted that in Washington, particularly in one-judge counties, case processing can extend from one to four

months due to the unavailability of judges. In California, where many court systems operate under a master calendar system, delay is not a serious problem, according to Administrator Gampell. He explained that when a challenge is filed, the case is either routed to the next available department for trial or a new trial date is assigned. However, he added, sometimes a case may be delayed until a spot in another department becomes available. In the larger courts, he maintained, cases are usually reset the same day.

Of those who addressed the issue, the Honorable Roy Gulley was the only administrator who completely ruled out delay as a problem in his state. In Illinois, each circuit has established a pool of judges from which replacements for substituted judges are readily drawn. "As a result," Gulley explained, "the case ordinarily proceeds to trial on the original date for which it was set."

Administrators in California, Illinois and North Dakota stated that peremptory challenges do not interfere with calendar management. According to Administrator Gampell, cases are routinely assigned without any scheduling complications. Judge Gulley stated that problems are nonexistent in Illinois since it is relatively easy to choose a replacement judge from the pool. Scheduling is reportedly most disrupted in South Dakota and in the one-judge counties in Washington. Administrators in those states reported that difficulties occur because a judge often has to be brought in from another court to hear cases resulting from a substitution: thus it becomes necessary to accommodate both judges' schedules.

Only two administrators addressed the fiscal consequences of peremptory challenges. Administrator Geddes in South Dakota claimed that frequent and lengthy travel across the state puts an added strain on their budget.

Administrator Gampell of California noted that although his office does not monitor costs arising from challenges, he has no information that would lead him to believe that peremptory disqualifications had resulted in a need for increased budgets.

The only administrator who indicated that there was a need to place additional judges on the bench as a result of peremptory challenges was South Dakota Administrator Mark Geddes. Administrators in California and Illinois asserted that there is generally no need to employ extra judges.

ATTORNEYS GENERAL

All nine attorneys general or their assistants who responded to requests for information favored the use of peremptory challenges.[6/] Wyoming Attorney General McClintock based his support of the procedure on the inherent right of litigants and attorneys to be free of judicial prejudice or bias. He wrote:

> It is better for our judicial system that the client--however vague his objections to a particular judge may be--be assured within reasonable limits that he is getting his case heard by a judge who is without prejudice and will give him a fair trial. The challenge also permits the attorney who may have developed a difficult relationship with a particular judge to satisfy himself that he will not be the victim of prejudice or bias.

6/ Letters were received from Attorneys General in Arizona, Minnesota, North Dakota and Wyoming and their assistants in Alaska, Montana, Oregon, Washington and Wisconsin.

All nine respondents indicated that peremptory challenges are working well in their state. In Montana, for example, Assistant Attorney General Moreen noted that peremptory challenges have "become part of the fabric of justice." Attorney General McClintock noted the ease with which judges can be replaced if challenged, "without taxing the judicial process." Similarly, Nicholas Spaeth reported that in North Dakota "statutory provisions pertaining to requests and demands for change have posed little difficulty in application."

Eight of nine of the respondents indicated that there are no major abuses in their peremptory challenge systems. Only in Wisconsin was there mention of "occasional abuses." Even in states such as Wyoming, where the attorney general noted that although the peremptory challenge system is "fraught with some possi-bility of abuse," no significant problems were reported. Assistant Attorney General Guaneli of Alaska suggested that in his state "judicial reaction to automatic peremptory challenges depends more on an individual judge's attitude about himself and the system, . . . than any perceived abuses that might occur."

A majority of the respondents disagreed with the suggestion that lawyers invoke challenges for the slightest of reasons in an effort to avoid charges of malpractice. No specific reasons, however, were offered.

All of the attorneys general and their assistants preferred the judicial peremptory challenge system to one in which cause must be shown. One of the primary reasons suggested was that a peremptory challenge eliminates the potential for hostile confrontations with judges, since no specific allegations of judicial prejudice of bias need to be presented. "To have a system where cause would have to be established would be much more detrimental and unworkable,"

insisted Assistant Attorney General Petruss of Washington. Assistant Attorney General Sanderson of Oregon, explained further.

> To require a meticulous spilling out of blood, guts and feathers details in a showing of cause would simply lead to more deep seated and long lasting ill will amongst bench and bar.

Attorney General McClintock of Wyoming suggested an alternative reason for favoring the peremptory challenge system over challenges for cause. In Wyoming, if an attorney believes the judge is prejudiced or biased, the customary action taken is an informal request that a judge step down from a case, rather than the initiation of a formal procedure, which would eventually go on record. He argued that "while this procedure is not impossible under the challenge-for-cause approach, the attorney who contacts the judge in this situation knows that he is without weapons to use in effecting his challenge."

Of the five respondents who addressed the issue, none believed that judicial independence is compromised as a result of peremptory challenges. For example, Attorney General McClintock stated that "judges are eminently independent; no threat of a challenge is going to keep them from calling the tune as they believe right." Additionally, Assistant Attorney General Guaneli in Alaska wrote that any changes as a result "are likely to be beneficial, in terms of eliminating extremes in judicial behavior and decisionmaking."

A majority of respondents reported that the use of peremptory challenges does not impair public confidence in the judiciary. Indeed, according to Attorney General Humphrey, in Minnesota, the challenge system has the reverse effect:

> It gives some litigants the perception that the judicial system is more fair and equitable than it would be without the removal procedure. This, obviously, is a benefit that is achieved at a cost that does not appear to be great.

According to those who do come in contact with the system, public confidence is not eroded, insisted Humphrey. "Being forced to proceed with a biased judge," he continued, "is what undermines public confidence in the judiciary."

BAR ASSOCIATION PRESIDENTS

Bar association presidents are highly favorable toward peremptory challenges.[7/] The entire group agreed that the procedure is working well in their states, and that it should be continued.

A majority of the attorneys suggested that peremptory challenge procedures do not result in widespread abuse. Melinda Lasater, President of the San Diego Bar Association, did note that sometimes the procedure is used to effect delay. However, in those instances, she indicated, judges generally utilize tactics to effectively control such activity by processing cases as quickly as possible.

Six of the nine attorneys suggested that there are no pressures on lawyers to challenge judges for the slightest of reasons, fearing that if they do not, malpractice suits may result. Instead, they claimed that it is the practice of attorneys with whom they are familiar to take the procedures very seriously. According to the bar presidents, attorneys initiate substitutions only when they

---

7/ Responses were received from five state bar presidents and four local presidents.

believe that it is absolutely necessary to ensure a fair trial. As Patricia Phillips, President of the Los Angeles County Bar Association wrote:

> A peremptory challenge is only exercised after due deliberation of all factors that might either encourage the exercise or militate against it. It is not used as an escape hatch to avoid malpractice.

Seven of the nine presidents argued that the use of peremptory challenges results in less acrimony between the bar and the bench than procedures establishing cause. Their rationale is that it is preferable to have a system which does not mandate that accusations of bias or prejudice be alleged. A few of them did indicate that judges sometimes are personally offended, particularly in cases when attorneys challenge with high frequency, and especially when they use the procedure to totally eliminate a judge from hearing certain types of cases. However, in their experiences, these situtations are rare.

All of the bar association presidents who addressed the issue indicated that judicial independence is not undermined as a result of peremptory challenges. Walter Grebe, President of the Multnomah Bar Association in Oregon, did suggest the possibility that independence may sometimes be affected, but only if procedures are "misused." Patricia Phillips claimed that there is no threat to the judges since the procedure is merely a substitution. She added, "it imposes no obligation on any judge to act in any particular way."

Only two bar association presidents mentioned the impact of peremptions on public confidence in the judiciary. Both agreed that it is enhanced as a result of peremptory challenges. Larry Suciu, President of the Arizona State Bar, elaborated. "The existence of the peremptory challenge," he wrote, "enhances

public confidence in the judicial system because it gives the client some measure of control over his own destiny and creates the impression of a certain randomness that makes evenhanded treatment seem more likely."

Only one bar president discussed the potential impact of peremptory challenges in the federal system. Larry Suciu claimed that, although there will inevitably remain fears of potential administrative difficulties in the federal judiciary, the success of the procedure in the states "should go a long way toward relieving those fears."

CHIEF JUDGES

Of the 111 chief judges expressing an opinion, 78% claimed that peremptory challenges are working well in their state (see Table IX-1). Only in Missouri, Montana, Oregon and Wisconsin did more than one respondent suggest that challenges are not working well. Indeed, judges in these four states accounted for 68% of those who held negative views.

Nearly two-thirds of the chief judges thought that their system of peremptory challenges is being abused. In all but Illinois, North Dakota, South Dakota and Wyoming a majority of the chief judges held this belief.

Despite the overwhelming consensus that peremptory challenge systems in most of the states are abused, three-fourths of the chief judges believe that their system should be continued. Indeed, only in Alaska did a majority indicate that peremptory challenges should be discontinued.

TABLE IX-1

PERCEPTIONS OF CHIEF JUDGES ABOUT PEREMPTORY CHALLENGES[1/]

Topic		Yes	No
Working Well	(N=111)	78%	22%
Abused	(N=83)	63	37
Should Be Continued	(N=115)	75	25
Adopt at Federal Level	(N=26)	39	61
Travel Hardships	(N=81)	36	64
Frustrate Judges	(N=75)	53	47
Strain Relationships	(N=69)	28	72
Compromise Judicial Independence	(N=42)	26	74
Helpful Feedback to Judges	(N=24)	54	46
Causes Delay	(N=96)	51	49
Disrupts Calendars	(N=97)	50	50
Increase Budgets	(N=62)	42	58
Need for More Judges	(N=55)	35	65
Reduces Appeals	(N=15)	20	80
Enhances Public Confidence	(N=35)	60	40

1/ Excludes chief judges in California. The total number of chief judges responding was 128.

In spite of the relatively strong support for peremptory challenge systems at the state level, a clear majority of the chief judges recommended against adopting one at the federal level. Unfortunately, very few of the chief judges addressed this issue and thus the statistic in Table IX-1 should be treated with caution.

Impact on Judges. Peremptory challenges may impact judges personally in several ways. They may lead to hardships associated with travel, cause considerable frustration, strain relationships between judges and attorneys, affect judicial independence or provide them with helpful feedback.

TRAVEL HARDSHIPS. Almost two-thirds of the chief judges who addressed the issue agreed that there are not significant hardships associated with travel as a result of peremptory challenges. Negative responses appeared to strongly correlate with rural states and districts with relatively few judges.

Most of the hardships associated with travel were reported in states such as Alaska, Idaho, Wyoming and Montana where judges frequently travel over 50 miles to the nearest courthouse. In Alaska judges are often required to utilize air transportation to replace challenged judges. In Montana one judge estimated that because of the great distance in the nation's fourth largest state (which has only 32 trial judges) approximately 20% of his time is spent on "unproductive" traveling. It should be noted, however, that several judges in rural areas reported that a considerable amount of travel is necessary in any event because of self-disqualifications. Further, several judges in these areas stated that they accept their positions knowing that travel is a requirement of their occupation.

Even in states with large urban areas extensive travel may be required. In Washington, for example, a sole presiding judge reported that it is "not unusual" for him to travel 240 miles to hear a case. Similarly, despite two relatively large urban areas in Wisconsin, extensive travel is nonetheless required in other parts of the state. The Tenth District, for example, has only four counties with more than one judge. As a result, according to one judge, a "good deal of wasted time is expended on travel that could be much better used in the courtroom."

FRUSTRATION. Slightly over one-half of the judges who addressed the issue reported that frustration is experienced as a result of peremptory challenges. The primary reasons mentioned were related to frequent and lengthy travel, perceived misuse by attorneys of the procedure, and difficulties in finding replacements for those who have been substituted. In Alaska, one judge noted that although judges have come to expect a certain amount of travel, "a judge who is already on the road who must perform additional travel due to being peremptorily challenged is going to reach a frustration level more quickly." In Wyoming, one judge claimed that the closest available judge is 165 miles away, and that individual is already overloaded with work. The resulting frustration for both judges is "unbelievable."

A number of judges claimed that frustration is often encountered in the attempt to replace judges who have been substituted. As a result, according to one judge in North Dakota, peremptory challenges are "an aggravation, not only to the challenged judge and the assigned judge, but to the Presiding Judge of the district who in assigning another judge to hear and determine the action must try to apportion the workload." In Montana, in particular, where there are

no trial court administrators, frustration was expressed by at least three judges over the time wasted in searching for replacement judges. One judge complained about the fact that when he is challenged, it is up to him to locate another judge. He wrote: "time spent in endlessly reshuffling schedules to accommodate both travel and the visiting judge are (sic) unproductive." The problem is exacerbated, according to yet another judge, when a replaced judge who is finally chosen travels many miles to hear a case only to be disqualified again.

Judges reported a number of other reasons for becoming frustrated. One in Wisconsin, for example, related his anxieties over the fact that sometimes attorneys, through their persistence, eliminate judges from hearing certain types of litigation. In the majority of cases, he explained, there is nothing a judge can do about it. Other judges claimed that their personal reputations have been tainted as a result of large numbers of challenges and subsequent public exposure through the news media. One judge in Washington, however, wrote, "it generally appears that those judges that are bothered by the filing of an affidavit of prejudice are the ones who seem to get the most of them."

STRAIN ON RELATIONSHIPS BETWEEN JUDGES AND ATTORNEYS. Seventy-two percent of the chief judges who addressed the issue agreed that judicial peremptory challenges are less likely to strain relationships between judges and attorneys than procedures which require cause to be established. Only in Missouri did more than one or two judges (five of sixteen) indicate that challenges for cause result in less strain between the bar and bench than peremptory challenges.

A majority of attorneys who indicated that peremptory challenges create less strain than challenges for cause believe that judges are less offended personally in the former system because allegations of bias are not openly presented. As one judge in Wyoming stated, "a peremptory challenge creates less strain on interpersonal relationships than does a challenge for cause in which all of the warts of the judge are paraded past his nose for public dissemination and review . . . It hurts to learn that someone believes you cannot be fair," he continued, "but much of the sting can be taken out if it is done with an expression of personal apology, quiet dignity and little fanfare."

JUDICIAL INDEPENDENCE. Three-quarters of the chief judges addressing the issue expressed the belief that peremptory challenges do not compromise judical independence. The relatively small number of judges who claimed that judicial independence is jeopardized through the use of challenges was concentrated in Missouri. Three judges presiding in that state mentioned that challenges invoked for "inappropriate" reasons allow attorneys to manipulate the outcome of litigation and inevitably effect a loss of judicial control.

FEEDBACK. Fifty-four percent of the chief judges addressing the issue suggested that peremptory challenges provide helpful feedback to the judiciary. According to one judge in Illinois, they are a "beneficial administrative tool" which can be used to pinpoint judges that have particular problems. Other judges implied that the use of challenges may represent a signal that a particular judge's sentencing practices are outside of the norm. One judge suggested that his colleagues "would prefer to know that a litigant has some question regarding ... [their] handling of the case and would welcome such a motion." Another judge's comments were very specific:

> Judicial peremptory challenges keep judges attentive, civil and industrious - absence encourages arrogance, insensitivity and sloppy work habits ... its presence interjects a much needed element of humility, particularly in a judicial system which does not face reelection.

Impact on Judicial Administration. The chief judges were also asked about how peremptory challenges impact on judicial administration. The five areas of inquiry were delay, calendar management, judicial budgets, the need for additional judges, and the number of appeals to higher courts.

DELAY. Slightly over one-half of the chief judges addressing the issue claimed that peremptory challenges result in delay. Most are from rural areas or suggest that delay is greatest in one- and two-judge districts. In jurisdiction with several judges readily available there is little difficulty in reassigning judges; often they are assigned the same day the challenge is made. In rural areas, however, it is much more difficult to find a judge who is available to hear the case. The problem is compounded in states where great distances between neighboring courthouses exist. A judge in Idaho noted that delay often results in his jurisdiction where replacement judges travel sometimes up to one hundred miles to the nearest courthouse. Judges in Alaska, Montana and Wisconsin expressed similar concerns.[8/]

8/ It should be noted that there may be a correlation between delay and time limitations for filing challenges. In Washington, for example, where it is mandatory that applications be filed early in the process, there are fewer complaints about delay than in Missouri where challenges may be initiated close to the scheduled trial date.

A number of judges maintained that the use of peremptory challenges results in less delay than in systems which allow only challenges for cause. One judge, for example, stated that challenges for cause create more delay because of the time it takes to hold a hearing to establish cause. Another judge claimed that peremptions can actually speed up justice if the substitute is one with a "better ability or desire to move litigants through" litigation.

Judges in some states suggested that informal procedures are used to effectively prevent attorneys from using challenges to gain delay. In several jurisdictions, when judges are suspicious that attorneys are trying to gain a continuance, they band together and process those cases as quickly as possible.

CALENDAR MANAGEMENT. Approximately one-half of the chief judges addressing the issue stated that peremptory challenges have a tendency to disrupt calendar management in their district. The states apparently having the most problems are Alaska, Idaho, Missouri and Oregon. The states least affected are Illinois, Minnesota, Nevada, South Dakota, Washington and Wyoming.

Several reasons for disruption of calendar management were given. A number of judges in Oregon and Missouri mentioned that problems occur mostly from late applications in filing challenges. In Oregon, in particular, one judge noted that when challenges are made after case assignment, all subsequent case assignments are put on hold until the reassignment is made. In Idaho, it was suggested, judges often have full schedules. Thus, it becomes difficult to set a hearing within a reasonable time limit. Also, when calendars are reshuffled, stated one judge, a "burdensome amount of paperwork" is created.

Problems also occur, according to two judges in Missouri, when cases must be scheduled around the availability of a single courtroom. This, he stated, "requires considerable calendar attention."

On the other hand, about one-half of judges suggested that it is fairly easy to switch calendars when peremptory challenges are exercised. This is especially true where there are large numbers of judges available as replacements. For example, one district in Illinois has twenty-one judges available to hear cases. As a result, there is no impact on calendar management.

Several judges in rural areas also reported that there was little impact on calendar management when peremptory challenges are exercised. This was particularly true in Washington and Nevada.

BUDGETS. Fifty-eight percent of the chief judges who addressed the issue stated that peremptory challenges result in increased judicial budgets. Most of these judges came from Alaska, Arizona and Montana. Few of these judges came from Illinois, Nevada, North Dakota and Wyoming.

The greatest increase in cost is due to travel. In Alaska, for example, travel is very expensive. When a judge is required to change places with another, not only is there "double the per diem expense" but also additional expenses for staff as well. Similarly in Arizona and Montana, travel is quite costly when out-of-county judges are utilized.

Illinois and Nevada judges reported that peremptory challenges do not have a significant impact on costs. In Illinois, the availability of judges was cited as the major reason. In Nevada, the relatively low costs may be due to the relative infrequency with which challenges are exercised.

ADDITIONAL JUDGES. One-third of the judges who discussed the issue suggested that peremptory challenges result in the need to place additional judges on the bench. Montana was the only state in which a large number believed that challenges create the need for additional judges.

APPEALS. Only 15 of the 111 judges commented on whether or not peremptory challenges have an impact on the number of appeals taken to higher courts. Of those 15, only two believed that the number of appeals is actually reduced as a result of the procedure; neither stated his reason.

Impact on Public Confidence in the Judiciary. Three-fifths of the chief judges who commented on the issue suggested that peremptory challenges enhance public confidence in the judiciary. Most judges apparently believe that the opportunity afforded a litigant to eliminate a judge without being required to set forth reasons instills trust in the judicial system, and leads to the possibility of a "fair presentation and consideration of the case."

On the other hand, two-fifths of the chief judges believed that public confidence is not enhanced through the use of challenges. One judge in Minnesota, for example, indicated that most challenges are filed "at the prerogative of the lawyer, not the client." He expressed his doubt that the parties are even aware that the judge has been disqualified. Another judge in North Dakota offered a more negative impression. He indicated that peremptory challenges reinforce the "public impression that courts are unwieldly in delivery of judicial services."

PROSECUTING ATTORNEYS

Eighty-eight percent of the prosecuting attorneys asserting an opinion claimed that peremptory challenges are working well in their states (see Table IX-2). Only in Wisconsin, where prosecutors are not allowed to invoke the challenge, is there an appreciable number who believe that they are not.[9/] In Illinois, where prosecuting attorneys also are not empowered to exercise the challenge, only four of 20 prosecutors reported that the system is not working well. In Nevada, where challenges are not allowed in criminal cases, all four respondents reported that the system is working well.

Unlike the chief judges, an overwhelming majority of whom believe that peremptory challenges are abused, a clear majority of prosecutors who addressed the issue claim that they are not. Indeed, 62% hold this view; only in Alaska and Montana did more than one-half of the prosecutors indicate that the peremptory challenge system in their state is abused.

Like the chief judges, an overwhelming majority of prosecutors believe that peremptory challenges should be continued. This was true in every state but Wisconsin where one-half of the 24 prosecutors suggested that they should be discontinued. Again it must be recalled that in Wisconsin prosecutors are not allowed to use the challenge. In Illinois only five of 22 prosecutors suggested that the use of peremptory challenges should be terminated.

The number of prosecutors offering a recommendation about whether peremptions should be allowed at the federal level was relatively small. However, as

---

9/ Nine of 20 prosecuting attorneys in Wisconsin reported that peremptory challenges are not working well.

TABLE IX-2

PERCEPTIONS OF PROSECUTING ATTORNEYS ABOUT PEREMPTORY CHALLENGES[1/]

Topic		Yes	No
Working Well	(N=248)	88%	12%
Abused	(N=144)	38	62
Should Be Continued	(N=245)	86	14
Adopt at Federal Level	(N=42)	62	38
Travel Hardships	(N=81)	36	64
Malpractice Suits	(N=110)	7	93
Strains Relationships	(N=134)	8	92
Compromises Judicial Independence	(N=74)	15	85
Enhances Public Confidence	(N=61)	71	29

1/ A total of 339 prosecuting attorneys responded to the letters of inquiry.

with the other target audiences a majority of those responding suggested that the federal system would benefit from their usage.

Impact on Prosecuting Attorneys. Peremptory challenges may impact prosecuting attorneys personally in at least two ways. First, the existence of peremptions may cause prosecutors to invoke challenges in frivolous instances, fearing that if they do not, they may be subjected to malpractice suits. Second, invoking challenges may strain relationships between them and the judges before whom they must practice.

MALPRACTICE SUITS. Ninety-three percent of the prosecutors addressing the issue indicated that lawyers do not file peremptory challenges to avoid malpractice suits. Apparently they believe, as one attorney stated, that they have a considerable amount of "discretionary leeway" in handling cases under current standards and thus need not worry about being sued for malpractice. One prosecutor noted that as public officials, prosecuting attorneys and public defenders are generally immune from malpractice suits in any event.

STRAINED RELATIONSHIPS. Few prosecutors who commented suggested that peremptory challenges cause a greater strain in relationships between judges and attorneys than challenges for cause. It is generally their belief that when cause is required, judges tend to feel as though they have been personally attacked and their egos become bruised when allegations of bias or incompetence are made public. According to one attorney, for example, requiring cause results in the airing of "ugly details," which are seen as "accusatory" in nature. Such revelations are avoided in peremptory challenge systems, reducing embarrassment not only to judges, but also to attorneys who are not required to

elaborate on their allegations as in challenge for cause systems. As one attorney in South Dakota stated, "the judge is more comfortable being removed under some vague concept ... rather than trying to deal with some specific allegations against his character or his attitude or his competence."

Some attorneys insisted that peremptory challenges actually aid in preserving amicable relationships between the bar and bench because of the discreet nature of the procedure. In South Dakota, attorneys are required to first request a substitution informally before initiating a challenge.[10/] According to one attorney, this not only produces better results, but also creates harmony between the two groups and leads to improved overall cooperation.

The relatively few attorneys who favored challenges for cause over peremptory challenges prefer a procedure in which attorneys are required to prove that bias or prejudice exists. One attorney explained his reason. He suggested when no claim of bias or prejudice is made, suspicion is aroused among judges that the real reason for invoking the challenge is not a legitimate one. According to him, challenges for cause alleviate this concern.

Impact on Judicial Independence. Few prosecutors addressed the issue of whether peremptory challenges compromise judicial independence. Of those who did, only 15% thought this to be the case. Two general explanations were offered. A Missouri prosecutor, for example, suggested that the threat of peremptory challenges forces judges to accept plea bargains which they would not otherwise do. Other attorneys suggested that independence is compromised when a judge is prohibited from hearing certain types of cases.

10/ Informal challenges are also allowed in Alaska and Arizona.

The general belief among most prosecutors is that judicial independence is not compromised by peremptory challenges. To them, instead of undermining independence, challenges encourage judges to be fair. A California prosecutor succinctly summarized this view. According to him:

> [peremptory challenges] influence the judge to moderate whatever is causing attorneys to repeatedly tender challenges ... [It] therefore injects a balancing into the justice system that works to ensure that justice is dispensed fairly, impartially, and evenhandedly ... In some measure, then, the system of peremptory challenges protects us all from judicial tyranny.

Impact on Public Confidence in the Judiciary. As with the subject of judicial independence a small number of prosecutors addressed the issue of whether peremptory challenges enhance public confidence in the judiciary. However, of those who did, nearly three-fourths believed this to be the case. Apparently their basic rationale is that the procedure fosters a feeling of assurance among litigants that their case will receive a fair hearing before an impartial judge. As one Idaho attorney stated, the procedure makes the "public feel that the judicial system is accountable and is properly performing the public service for which it was created." Therefore, he indicated, there is a greater willingness to accept the ultimate outcome of judicial decisions.

Relatively few of the prosecutors suggested that confidence may be impaired through the use of the procedure. Some, however did. For example, an attorney in Wisconsin advanced the theory that peremptory challenges reinforce the "feeling that the courts are not there to protect the rights of the public, but they are instead easily manipulable by lawyers who like to use technicalities." A majority of those who argued that public confidence is not enhanced suggested that the general public is simply not even aware that the

procedure exists. Consequently, it can have no impact on their confidence in the judicial system.

PUBLIC DEFENDERS

The responding public defenders were almost unanimous in their opinion that peremptory challenges are working well in their states (see Table IX-3). The sole defender who believed that they are not was in Wisconsin. Although 40% of the defenders believe that their system is abused, all of them agreed think that it should be continued. Similarly, of these who commented, an overwhelming majority thought that peremptory challenges should be extended to the federal judiciary.

Impact on Public Defenders. Peremptory challenges may personally affect public defenders in the same manner that they affect prosecutors. First, the existence of peremptions may cause defenders to invoke challenges in frivolous instances, fearing that if they do not, they may be subjected to malpractice suits. Second, invoking challenges may strain relationships between them and judges before whom they must practice.

MALPRACTICE SUITS. The responses of public defenders addressing the issue of malpractice suits were consistent with those of the prosecuting attorneys. Ninety-two percent asserted that lawyers do not file peremptory challenges in frivolous instances, pressured by the threat of a malpractice lawsuit. Their reasons were almost identical to those offered by the prosecuting attorneys.

Eight percent of the public defenders disagreed. One in Illinois, for example, suggested that attorneys are "compelled to practice defensive litigation, due to the "exaggerated proliferation of both legal malpractice litigation

TABLE IX-3

PERCEPTIONS OF PUBLIC DEFENDERS ABOUT PEREMPTORY CHALLENGES[1/]

Topic		Yes	No
Working Well	(N=60)	98%	2%
Abused	(N=30)	40	60
Should Be Continued	(N=57)	100	--
Adopt at Federal Level	(N=14)	79	11
Malpractice Suits	(N=53)	8	92
Strains Relationships	(N=37)	0	100
Compromises Judicial Independence	(N=35)	20	80
Enhances Public Confidence	(N=14)	93	7

1/ A total of 82 public defenders responded to the letters of inquiry.

and appellate claims of ineffective assistance." Another defender in Missouri went so far as to claim that if attorneys do not have the inside knowledge, common to other members of the bar, that a certain judge's practices warrant the filing of a challenge, "they have no business practicing law and ought to be disbarred."

STRAINED RELATIONSHIPS. All of the public defenders who discussed the issue suggested that peremptory challenges are less likely to cause friction between attorneys and judges than challenges for cause. Again, their reasons were similar to those of the prosecuting attorneys. Peremptory challenges, they claimed, are less likely to be offensive, and are likely to ease tension between the bar and bench. Challenges for cause, on the other hand, tend to exacerbate what are often already strained relationships. Many implied that encounters which force attorneys to publicly state their objections to a particular judge are likely to result in "disastrous consequences." One problem mentioned in particular is when challenges for cause are denied, "leaving the litigant in a merciless position before the judge."

Many of the public defenders argued that most judges understand the need for peremptory challenges, and that they view the attorneys who file affidavits in a specific case as demonstrating "good lawyering." Several defenders also suggested that a majority of judges do not view challenges as a personal attack on their competence, integrity or fairness.

Impact on Judicial Independence. Eighty percent of the public defenders expressing an opinion stated that peremptory challenges pose no threat to judicial independence. The small number who disagreed maintained that independence is jeopardized only when challenges are used "unfairly" or in a "threatening

manner." For example, if a judge who is particularly harsh on drunk drivers is eliminated from hearing all related cases, his independence is compromised. A number of the public defenders suggested that although a judge's independence may be affected by high rates of challenge, the end result is, more often than not, positive. As one California respondent wrote, "A peremptory challenge acts as a sobering and learning experience for tyrannical and idiosyncratic judges which tempers them and makes them better judges."

Impact on Public Confidence in the Judiciary. All but one of the public defenders expressing an opinion stated the belief that peremptory challenges enhance public confidence in the judiciary. They indicated that the right to exercise challenges reinforces the presumption that the public is being treated fairly and that any questions about the fairness of court proceedings can be addressed by a simple procedure. Moreover, they argue, it is comforting to know that mediocre, biased or prejudiced judges, or judges with extreme behavorial patterns, (whether judicial or personal) can be effectively regulated. As one public defender in California suggested, peremptory challenges promote public confidence by restoring the belief that "judicial tyrants can be stopped from rendering their own brand's (sic) of 'justice' on helpless and hapless individuals." The sole defender who argued that peremptory challenges do not promote public confidence in the judiciary argued that the majority of the public is not even aware that the procedure exists and thus challenges can not possibly have an effect on them.

TRIAL COURT ADMINISTRATORS

Relatively few trial court administrators responded to written requests for information (see Table IX-4).[11/] Thus, firm conclusions cannot be drawn from their responses. It is interesting to note, however, that 14 of 19 administrators addressing the issue suggested that peremptions are working well in their states. On the other hand, six of 11 administrators thought that they should be discontinued. Nearly all of them think their system is abused.

Negative reaction to peremptory challenges among administrators is based in large part on administrative difficulties they cause. Nearly two-thirds of those addressing the issue asserted that peremptions cause delay in the judicial process. Nearly one-half of this group work in sparsely populated jurisdictions with only one or two judges.

Over one-half of these administrators addressing the issue claimed that peremptions disrupt calendar management. Negative reactions came mostly from rural jurisdictions in Missouri, Oregon, Washington and Wisconsin. A number of administrators attributed calendar disruption to "blanket" filings. For example, administrators in several rural districts noted that their ability to control calendars is hindered when judges are effectively removed from hearing certain types of cases. Administrators in multi-judge courts, however, such as those in California, reported less negative impact on calendar management.

11/ "Of the 103 solicited for information, 34 responded for a rate of 33%. The low rate is perhaps due to the fact that most of them had already responded to telephone inquiries for information about the frequency of challenges in their district.

TABLE IX-4

PERCEPTIONS OF TRIAL COURT ADMINISTRATORS ABOUT PEREMPTORY CHALLENGES 1/

Topic		Yes	No
Working Well	(N=19)	74%	26%
Abused	(N=14)	93	7
Should Be Continued	(N=11)	45	55
Adopt at Federal Level	(N=2)	0	0
Causes Delay	(N=28)	64	36
Disrupts Calendars	(N=25)	56	44
Increases Budgets	(N=13)	46	54
Need for More Judges	(N=16)	31	69

1/ A total of 34 trial court administrators responded to the letter of inquiry.

Relatively few administrators commented on whether peremptions result in increased judicial budgets or create a need for additional judges on the bench. Of those who did, about one-half thought that costs are escalated by the use of challenges. Most of these judges reside in Alaska, South Dakota, Washington and Wisconsin and attribute the increase to the expense of travel. Only a few administrators believe that peremptions result in the need for additional judges.

SUMMARY

The perceptions of peremptory challenges in the states reveal that, overall, the procedure appears to be working well. Not surprisingly, the most positive responses came from the attorneys and the least positive from the trial court administrators. The majority of the state court administrators and the chief judges surveyed were favorable toward the procedure, although they did express some reservations.

The chief justices, attorneys general, bar association presidents, prosecuting attorneys and public defenders were overwhelmingly in favor of the system. Nearly all of these respondents reported that peremptory challenges are working well in their state. The majority of the district attorneys who asserted that the procedure is not working well were centered mostly in Wisconsin and partially in Illinois, where district attorneys are prohibited from using the procedure.

Over three-fourths of the chief judges stated that peremptory challenges are working well in their state. However, almost two-thirds indicated that abuse exists, and about one-half indicated that the procedure can lead to frustration, delay, increased budgets and disruption in calendar management.

The responses of the trial court administrators were somewhat similar to those of the chief judges. Although 74% of the administrators noted that the procedure appears to be working well, nearly all claimed that it is being abused. Most negative reactions were attributed to administrative difficulties resulting from use of the procedure, particularly in the smaller jurisdictions. Approximately two-thirds acknowledged that peremptory challenges can cause delay, and about one-half asserted that it causes disruption in calendar management.

The following section examines the impact of peremptory challenges on judicial administration, judges, attorneys and the public, as reported by each of these groups.

Chapter X:

Perceptions About The Impact Of Peremptory Challenges On Judicial Administration, Judges, Attorneys And The Public

CHAPTER X

PERCEPTIONS ABOUT THE IMPACT OF PEREMPTORY CHALLENGES ON JUDICIAL ADMINISTRATION, JUDGES, ATTORNEYS AND THE PUBLIC

The consequences of peremptory challenges fall into four main categories: their impact on judicial administration, judges, attorneys and the public. Although these topics have been alluded to in earlier chapters it is useful to isolate the specific issues involved for concentrated analysis.

IMPACT ON JUDICIAL ADMINISTRATION

Peremptory challenges have the potential of affecting judicial administration in five areas: delay in the processing of cases, calendar management, judicial budgets, the requisite number of judges and the number of appeals from trial court decisions.

Delay. One of the primary controversies surrounding peremptory challenges is the extent to which they cause delay in the judicial process. The only statistical data available to help resolve the debate comes from Wisconsin. Unfortunately the state is atypical in several respects. First, the subject of peremptory challenges there is highly controversial and emotionally charged. Second, a relatively large number of judges in that state are challenged in blanket fashion. Third, the general frequency with which judges are challenged in several districts is unusually high. Thus, the data must be treated with caution. Nonetheless, a study by the state court administrator's office found that "cases with substitutions do take significantly longer."[1/] In criminal

---

1/ Director of State Court, Office of Court Operations, Analysis of Substitutions in Wisconsin Circuit Courts Prepared for the Wisconsin Judicial Conference, September 16, 1985, at 6.

matters during 1984, the average age at disposition was 53 days longer for cases with substitutions than cases without substitutions. Civil substitution cases took 81 days longer than those without substitutions.[2/]

Additional information about the impact of peremptions on case processing time may be gleaned from the perceptions of chief judges and trial court administrators. Of the 128 judges who responded to requests for information, 96 discussed the subject of delay (see Table X-1). Slightly over 50% reported that case processing time is increased because of peremptory challenges.[3/] A majority of judges believe this to be true in Alaska, Arizona, Idaho, Missouri, Montana, Oregon and Wisconsin. A minority believe this to be true in the remaining seven states.[4/]

Judges who claim that peremptions cause delay come from highly unified states such as Idaho and Wisconsin and such non-unified states such as Oregon and Montana.[5/] Some use individual calendars while others use master calendar systems. Similarly, those who claim that peremptory challenges do not cause delay come from such unified states as Illinois and Minnesota and such non-unified states as Washington and Wyoming. They too come from jurisdictions

---

2/ The researchers noted the possibility that complex cases (which take a long time to process) may result in more challenges than simple cases (which take little time to process) and thus partially explains why challenged cases take longer than unchallenged ones.

3/ Included in the percentage are all judges who indicated that even slight delays occurred. Indeed, many of them indicated that only minor or infrequent delays take place.

4/ California is excluded from the tally.

5/ Unified states are characterized by a high degree of central administration and structure.

Table X-1

THE IMPACT OF PEREMPTORY CHALLENGES ON JUDICIAL ADMINISTRATION

Topic	Percent Answering Affirmatively		
	Chief Judges[1/] (N=128)	Trial Court Administrators (N=36)	Total
Causes Delay	(N=96) 51%	(N=28) 64%	(N=124) 53%
Disrupts Calendar Management	(N=97) 50%	(N=25) 56%	(N=123) 50%
Increases Judicial Budgets	(N=62) 42%	(N=12) 50%	(N=74) 43%
Results in Need for More Judges	(N=55) 35%	(N=16) 31%	(N=74) 34%
Reduces the Number of Appeals	(N=15) 20%	--	(N=15) 20%

1/ Excludes California chief judges.

which use individual and master calendars. The extreme positions held on this subject are typified by comments from chief judges in Missouri and Nevada. "In our circuit," wrote Judge Weldon W. Moore of Missouri, "almost 100 percent of the time a change of judge is made for the purpose of delay and generally is made against a judge who has a current docket with the hope that the case will be assigned to some judge who cannot get to it for another 60 or 90 days." Conversely, Judge Addeliar D. Guy of Nevada wrote that "[t]here is no delay or disruption of cases because of peremptory challenges...." The only factor which seems to be associated with the judges who claim that peremptions cause delay is isolation. Most of them come from rural areas or courts with relatively few judges in close geographic proximity.

Comments from chief judges in Missouri and Montana typify concerns about delay. Anthony J. Heckemeyer noted a recent example. "[J]ust about a week ago," he wrote, "a case that was tried about four years ago in another circuit was venued here. . . . It had been set for two entire weeks in my trial schedule and thirty-three days before it was set for trial they disqualified me. It was obviously a tactic to delay the final outcome. . . ." Montana Judge Joel G. Roth reported a different problem.

> I recall a case which was originally assigned to me and in which I was peremptorily challenged. I tendered the case to the Department A judge and he accepted jurisdiction. Subsequently, a bench trial was set on my calendar (Department C) because everyone (including both attorneys) was relying on the case number as still indicating the case was assigned to Department C. On the morning of the trial, with both parties and their counsel in the courtroom together with many witnesses. . . I noted . . . that I had been disqualified early on. Everyone had forgotten. I refused to hear the case and unfortunately the Department A judge. . . was on a jury trial and couldn't hear the case at that time.

There is little doubt that at least some delay accompanies the exercise of peremptory challenges in numerous locales.[6/] However, many chief judges report that this can be eliminated or kept to a minimum with aggressive action. For example a judge in Washington noted that court officials there had been able to cut down on the use of challenges as a tool for delay by working closely together. "If there is any suggestion that the affidavit in any of the surrounding counties are filed for the purposes of delay," he reported, "we all respond quickly. It doesn't take long," he continued, "that the word gets out that the delay tactic is not working." He cautioned, however, that preventing delay "requires constant vigilance on our part."

Another method of avoiding delay is to require that challenges be filed early in the judicial process. This view was succinctly stated by a North Dakota judge. "[I]t is necessary," he wrote, "to require that the right to demand a change of judge. . . be filed very early in the case to avoid its use for dilatory purposes." A prosecutor from Missouri offered a similar comment. "Years ago," he wrote, "we used to allow a change of judge on the day of trial, and then it was frequently abused to get a continuance. Now, however," he continued, "the motion must be filed soon after the trial judge is assigned to the case or it is set for trial, and we have eliminated the 'free continuance.'"

Trial court administrators are also divided on the subject of delay. Due to the relatively low response rate, the statistic in Table X-1 must be treated

---

6/ Ironically some prosecutors and defenders reported that peremptory challenges are used to avoid delay. For example, a prosecuting attorney in North Dakota noted that he challenged one judge "due to the fact that his court calendar was so backed up that we knew a violent defendant set for trial before that court would not be tried for about one year. With the challenge, we were able to bring that into court within 90 days."

with caution. However, the data are generally confirmed in numerous telephone conversations with other administrators throughout the country.

Like chief judges, many administrators believe that delays resulting from the exercise of peremptory challenges can be eliminated. For example, James Slette noted that soon after the most recent provision became effective in Minnesota "it was apparent that the notice to remove was used for delay purposes." Consequently, "a policy. . . was developed that whenever a judge is disqualified. . . another judge trades assignments immediately and the trial proceeds without delay." Stuart Beck, another trial court administrator from Minnesota, reiterates this view. "We don't let anyone delay by filing a notice to remove. Rarely does a notice. . . cause a continuance of a case." Similarly. in Phoenix, Arizona Administrator Michael Planet reports that use of the "fast track system" has prevented any delay resulting from challenges.

Calendar Management. Perceptions about the impact of peremptory challenges on calendar management are divided. Approximatey one-half of the judges and administrators believe that calendars are disrupted and one-half that they are not (See Table X-1).7/ Again, those who believe that peremptions negatively impact calendar management come from both unified and non-unified states and/or jurisdictions which use individual and master calendar systems. As with the subject of delay, most who believe that peremptions have a negative impact on calendar management come from courts with few judges in relatively isolated

---

7/ Included in the percentage who believe that peremptory challenges cause calendaring problems are all judges and administrators who indicated that even slight disruption occurred.

areas. For example, a rural judge in North Dakota reported that reassignment of the cases because of challenges "invariably results in schedule disruption. . . and an actual lowering of judicial efficiency." Similarly, a judge in Missouri noted that because "each judge has his own calendar to deal with, it makes it very difficult to coordinate trial calendars to make use of a single courtroom in most rural counties."

Despite the fact that the smooth operation of calendaring systems is hampered at least to some extent by peremptions, extreme disruptions appear to be isolated within a few jurisdictions in a few states. Even in many rural areas disruptions are not always serious. For example, a South Dakota judge reported that "[o]bviously there are times when. . . calendar management has been disrupted in a minor way. However, the problems have not been serious and we have not noted a detrimental effect here." Similarly, a judge in Nevada wrote that the "challenge has been exercised so infrequently, that few calendar problems have resulted."

Many chief judges and administrators noted that disruptions to calendaring systems can be minimized by strict control of procedures and cooperation among the individuals involved. Administrator Robert A. Zastany in Illinois, for example, suggests that a calendar coordinator can help reduce any problems which may arise. "Having a professional in charge of calendar management," he wrote, "will facilitate better case flow and control problem areas." Calendar coordinators are apparently used in many jurisdictions. In Oregon, for example Administrator David A. Zenk, Jr., notes that a calendar coordinator assigns the trial date relatively early in the judicial process and takes disqualifications at that time. According to him, this practice "eliminated much of the calendar disruption" which previously existed. Missouri Judge R. Kenneth Elliott,

however, notes that even when challenges must be made early in the process the "restriction does not solve all of the docket disruption problems." The remainder, he suggested, "can be taken care of by informal agreements between judges [which are made] well known to the bar."

Judicial Budgets. Nearly one-half of the chief judges and administrators reported that judicial budgets are increased because of peremptory challenges (see Table X-1). Most of these individuals come from rural areas where only one or two judges sit in a single location. The additional costs are incurred when mileage and per diem expenses must be paid to judges who travel to cover the dockets of challenged colleagues. Naturally, the greater the distance and the longer the case, the greater the increase in cost. Some of the most extreme examples reported by the respondents are listed below:

- I am frequently disqualified in criminal cases and in these instances the Supreme Court sends a judge who lives ninety miles from Hannibal. Chief Judge, Missouri

- Superior, the county seat of Douglas County, is approximately 60 miles away from the next nearest county seat. Chief Judge, Wisconsin

- . . . . if a judge is disqualified, it is often necessary to assign the case to a judge who may have his chambers a hundred miles away. Chief Judge, Idaho

- I should point out that the two district judges in the county in which I sit are in buildings located 20 miles from each other and the district judge in the other county is 80 miles away. Chief Judge, Oregon

- Judge . . . recently drove 90 miles to Hurley to handle a not guilty plea, a guilty plea in a traffic case, and for a preliminary hearing that neither side was ready for. He then drove 40 miles out of his way to Rhinelander, and the next day had to return to Hurley, when he granted a motion to dismiss a case, a motion that could have been made the first day. Administrator, Wisconsin

Not all judges in rural areas, however, claim that peremptory challenges significantly increase the size of judicial budgets. For example, one member of the bench who sits in a single-judge district in Washington stated that "[n]o doubt some additional costs result. . . [but they are] not a significant amount in my budget." This view was reiterated by a colleague sitting in another part of the state. "There is undoubtedly an increase in judicial budgets in the smaller courts," he wrote, but "that increase would not amount to a significant percentage of the entire budget." Similarly, another member of the judiciary sitting in a two-judge district in Missouri claimed that he had "not seen any particular impact on judicial budgets as a result of the judicial peremptory challenge system."

Judges in urban areas with several colleagues indicate that very little travel occurs due to the exercise of peremptory challenges and thus judicial budgets are not significantly increased. For example, Spokane Judge Marcus M. Kelly, who works with nine colleagues, stated that in his district "the use of the mandatory disqualification for judge does not require any travel on our part." Similarly a Missouri judge wrote that "[i]n our suburban Kansas City circuit, we are a multi-judge circuit and there is little travel required by the rule. One merely transfers the case to another division."

Specific dollar figures associated with peremptory challenges are exceedingly difficult to determine. This is primarily due to the fact that in nearly all jurisdictions expenses resulting from travel because of peremptory challenges are integrated with similar costs resulting from challenges for cause, self-disqualifications and those costs which are incurred when judges

must travel to cover the dockets of ill colleagues or those on leave or on vacation. Indeed, estimates were provided by only one respondent and they must be treated with some caution. There were an unusually large number of peremptions in his district at the time and he was located in a relatively rural area. Administrator Norman Meyer estimated that during 1979 challenges cost Wisconsin's Ninth Judicial District (headquartered in Wausau) about $175,000.[8/] "I figure each of the substitutes," he stated to a local newspaper reporter, "is costing $350. That's a total of $175,000 per year. . . . Statewide it probably amounts to a waste of $750,000."[9/]

The only other information found on dollar costs of peremptory challenges is that in a study conducted by an agency of the state legislature in Alaska. It too, however, must be treated with caution.[10/] The state is the largest in the nation and one of the most rural. At the time of the study, the judicial system was experiencing the exercise of several blanket challenges. Moreover, there is dispute over actual costs between district administrators and the state fiscal officer. One administrator found that during 1983 the travel and per diem costs for a single judge (to cover a perempted colleague) amounted to

---

8/ Jim Elliott, "Substitution adds costs, delays to state justice," Daily Herald, September 18, 1981.

9/ Id. The accuracy of the latter figure is particularly suspect. Wisconsin has only ten districts and as observed earlier, in urban areas there are few, if any, per diem and travel expenses which are incurred because of peremptory challenges.

10/ Peremption of Judges, Memorandum from Heidi Borson-Paine, Legislative Analyst, Research Agency, Alaska State Legislature, to Representative Milo Fritz, January 24, 1984.

$8,796.[11] Another administrator reported that expenses for a judge who was challenged in blanket fashion were approximately $10,000.[12] Still another administrator in a very rural area of the state estimated the travel and per diem costs to cover 20 peremptions of one judge were approximately $16,820.[13] Thus, the estimated costs of perempting three judges was $35,616. The authors of the report noted, however, that two of the judges had the largest number of peremptions in the state and that the other lived in an extremely rural location where the cost of living was very high.

After obtaining this information the agency sought additional data from the fiscal officer of the Alaska Court System. He estimated that $25,000 was spent per year for peremptions statewide.[14] His estimate was arrived at by conducting a study of all travel and per diem claims resulting from peremptions for a six-month period and doubling them. The fiscal officer believed his estimate to be accurate even if it appeared low because several perempted cases are handled in a single trip. In addition, he maintained that many of the peremptions occurred in Anchorage and Fairbanks where judges swapped cases at no cost.[15]

The Need for More Judges. Only one-third of the chief judges and administrators commenting on the subject indicated that peremptory challenges result in the

---

11/ Id., at 4.

12/ Id. This figure represents the expenses for both the challenged judge who was sent to another district and his replacement.

13/ Id., at 5.

14/ Id.

15/ Id., at 6.

need for more judges (see Table IX-1). Few offered any details. Most simply expressed the idea that peremptory challenges waste time and cause extra work for judges and administrators. For example, a judge in Idaho explained that peremptions "create a waste of judicial manpower when a complicated case has moved along for some period of time, and then a new party is added to the controversy, and he exercises the peremptory challenge." Similarly, an Arizona judge who handles reassignments noted that the process "means extra work for me and at times can be quite a nuisance."

Time is not only lost in the administrative reshuffling of cases but in travel as well. "If a judge from one judicial district has assumed jurisdiction of a case in another judicial district (which frequently occurs)," explained a Montana judge, "there is travel time involved (which is wasted time). . . ."

The only estimate of how much judicial time is lost due to the exercise of peremptory challenges came from Administrator Norman Meyer, formerly from Wisconsin's Ninth Judicial District. During 1981 he estimated that approximately one and one-half of the 17 judges that he had at his disposal to assign to cases, "were wasting their time driving from one courthouse to another at any given point."[16/]

Most of the respondents, however, suggested that peremptory challenges cause only a minor amount of lost time and thus do not result in the need for additional judges. The comments of a member of the Illinois bench are typical. "[T]he. . . judicial time lost," he wrote, "is not a significant factor."

16/ Letter from Norman H. Meyer, Jr., Court Administrator, Second Judicial District of Oregon, Eugene, Oregon, to Larry Berkson, July 8, 1985. See also Elliott, supra note 8.

Similarly, a Missouri judge wrote, "I do not believe the procedure. . . require[s] additional judges on the bench."

The Number of Appeals. Only 15 of the 128 chief judge respondents commented on whether peremptory challenges reduce the number of appeals (see Table X-1).[17/] Twenty percent thought that they did. However, none offered any explanation. Because of the low response rate and lack of comments no helpful information was obtained about whether appeals are reduced due to the peremptory challenge process.

IMPACT ON JUDGES

Peremptory challenges may affect judges in several ways. They may compromise judicial independence, cause hardships associated with travel, cause extensive frustrations among judges or in a positive fashion, provide helpful feedback to the judiciary.

Judicial Independence. The issue of whether peremptory challenges compromise judicial independence is hotly debated in the literature. Overall, however, only 19% of the responding chief judges, prosecuting attorneys and public defenders thought that judicial independence is compromised by peremptions (see Table X-2). Quite unexpectedly, a vast majority of the chief judges commenting on the issue claimed that the procedure did not compromise independence. Indeed, only 26% claimed that it did.[18/] Unfortunately, they did not explain how independence is compromised or give examples of when it took place.

17/ Court administrators were not asked to comment on this subject.

18/ It should be noted that only 33% of the chief judge respondents commented on this subject.

Table X-2

THE IMPACT OF PEREMPTORY CHALLENGES ON JUDGES

Topic	Percent Answering Affirmatively			
	Chief Judges[1/] (N=128)	Prosecuting Attorneys (N=339)	Public Defenders (N=82)	Total
Compromises Judicial Independence	(N=42) 26%	(N=74) 15%	(N=35) 20%	(N=151) 19%
Causes Hardships Associated with Travel	(N=81) 36%	--	--	--
Causes Frustration Among Judges	(N=75) 53%	--	--	--
Provides Helpful Feedback to Judges	(N=24) 54%	--	--	--

1/ Excludes California chief judges.

As expected, prosecuting attorneys and public defenders were even less likely to believe that peremptions affect judicial independence. Many of those who did thought that challenges affect it in a positive way. The following are two examples of this perspective:

- I see perempts as having a leveling effect on the judiciary. If one judge is considerably out of line on sentencing, judicial conduct in court, legal ability, etc. he/she will be challenged. Certainly judicial independence is compromised: it prevents, to some extent, a judge from becoming completely autonomous in the courtroom. This is highly desirable since it tends to prevent disparate treatment of defendants. Public Defender, Alaska

- In response to the suggestion that there is some compromise of judicial independence resulting from peremptory challenge, to some extent that is my perception. However, it is my view that this compromise of judicial independence in other terms could be expressed as a more cautious approach to doing their job properly. In other words. . . [judges do not] alter their practices as a result, but rather they examine closely their rulings and their positions. . . . This does not curtail judges from doing their job properly. In fact, it inspires them to do it better. Prosecuting Attorney, California

Other Consequences. The hardships associated with travel and the frustrations caused by peremptory challenges were discussed in the previous chapter and need be only briefly reiterated here. Suffice it to note that over one-third of the chief judges addressing the subject alluded to the hardships caused by travel as a result of peremptory challenges (see Table X-2). A majority of those most emphatic about these hardships preside in single-judge districts. For example, a Wyoming judge wrote that the "hardships associated with frequent and lengthy travel" in his district and the "frustration" caused "is unbelievable." Similarly, a rural Wisconsin judge wrote that "[o]bviously because of the distances involved, judges are subjected to hardships associated with frequent and lengthy travel."

For other judges the problems associated with travel due to the exercise of peremptory challenges are not as great but, nonetheless, are present. The term "inconvenience" is often used. Not all rural judges, however, feel burdened by travel. Several stated that they have done very little traveling as a result of peremptions. For example, a Wyoming judge wrote:

> Distances in Wyoming, as you know, are great. Judges are accustomed to long travel. But travel occurs more frequently because of other circumstances than as a reaction to this rule. Judges will frequently take themselves off cases and ask other judges to hear them in their stead. This occurs more often than to be refused a case by peremptory challenge.

Some judges actually view traveling as a positive factor rather than as a burden. Typical of comments from this point of view are listed below:

- Many judges like traveling from time to time. Most out of town traveling is accomplished within a week. There are personal advantages. My wife enjoys a weeks trip to Seattle on occasion and the Seattle judges and their families enjoy a trip to our vacation areas during the summer, [or] fishing or hunting seasons. Although some trips are pleasant, others are a real chore. Chief Judge, Washington

- There has been some lengthy travel in sitting in other counties, but this is more of a cure than an illness. Chief Judge, Arizona

- I do a lot of traveling and I have sat in over half the circuits in the State of Missouri. It is not always what I would especially like to be doing at the time. . . .On the other hand, it has given me the opportunity to meet personnel in the judiciary and law enforcement throughout the State of Missouri, and to observe and exchange ideas with them as to what is the best way to most efficiently accomplish the task. Chief Judge, Missouri

Two judges noted hardships caused by peremptory challenges other than those associated with travel. Both reside in Montana. One alluded to the fact that it was his experience that some judges could become "badly overloaded" where peremptory challenges are exercised while "others may waft along."

Another judge offered an example.[19] He knew of a colleague who suffered "actual hardship" because of the system. "With a reputation as a top trial judge, and an inability to say 'no,'" wrote the respondent, "he was on the road outside district so much that he was burning out and the load on his own district was suffering."

Fifty-nine percent of the responding judges commented about frustrations caused by peremptions. Over one-half indicated that frustrations do occur (see Table X-2).[20] Some apparently are due to travel while others are because of increased administrative burdens placed upon judges. The depth of these frustrations among some judges is reflected in the comments of a Montana judge:

> The impact upon me personally is that of frustration. When I'm 'substituted,' under our usage it is up to me to find another Judge. If the Judge I approach has been substituted out of some of his own cases, he's willing to talk. If he has nothing to trade at the moment, he perhaps is too busy to take on my case. There are thirty-two trial judges in Montana, the fourth largest state in the Union. So regardless of who I get, he, and I, have to travel great distances. Time spent in endlessly reshuffling schedules to accommodate both travel and the visiting judge are (sic) also unproductive.[21]

19/ It should be noted that this was the only example he knew of and the tone of his comment was that the impact of peremptory challenges on judges is not great.

20/ Some expressed the opinion that frustrations decrease with longevity on the bench. For example, a chief judge in Illinois stated that "[i]t has been my experience that the judges most recently elected or appointed to the bench experience some personal frustration when a substitution is requested. Time seems to cure this."

21/ The problem of obtaining a substitute judge was also mentioned by an Arizona prosecutor. "Our local judge," he wrote, "has been unable to pursuade any of his colleagues to come to hear these cases and they have each now been delayed for about one month and the end is not in sight."

Few judges stated that challenges are simply annoying to them but conversations with members of the bench and administrators throughout the country indicate that many judges are frustrated because they see challenges as a personal affront to their character or an attack on the integrity of judicial system itself.

Only a small percentage of the chief judges commented on whether peremptory challenges provide helpful feedback to the bench. However, of those who did, 54% took a positive view. For example, a Washington judge suggested that challenges "provide a valuable experience." According to him "[t]ravel to other counties and dealing with other attorneys is always educational not only to the judges, but also [to] the attorneys involved."

Those who believe that peremptory challenges do not provide helpful feedback to judges are often emphatic about their perception. Two comments are illustrative:

- Anyone who would claim that this procedure provides helpful feedback to judges, . . . is either a lawyer with his tongue stuck deeply into his cheek or someone who is totally uninformed about how the system works. Chief Judge, Oregon

- Helpful feedback to judges, . . . is pure hogwash. Chief Judge, Missouri

IMPACT ON ATTORNEYS

Peremptory challenges may affect attorneys in at least two ways. They may strain relationships between lawyers and judges and they may lead to malpractice suits if not exercised liberally.

Relationships Between Attorneys and Judges. Overall, only 13% of the respondents indicated that peremptory challenges strain relationships between

attorneys and judges (see Table X-3). Most of these responses came from chief judges. Indeed, none of the public defenders thought this to be the case and only 11 (8%) of the prosecuting attorneys thought this to be true. The various attitudes of the respondents are reflected in the following comments:

- When challenges are filed it rarely results in a breakdown of the relationship between the judge and the particular counsel as counsel always blames it on his client. Public Defender, California

- We have not observed that disqualifying a judge strains rapport with the judge. It would seem that not having to list specific reasons for the disqualification makes the change less offensive. Public Defender, Arizona

- I strongly disagree with the proposition that the use of a peremptory challenge strains relation between bench and bar more than a challenge for cause. I have seen permanent damage done to relationships between attorneys and judges as a result of an exercise of a challenge for cause, where a peremptory challenge filed for the same underlying reason by another attorney, has produced no harmful effects. . . . Public Defender, Alaska

- My observation is. . . that there would be a much greater strain on the relationship between attorneys and judges were causes required to be shown. In the peremptory situation, the lawyer can always claim that the client insisted on the challenge. . . . Prosecuting Attorney, Minnesota

- I have not heard of any judicial animosity caused by the removal of a judge. In fact, relations have improved since an attorney no longer needs to sign an Affidavit of Prejudice. Prosecuting Attorney, Minnesota

- I feel that our judges are professional enough not to take personal offense at a motion for substitution. Prosecuting Attorney, Illinois

- . . . I have had occasion to file peremptory challenges myself in a number of instances. I remain good friends with every judge against whom I have filed. . ., and I have tried other cases in front of those same judges without any difficulty whatsoever. Prosecuting Attorney, California

Table X-3

THE IMPACT OF PEREMPTORY CHALLENGES ON ATTORNEYS

Topic	Percent Answering Affirmatively			
	Chief Judges[1/] (N=128)	Prosecuting Attorneys (N=339)	Public Defenders (N=82)	Total
Strains Relationships Between Attorneys and Judges	(N=69) 28%	(N=134) 8%	(N=37) 0%	(N=240) 13%
Exercised Out of Fear of Malpractice Suits	--	(N=110) 7%	(N=53) 8%	(N=163) 7%

1/ Excludes California chief judges.

- As to the claim that the procedure strains the relationship between lawyers and judges, I believe that the opposite is true. If an attorney really felt a need to challenge a judge on behalf of his client, it would place an irrevocable barrier between that attorney and the judge if he were forced publicly to prove such a claim as bias, etc. Prosecuting Attorney, South Dakota

- I would expect the availability of peremptory challenges to cause less strain on attorney judge relationships than otherwise since no allegations of bias or prejudice need be aired. We admonish jurors not to be hurt or offended if they are subject to a peremptory challenge. A judge should be at least as mature. Prosecuting Attorney, Nevada

- I haven't seen any evidence of disqualification of judges straining any relationships between the judge and the lawyer disqualifying him and in fact, there may be some evidence that disqualified judges in subsequent cases may bend over backwards for a particular lawyer hoping that they won't be disqualified in future cases. Prosecuting Attorney, Montana

A few of the respondents indicated that peremptory challenges strain relationships not so much between the bench and bar, but among judges. For example, a chief judge in Idaho explained that when one of his colleagues is consistently disqualified from cases that have "high public exposure" and another judge is required constantly to take those cases, "that Judge has a tendency to blame the disqualified judge for the adverse public reaction to himself/herself." Similarly, a public defender in California noted that strains which develop are "likely to be between the judge challenged and his judicial colleague who must now shoulder the challenged judge's caseload as well as their own."

Malpractice Suits. Very few prosecutors or defenders thought that the existence of peremptory challenge procedures forced lawyers to disqualify judges for minor reasons, fearing that if they do not, they will be open to malpractice suits. Indeed, overall only 7% of the respondents thought this to be true (see Table X-3). The low rate may be, in part, due to the fact that the responses came

from public rather than private attorneys. Prosecutors and defenders are relatively immune from law suits and thus may not be as concerned about the consequences of failing to invoke a challenge as are those in private practice. The comments of a Montana prosecuting attorney illustrate this point. "I am primarily a county prosecutor," he wrote, "and therefore do not have to worry too much about being sued for malpractice in the event I do not challenge a particular judge."

If the responses of state and local bar presidents (or their representatives) are any indication, however, it can be anticipated that relatively few attorneys in private practice would claim that challenges are exercised because of a fear of malpractice law suits. Presidents in Arizona, Oregon, South Dakota and Minnesota reported that they had never heard of any malpractice suits arising from the failure to exercise a challenge and that they doubted if this was a consideration in decisions to invoke peremptions.

IMPACT ON THE PUBLIC

As observed in Chapter IV, the impact of peremptory challenges on public confidence in the judiciary is the subject of great debate in the literature. Among the respondents, however, there was a relatively strong consensus that challenges enhance the public's confidence in the courts. Indeed, over 70% of the judges and attorneys thought this to be the case (see Table X-4). Their general attitudes are reflected in the following statements.

- It is obvious that if the general public feels they get a different and independent judge (assuming they are suspicious of the local judge) that their confidence in the judiciary is increased. I personally recuse myself quite often solely for the purpose of enhancing public confidence in the judiciary. It is hard for me to feel that the affidavit procedure does not enhance public confidence in the judiciary. Chief Judge, Washington

Table X-4

THE IMPACT OF PEREMPTORY CHALLENGES ON THE PUBLIC

Topic	Percent Answering Affirmatively			
	Chief Judges[1/] (N=128)	Prosecuting Attorneys (N=339)	Public Defenders (N=82)	Total
Enhances Public Confidence in the Judiciary	(N=35) 60%	(N=61) 71%	(N=14) 93%	(N=77) 70%

1/ Excludes California chief judges.

- However, in my view, the judiciary is only as good as the public perception of the judiciary and the disqualification of judge provision does make the public feel that the judicial system is accountable and is properly performing the public service for which it was created. Prosecuting Attorney, Idaho

- I think their availability is a benefit and does generally increase the public's confidence in the system in that it allows a litigant, for whatever reason--right or wrong--to move his case from a tribunal he has less than complete confidence in. Prosecuting Attorney, Montana

- . . . I find that public confidence in the judiciary is enhanced by the use of the peremptory challenge. The public too often thinks that they have no impact into the judicial process. Allowing a client to remove a judge that he feels is incapable of making a fair determination in his case enhances the system's credibility. Prosecuting Attorney, Minnesota

- In the final analysis, we are public servants, and if the quality of our service, real or imagined, is enhanced by allowing a litigant the opportunity to obtain a judge in whom he or she has more confidence, what harm can be done? Obviously very little, except to frail my ego and pride, as well as that of my brothers on the bench. Chief Judge, Wyoming

Most of the respondents who believe that public confidence in the judiciary is not enhanced by the existence of peremptory challenge procedures suggest that the reason is because the public is generally uninformed about the judiciary or how it operates. Typical are the following remarks.

- I doubt very much if public confidence has anything to do with it one way or the other. As a general rule, the public has no knowledge of the system, much less of how it works. Prosecuting Attorney, North Dakota

- I do not believe that the challenges for prejudice are even part of the public awareness let alone understanding so I do not believe it effects public confidence. Prosecuting Attorney, Oregon

- I doubt that public confidence is affected because I don't believe the public even realizes when any judge has been peremptorily challenged. Prosecuting Attorney, Wyoming

- Public confidence I find to be of no consequence; they don't know about SOJ's [substitution of judges], don't hear about them and could care less. Prosecuting Attorney, Illinois

CONCLUSION

Perceptions about the impact of peremptory challenges on judicial administration are varied. It is clear that many believe peremptions create delay. Indeed, 53% of the judges and administrators think this to be the case. These individuals come from unified and nonunified court systems and from jurisdictions which use master calendar systems and from locales which use individual calendar systems. The sole explanatory variable is isolation. Most of the judges who believe peremptions cause delay come from rural areas and serve in courts with relatively few judges in close geographic proximity. How much delay can be avoided by strict controls, careful monitoring and cooperation among judges and administrators, is open to question. No doubt, some of it can be reduced where the most extreme cases are found. Certainly, many judges and administrators believe this is possible.

It is also clear that many judges and administrators believe that calendaring procedures are disrupted by the exercise of peremptory challenges. As with the issue of delay, those holding this view come primarily from rural jurisdictions with few judges.

The most extreme disruptions appear to be isolated. As with delay, it seems likely that the worst of these problems may be eliminated by careful control of calendaring procedures. Numerous respondents indicated that this could be done.

Nearly one-half of the judges and administrators believe that judicial budgets are increased when peremptory challenges are exercised. Most of these individuals come from rural areas where judges must travel relatively long

distances to cover the dockets of disqualified colleagues. Specific dollar figures are generally unavailable but in Alaska, a state which appears to have the most difficulty in this respect, the cost is estimated to be at least $25,000 per year. Statistics on less tangible costs such as those associated with increased administrative time to handle challenges are also not available.

Two-thirds of the judges and administrators thought that the amount of additional time required to deal with peremptions would not result in the need for more judges. However, many did point out that a considerable amount of time is expended by judges and administrators in dealing with challenges. In apparently one extreme case an administrator estimated that an extra one and one-half judges in his 17-judge district were needed to handle peremptions.

Perceptions about the impact of peremptory challenges on judges personally are not as varied as those about the impact on judicial administration. Indeed, only 19% of the respondents indicated their belief that peremptions compromise judicial independence. Slightly over one-third of the judges indicated that peremptory challenges caused hardships for them on their colleagues. Most were associated with the rigors of travel in rural areas. Sixty percent of the judges believe that peremptions lead to frustration among members of the judiciary.

Perceptions about the impact of peremptory challenges on lawyers are relatively uniform among public attorneys. Nearly all of them believe that peremptions do not strain relationships between lawyers and judges. However, despite the fact that nearly 75% of the judges agreed, over one-quarter suggested that the procedure does strain relationships. Few of the prosecutors or defenders indicated the belief that challenges are filed to avoid malpractice suits.

Finally, a clear majority of the chief judges, prosecuting attorneys and public defenders believe that peremptory challenge procedures enhance public confidence in the judiciary. Many of those who do not share this view reject it because of the belief that the public is generally unaware of the procedure, how it works and when it may be exercised.

In conclusion, common sense dictates that at least some administrative problems accompany the exercise of peremptory challenges. Further, judges would be less than human if they were not, at times, at least annoyed when disqualified. The fundamental question is whether "on balance" the disturbances and annoyances are so great as to outweigh the perceived advantages. On the whole most of the judges, administrators and attorneys believe that they are not. Comments from individuals in three separate states are typical.

- It is my belief that the right to remove provided by Minnesota Law has some definite advantages which are not offset by the disadvantages. Joseph A. Harren, Minnesota

- After living with the problem for a number of years I am satisfied that the benefits of being able to disqualify a judge outweigh its inconveniences. Paul D. Hansen, Washington

- There are, no doubt, abuses of the system, but the abuses can be easier dealt with than the abolishing of the system. Val D. Soper, Oregon

Part B:

Peremptory Challenges In The Federal Courts

Chapter XI:
The History of Judicial Disqualification At The Federal Level

CHAPTER XI

THE HISTORY OF JUDICIAL DISQUALIFICATION AT THE FEDERAL LEVEL

As suggested in Chapter I, grounds for recusal or disqualification at the common law were very narrow.[1/] Initial expansion of the rules took place largely through decisions in federal appellate courts.[2/] Nonetheless, there were a few statutory enactments during the eighteenth and nineteenth centuries. During the twentieth century there were several more.

THE PRECURSOR OF SECTION 455 (1974)

In 1792, Congress enacted the first statute governing the disqualification of federal judges.[3/] It required that a district judge remove himself from hearing a case in which he appeared in any way "concerned in interest" or had been "of counsel for either party." Procedurally, when a party raised an objection, the judge was required to enter it in the court record and forward an "authenticated copy" with all of the proceedings in the suit to the next circuit

---

1/ "Disqualification for Interest of Lower Federal Court Judges: 28 U.S.C. sec. 455," Michigan Law Review, 71 (1973), 538.

2/ John P. Frank, "Disqualification of Judges," Yale Law Journal, 56 (April, 1947) 605, 612.

3/ Act of May 8, 1792, ch. 36, sec 11, 1 Stat. 278 provided: That in all suits and actions in any district court of the United States, in which it shall appear that the judge of such court is, in any way, concerned in interest, or has been of counsel for either party, it shall be the duty of such judge on application of either party, to cause the fact to be entered on the minutes of the court, and also to order an authenticated copy thereof, with all the proceedings in such suit or action, to be forthwith certified to the next circuit court of the district, which circuit court shall, thereupon, take cognizance thereof, in the like manner, as if it had been originally commenced in that court, and shall proceed to hear and determine the same accordingly.

court of the district. The judge there was to hear the case "as if it had been originally commenced" in his court. The statute was very general and, as Susan Barton has suggested, it "placed few limits on judicial discretion in recusal matters."[4/]

It was not until 50 years later, in 1821, that Congress added another ground for disqualification to the original statute.[5/] It prohibited district judges from hearing a case if "related to, or connected with, either party." Language was also added which made it clear that the challenged judge was to rule on his own disqualification. Indeed, he was to be removed from the case only if "in his opinion" it was improper for him to hold the trial.

4/ Susan E. Barton, "Judicial Disqualification in the Federal Courts: Maintaining an Appearance of Justice Under 28 U.S.C. sec. 455," University of Illinois Law Form, 4 (1978) 863, 864, n. 11.

5/ Act of March 3, 1821, ch. 51, 3 Stat. 643 provided: That in all suits and actions in any district court of the United States, in which it shall appear that the judge of such court is any ways concerned in interest, or had been of counsel for either party, or is so related to, or connected with, either party, as to render it improper for him, in his opinion, to sit on the trial of such suit or action, it shall be the duty of such judge, on application of either party, to cause the fact to be entered on the records of the court; and, also an order that an authenticated copy thereof, with all the proceedings in such suit or action, shall be forthwith certified to the next circuit court of the district; and if there be no circuit court in such district, to the next circuit court in the state; and if there be no circuit court in such state, to the most convenient circuit court in an adjacent state; which circuit court shall, upon such record being filed with the clerk thereof, take cognizance thereof, in the like manner as if such suit or action had been originally commenced in that court, and shall proceed to hear and determine the same accordingly; and the jurisdiction of such circuit court shall extend to all such cases so removed, as were cognizable in the district court from which the same was removed.

It is the general consensus of legal scholars that the statute was later greatly limited by restrictive interpretations of federal courts.[6] The statute was also problematic because it allowed the challenged judge to decide whether he should be disqualified.

Another ground for disqualification was added nearly a century later during the recodification of 1911.[7] It specified that a judge could be challenged if he was a "material witness" in the case. As with the 1792 Act, a party to the case was required to raise the objection.

In 1948, the Judicial Code was again recodified.[8] This time the statute was drawn to apply to all federal judges including those at the appellate level. Two changes were made in the grounds for disqualification. First, the word "substantial" was inserted before the word "interest" and thus the judge had to

---

6/ "Note: Disqualification of a Federal District Judge for Bias--The Standard Under Section 144," Minnesota Law Review, 57 (1973), 749, 754, n.27.

7/ Act of March 3, 1911, ch. 231, sec. 20, 36 Stat. 1090 provided: Whenever it appears that the judge of any district court is in any way concerned in interest in any suit pending therein, or has been of counsel or is a material witness for either party, or is so related to or connected with either party as to render it improper, in his opinion, for him to sit on the trial, it shall be his duty, on application by either party, to cause the fact to be entered on the records of the court; and also an order that an authenticated copy thereof shall be forthwith certified to the senior circuit judge for said circuit then present in the circuit; and thereupon such proceedings shall be had as are provided in section fourteen.

8/ Act of June 25, 1984, Pub. L. No. 80-773, 62 Stat. 908, 28 U.S.C. sec. 455 (1948) provided: Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or had been a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein.

have a "substantial interest" in the litigation before it was deemed improper for him to hear a case. Second, the additional ground of "relationship to a party's attorney" was added. One provision was eliminated from the previous statute: no longer was a party to the action required to make an application for the substitution. "The clear intent of this change," Lester Orfield has written, was "that, in the proper case, the judge should disqualify himself on his own initiative."[9/] In other words, once a judge learned of appropriate grounds for his disqualification he was to remove himself from the case regardless of the source of his information.

Despite these changes, the statute continued to be interpreted very narrowly.[10/] Further, as Randall Litteneker has written, "[t]he requirement of 'substantial interest' was ill-defined and could result in failure to disqualify even in the face of a judge's financial interest in a litigant."[11/] Indeed, one of the most often cited weaknesses of the statute was its lack of detailed and concrete standards to guide judges about when to disqualify themselves.[12/]

SECTION 144 OF THE PRESENT CODE

In response to the narrow intepretation characteristic of the Eighteenth and Nineteenth century disqualification statutes, Congress broadened the

---

9/ Lester B. Orfield, "Recusation of Federal Judges," Buffalo Law Review, 17 (Spring, 1968), 799, 800. See also Terry J. Lacy, "Disqualification of Federal Judges, Statutory Right to Recusal and the 1974 Amendments to Title 28," Southwestern Law Journal, 31 (Fall, 1977), 887-904.

10/ Randall J. Litteneker, "Disqualification of Federal Judges for Bias or Prejudice," University of Chicago Law Review, 46 (Fall, 1978), 236, 239.

11/ Id.

12/ See e.g., Lacy, supra note 9, at 900.

grounds for substitution in 1911 to include bias and prejudice.[13/] Section 144 of the new statute allowed any litigant in any action, criminal or civil, to file an affidavit alleging "personal bias or prejudice" against him or in favor of the opposite party. It had to contain "the facts and reasons for the belief that such bias or prejudice" existed, and be accompanied by a certificate of counsel stating that it was "made in good faith." Each party was restricted to one challenge which had to be filed not less than ten days before the beginning of the court's term unless "good cause" was shown.

Most commentators agree that the statute was intended to make disqualification automatic upon the filing of an affidavit.[14/] They point to the

---

13/ Act of March 3, 1911, ch. 231, sec. 21, 36 Stat. 1090 provided: Whenever a party to any action or proceeding civil, or criminal, shall make and file an affidavit that the judge before whom the action or proceeding is to be tried or heard has a personal bias or prejudice either against him or in favor of any opposite party to the suit, such judge shall proceed no further therein, but another judge shall be designated in the manner prescribed in the section last proceeding, or chosen in the manner prescribed in section twenty-three, to hear such matter. Every such affidavit shall state the facts and the reasons for the belief that such bias and prejudice exists, and shall be filed not less than ten days before the beginning of the term of the court, or good cause shall be shown for the failure to file it within such time. No party shall be entitled in any case to file more than one such affidavit; and no such affidavit shall be filed unless accompanied by a certificate of counsel of record that such affidavit and application are made in good faith. The same proceedings shall be had when the presiding judge shall file with the clerk of the court a certificate that he deems himself unable for any reason to preside with absolute impartiality in the pending suit or action.

See "Note: Disqualification of a Federal District Judge for Bias--The Standard Under Section 144," supra note 6, at 752.

14/ See,e.g., "Disqualification of Judges for Bias in the Federal Courts," Harvard Law Review, 79 (May, 1966), 1435, 1436; Helena K. Kobrin, "Disqualification of Federal District Judges--Problems and Proposals," Seton Hall Law Review, 7 (Spring, 1976), 612-13. Litteneker, supra note 10 at 243; Orfield, supra note 9, at 206; and H. Steven Walton, "Extra-Judicial Associations and the Appearance of Prejudice Test of 18 U.S.C. sec. 455(a)," University of Kansas Law Review, 31 (Fall, 1982), 200, 206.

House debates on the bill during 1910 and 1911 for their evidence, and most particularly, the remarks of Representative Cullop, the bill's chief sponsor. During the first debate he suggested that disqualification is a "personal matter to the judge" and that it "ought not to be left to his discretion."[15/] He added that a conscientious judge would not want the discretion left to him. In any event, he alleged, "it ought to be taken away from him, and taken away from him by law."[16/] The following year Congressman Cullop again asserted this position. Upon being asked whether the trial judge had any discretion once the affidavit was filed he responded, "No; it provides that the judge shall proceed no further in the case."[17/] These comments have been taken as a clear indication that the statute was intended to serve as a peremptory challenge system of substitution.[18/]

Like the earlier statutes, this provision was also narrowly construed. The seminal case was decided by the Supreme Court in 1921.[19/] District Judge Kenesaw Mountain Landis of Illinois had refused to disqualify himself from a case after an affidavit, asserting his personal bias and prejudice, had been filed by individuals accused of violating the Espionage Act. On certification by

---

15/ 46 Cong. Rec. 306 (1910).

16/ Id.

17/ Cong. Rec. 2627 (1911).

18/ Lacy, supra note 9, at 889; Litteneker, supra note 10, at 238; Ellen M. Martin, "Disqualification of Federal Judges for Bias Under 28 U.S.C. Section 244 and Revised Section 455," Fordham Law Review, 45 (1976), 139, 141; and "Note: Disqualification of a Federal District Judge for Bias--the Standards Under Section 144," supra note 6, at 754.

19/ Berger v. United States, 255 U.S. 22 (1921).

the Seventh Circuit Court of Appeals Justice McKenna, writing for the majority, rejected the government's claim that under the statute the affidavit was to be "submitted for decision and the exercise of...judicial judgment."[20/] He found no ambiguity in the statute's words. The provision, he concluded, "directs an immediate cessation of the action by the judge whose bias or prejudice is averred...."[21/] The Court rejected contentions that this interpretation of the statute would be a "serious detriment to the administration of justice," and would cause delays in trials. It also held that the Court could not void the provisions "upon a dread or prophecy that they may be abusively used," pointing out that those filing a false affidavit would be subject to the penalties of perjury.[22/] Justice McKenna concluded that the statute withdrew from the judge, "a decision upon the truth of the matters alleged."[23/] To him, the reason was clear:

> To commit to the judge a decision upon the truth of the facts gives chance for the evil against which this section is directed. The remedy by appeal is inadequate. It comes after the trial and, if prejudice exists, it has worked its evil and a judgment of it in a reviewing tribunal is precarious.[24/]

Nonetheless, the court asserted that "the reasons and facts for the belief the litigant entertains are an essential part of the affidavits, and must give fair support to the charge of a bent mind that may prevent or impede impartiality of judgment."[25/] Thus, while the Court applied a generally liberal

---

20/ Id., at 30.

21/ Id., at 33.

22/ Id., at 35.

23/ Id., at 36.

24/ Id.

25/ Id., at 33-34, emphasis added.

standard for disqualification, it did not support a system of automatic removals suggested by the statute.[26] Rather, it determined that the judge was required to pass on the affidavit's sufficency.

In the decades which followed, lower federal courts construed Section 144 very narrowly.[27] The Berger decision allowing the judge to decide whether the affidavit gave "fair support" to the allegations against him facilitated this approach.[28] Motions were disallowed if they alleged "mere conclusions" or the charges were not "personal." They were also disallowed if all of the procedural technicalities were n t followed, or if the time, place, persons, occasions and circumstances were not stated with at least the degreee of specificity required in a bill of particulars.[29] The statute was further narrowed by the view that a judge had a "duty to sit" unless the bias or prejudice was relatively clear.[30]

26/ "Note: Disqualification of a Federal District Judge for Bias--The Standard Under Section 144," supra note 6, at 755.

27/ Barton, supra note 4, at 865 and 872; David C. Hjelmfelt, "Statutory Disqualification of Federal Judges," University of Kansas Law Review, 30 (Winter, 1982) 255, 256; D.B.H.M., Jr., Mitchell v. Sirica: The Appearance of Justice, Recusal and the Highly Publicized Trial, Virginia Law Review, 61 (1975), 236, 237; and "Note: Disqualification of a Federal District Judge for Bias--the Standard Under Section 144," supra note 6, at 755.

28/ Martin, supra note 18, at 141.

29/ Id., at 142.

30/ See, e.g., Barton, supra note 4, at 870; and Litteneker, supra note 10, at 239.

The Supreme Court consistently refused to review these decisions and the failure of Congress to change the law in 1948 in any material way has been taken as an indication that there is legislative approval for this strict construction.[31/] The statute remains unchanged today.

1974 REVISION OF SECTION 455

By the late 1960s Sections 144 and 455 of the United States Code were widely viewed as inadequate. Stimulated by the controversy surrounding the nominations of Judges Haynesworth and Carswell to the Supreme Court, as well as the resignation of Justice Abe Fortas, the American Bar Association appointed a committee to recommend improvements.[32/] Formed in 1969 and headed by retired Chief Justice Roger Traynor of California, the committee radically rewrote the Canons of Judicial Ethics which had been originally adopted in 1924. Canon 3C of the new 1972 ABA Code of Judicial Conduct provided considerably more detail

---

31/ See Martin, supra note 18, at 143; Orfield, supra note 9, at 805; and Walton, supra note 14, at 207. The 1948 recodification, 28 U.S.C. 144 (1948) provided: Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

32/ For details of the Haynesworth affair see John P. Frank, "Disqualification of Judges: In Support of the Bayh Bill," Law and Contemporary Problems, 35 (Winter, 1970), 43, 51-58.

than its predecessor and enumerates specific situations in which disqualification was mandatory.[33/] It also provided that a judge "shall disqualify himself in any proceeding in which his impartiality might be reasonably questioned." This provision indicated that not only was the belief of impartiality sufficient grounds for disqualification, but also a belief about the appearance of impartiality as well. The "appearance of justice" or "appearance to community" test replaced the subjective "substantial interest" test which allowed a judge's personal opinion to determine his ability to impartially decide issues.[34/] The following year the Judicial Conference of the United States adopted the new Canon to govern the conduct of all federal judges.[35/]

Meanwhile, between 1971 and 1973, the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary twice held hearings on proposals to broaden and clarify the grounds for judicial disqualification.[36/] In May 1971 it considered two bills. The first, Senate Bill 1553, introduced by Senator Ernest F. Hollings, called for a revision and expansion of Section 455

33/ ABA Canons of Judicial Conduct, Canon 3C. The Canon may be found in Barton, supra note 4, at 867; and "Disqualification for Interest of Lower Federal Court Judges: 28 U.S.C. Sec. 455," supra note 1, at 541.

34/ See Barton, supra note 4, at 867; Mark T. Coberly, "Caesar's Wife Revisited - Judicial Disqualification After the 1974 Amendments," Washington and Lee Law Review, 34 (1977) 1201, 1205; "Disqualification of Judges and Justices in the Federal Courts," Harvard Law Review, 86 (Fall, 1973), 736, 745; and Brian P. Leitch, "Judicial Disqualification in the Federal Courts: A Proposal to Conform Statutory Provisions to Underlying Policies," Iowa Law Review, 67 (March, 1982), 525, 529.

35/ See S. Rep. No. 93-419, 93d Cong., 1st Sess. 3 (1973), 69 F.R.D. 273, 277 (1975).

36/ Hearings on S. 1064 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary, 93d Cong., 1st Sess. (1971-73).

of the Code. The second, Senate Bill 1886, was introduced by Senator Birch Bayh of Indiana. It not only recommended a revision of Section 455 but modification of Section 144 as well. The bill outlined a procedure for the peremptory challenge of federal judges.[37/] It provided that a party in any proceeding could file an affidavit of prejudice against a judge. Upon doing so the judge was prohibited from proceeding further. Only one affidavit could be filed by each side in the case and it had to be filed within certain prescribed time limits.

During the hearings cognizance was taken of the work then being conducted by the ABA under the auspices of the Traynor Committee. A considerable amount of time was also spent discussing Senator Bayh's proposal for peremptory challenges. He argued that it was improper for a judge to determine the sufficiency of motions to disqualify himself because of alleged prejudice or bias.[38/] According to Senator Bayh, the problem was not so much one of fundamental injustice as much as it was the appearance of injustice. This led him to conclude that "[n]o statute creates more distrust than does the section 144 procedures for disqualification or prejudice."[39/]

37/ Id., at 6-8. "Whenever a party to any proceeding in a district court either with his own verification or over his attorney's signature, makes and files a timely affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proced no further therein, but another judge shall be assigned to hear such proceeding. The affidavit shall be timely if field (a) twenty or more days before the time first set for trial or (b) within ten days after the filing party is first given notice of the identity of the trial judge or (c) when good cause is shown for failure to file the affidavit within such times. A party may file only one such affidavit in any case, and only one affidavit may be filed on a side. A party waives his right to file an affidavit by participating in a hearing or submission of any motion or other matter requiring the judge to exercise discretion as to any aspect of the case or by beginning trial proceedings before the judge."

38/ Id., at 12-13.

39/ Id., at 13.

Senator Gurney, through his questions to Senatory Bayh, expressed severe doubts about the propriety of a peremptory challenge procedure.[40/] Senator Hollings, on the other hand, strongly urged inclusion of a peremptory challenge provision in Section 144, despite the fact that he did not include one in his bill.[41/]

The chief witness during the 1971 hearings was John P. Frank, a recognized authority on judicial disqualification.[42/] He spent a considerable amount of time responding to questions about peremptory challenges.[43/] The thrust of his testimony was that these procedures were working with "great satisfaction" in the states and that there was a general feeling that the system was a just one.[44/] In support of his conclusions he presented letters from several chief justices in states using the system, as well as studies conducted in California.

Two years later the Subcommittee again heard testimony on a bill to broaden and clarify the grounds for judicial disqualification.[45/] Senate Bill 1064, introduced by Senator Quentin Burdick, however, did not contain a peremptory challenge provision. During his testimony Senatory Bayh again asserted his belief that peremptions were a proper measure. "In my view," he stated, "litigants who believe they cannot get a fair trial before a particular judge should not have to convince that same judge that he should disqualify

---

40/ Id, at 18-20. See also his remarks during the questioning of Senator Hollings, at 30-31.

41/ Id., at 27.

42/ Id., at 32-68.

43/ Id., at 40.

44/ Id., at 40-52

45/ Id., at 73-123.

himself."[46/] Apparently, the provision was omitted from S.B. 1064 because it was more controversial than the other amendments and might have had the effect of preventing any changes in the code.[47/]

In 1974 Congress amended Section 455 of the United States Code to read substantially the same as Canon 3C developed by the American Bar Association.[48/]

46/ Id., at 76.

47/ Id.

48/ Act of December 5, 1974, Pub. L. No. 93-512, sec. 1, 88 Stat. 1609, 28 U.S.C. sec. 455 (1976). The statute provides:

(a) Any justice, judge, magistrate, or referee in bankruptcy of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudcie concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy.

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

footnote 48, cont't.

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

(c) A judge should inform himself about his personal fiduciary financial interests and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

(d) For the purposes of this section the following words or phrases shall have the meaning indicated:

(1) "proceeding" includes pretrial, trial appellate review, or other stages of litigation;

(2) the degree of relationship is calculated according to the civil law system;

(3) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;'

(4) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party, except that:

(i) Ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the funds;

(ii) An office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization.

(iii) The proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect of the value of the interest;

(iv) Ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

(e) No justice, judge, magistrate, or referee in bankruptcy shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (1), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

The new statute, which remains effective today, applies to all justices, judges, magistrates and referees in bankruptcy. Subsection (a) contains the admonition that a judge must disqualify himself from any proceeding in which his impartiality might reasonably be questioned. By adopting this phraseology, Congress, like the ABA, intended to replace the subjective "substantial interest" standard with the objective "community appearance" standard. In addition, the legislative history also indicates that the new test was designed to abolish the duty-to-sit concept adhered to by the Court which mandated that a judge hear the case on all "close questions."[49]

Subsection (b) mandates disqualification in instances where a judge has:

- personal bias or prejudice concerning a party
- personal knowledge of disputed evidentiary facts
- served as a lawyer in the controversy
- been associated with a lawyer who served in the controversy
- been a material witness in the controversy
- served in government employment and participated in the case
- a spouse or minor children having a financial interest in the subject matter
- a spouse or a person within the third degree of relationship to either of them, or the spouse of such a person is a party to the proceeding broadly defined, acting as a lawyer in the proceeding, is known to have an interest in the proceeding or is likely to be a material witness in it

---

49 Coberly, supra note 34. See also Barton, supra note 4, at 869-70; Hearings on S. 1064, supra note 36; and Litteneker, supra note 10, at 241.

Subsection (c) makes it mandatory for judges to inform themselves about their financial interests and those of their spouses and minor children and subsection (d) defines several words and phrases in the statute. Subsection (e) prohibits a waiver of grounds in subsection (b) but allows them for cases arising under subsection (a) provided that the waiver is preceded by a full disclosure on the record of the basis for disqualification.

Chapter XII:
Recent Proposals For Peremptory Challenges At The Federal Level

CHAPTER XII

RECENT PROPOSALS FOR PEREMPTORY CHALLENGES AT THE FEDERAL LEVEL

Within a short while after passage of the 1974 revisions, criticism of Sections 144 and 455 began to surface.[1/] The American Bar Association as well as state and local bar associations became interested in pursuing a broadening of the rules allowing for federal judicial disqualification. This led Congress to, once again, consider the matter.

AMERICAN BAR ASSOCIATION

In August, 1979, the House of Delegates of the American Bar Association approved a resolution in support of judicial peremptory challenges in criminal cases.[2/] The plans outlined a peremptory challenge procedure in federal

---

1/ See Susan E. Barton, "Judicial Disqualification in the Federal Courts: Maintaining an Appearance of Justice Under 28 U.S.C. sec. 455," University of Illinois Law Forum, 4 (1978), 863-85; David C. Hjelmfelt, "Statutory Disqualification of Federal Judges," University of Kansas Law Review, 30 (Winter, 1982), 255-63; Sharon T. Jacobson, "The Elusive Appearance of Propriety: Judicial Disqualification Under Section 455," DePaul Law Review, 25 (Fall, 1975), 104-31; Gary L. Karl, "Disqualification of Federal District Court Judges for Bias or Prejudice: Problems, Problematic Proposals and a Proposed Procedure," Albany Law Review, 46 (Fall, 1981), 229-49; Helena K. Kobrin, "Disqualification of Federal District Judges--Problems and Proposals," Seton Hall Law Review, 7 (Spring, 1976), 612-41; Terry J. Lacy, "Disqualification of Federal Judges, Statutory Right to Recusal and the 1974 Amendments to Title 28," Southwestern Law Journal, 31 (Fall, 1977), 887-904; Brian P. Leitch, "Judicial Disqualification in the Federal Courts: A Proposal to Conform Statutory Provisions to Underlying Policies," Iowa Law Review, 67 (March, 1982), 525-49; and Ellen M. Martin, "Disqualification of Federal Judges for Bias Under 28 U.S.C. Section 144 and Revised Section 455," Fordham Law Review, 45 (1976), 139-63.

2/ ABA Report to the House of Delegates, Section on Criminal Justice, approved August, 1979, reprinted in Hearings on H.R. 7473 and 7817 Before Subcomm. on Criminal Justice of the House Comm. on the Judiciary, 96th Cong., 2d sess. (1980) 50-55 [hereinafter cited as Hearings on H.R. 7473 and H.R. 7817].

district courts having three or more judges. Only one challenge was allowed and it had to be made within 14 days after assignment of the judge. In multiple defendant cases, the defendants had to jointly file the motion of transfer.

The report attached to the resolution noted that the concept had been approved in the ABA Standards on Trial Courts[3/] and by the National Conference Commissioners on Uniform State Laws.[4/] Members of the Section on Criminal Justice who drafted the report reviewed the operation of peremptory challenges in the states and concluded that the procedure would "help to ensure the fairness--and perception of fairness on the part of the defendant."[5/]

Also during August, 1979, the Young Lawyers Division of the American Bar Association offered a resolution to the House of Delegates recommending that peremptory challenges be applied to federal civil litigation as well.[6/] The Young Lawyers concluded that Section 144 had been restrictively construed in such a way that it had failed to carry out Congress' objectives.[7/]

Like members of the Criminal Justice Section, the Young Lawyers examined the ABA Standards on Trial Courts.[8/] They also reviewed the experience with

---

3/ American Bar Association, ABA Standards on Trial Courts (Chicago: American Bar Association, 1974).

4/ National Conference of Commissioners on Uniform State Laws, Uniform Rules of Criminal Procedure (1974), reprinted in Hearings on H.R. 7473 and H.R. 7817, supra note 2, at 56-61.

5/ Hearings on H.R. 7473 and H.R 7817, supra note 2, at 55.

6/ American Bar Association, Young Lawyers Division, Report to the House of Delegates, No. 125, February, 1980.

7/ Id., at 1.

8/ American Bar Association, supra note 6.

peremptory challenges in the states and concluded that "peremptory disqualification systems...have demonstrated that such systems lead neither to overly burdensome or costly administrative difficulties, nor to excessive use of disqualification, nor to a decreased respect for the integrity of the judiciary."[9/]

On the basis of these observations the Young Lawyers concluded that the peremptory challenge system offered a number of benefits. First, it "avoids the acrimony associated with making a factual showing of prejudice and the appearance of making an assault on the judge's dignity."[10/] Second, it "prevents delay and diversion of the parties' and court's attention from the merits of the matter to a contest over the impartiality of a judge."[11/] Most important to the Young Lawyers was that the peremptory challenge approach "recognizes that the integrity and dignity of our judicial system goes beyond that of any individual judge and places a higher value on ensuring that litigants believe in the impartiality of our courts than on the personal offense which a judge may feel upon being disqualified without just reason."[12/]

H.R. 7473

On June 6 and 9, 1980, the Subcommittee on Criminal Justice of the House Committee on the Judiciary held hearings to consider certain amendments to the Federal Rules of Criminal Procedure and the Federal Rules of Evidence.[13/] Its

---

9/ Id., at 4.

10/ Id., at 2.

11/ Id.

12/ Id., at 3.

13/ Hearings on H.R. 7473 and H.R. 7817, supra note 2.

Chairman, Congressman Robert F. Drinan, also placed on the agenda a bill embodying the recommendation and model statute on judicial peremptory challenges drafted by the American Bar Association. H.R. 7473 provided that:

> If all defendants in a criminal case in a United States district court having 3 or more judges in regular active service jointly file timely notice under this section, the judge presiding over such case shall not proceed further in such case and the case shall be assigned to another appropriate judge selected in random manner.[14/]

The notice had to be filed not later than 14 days after: (1) the date of the initial assignment of the case, (2) the date of the filing of an order having the effect of granting a new trial or reversing or modifying the judgment of the court so that further proceedings are necessary, or (3) the date of the reassignment of the case to another judge (other than because of a notice under this rule).

Testifying on behalf of the bill was John J. Cleary, Executive Director of Federal Defenders of California, Inc., and a member of the American Bar Association, Criminal Justice Section.[15/] Mr. Cleary noted that 16 states then employed similar provisions and claimed that there had been a "healthy experience" with the procedure.[16/] He also reviewed several arguments for and against the concept and concluded that fears about its adoption were

---

14/ H.R. 7473 in Id., at 3-4.

15/ Id., at 31-49, 62-71.

16/ Id., at 33.

"unfounded."[17/] To him, and to the American Bar Association which he represented, a judicial peremptory challenge procedure would not only "establish fairness of...proceedings, but the appearance of it also."[18/]

During his testimony Mr. Cleary defended the idea that only defendants should be allowed to exercise the challenge. He noted that the type of case and the number of charges to be brought are totally within the discretion of the prosecutors and that over 90% of the cases are disposed of by guilty pleas.[19/] Thus, the prosecutor has far more control over the process than the defense. Further, he argued, "[t]he prosecutor with all the cases gets all the judges, with all their weaknesses and all their strengths, so it counterbalances out."[20/] On the other hand, he continued, the "individual appears before the judge the one time in court" and thus it is important for him to be ensured that he will receive a fair trial.

Mr. Cleary also argued that there would be a problem if the prosecutor was allowed a challenge: "When the Government stands up, it would be the United States challenging that judge, and it has imputations of unfairness which would not be connected with the rule."[21/] He also noted that the "defendant does not

---

17/ Id., at 47.

18/ Id., at 49.

19/ Id., at 66.

20/ Id.

21/ Id., at 67.

enjoy the Department of Justice's activity in the appointment or promotion of federal judges.[22/] To him, that gave the prosecution a decided advantage over the defendant.

Support was also offered for the idea of limiting the challenge to districts with three or more judges. Upon being questioned by Congressman Kindness about the possibility of Equal Protection Violations, Mr. Cleary responded that "[a]s long as there is a rational basis for the line drawing capability...then I think that is reasonable."[23/] He argued that since the procedure "is not some inherent, fundamental, constitutional right," that a rational relationship standard could be applied.

Three days after Mr. Cleary's testimony, hearings were again held on the proposed amendments and H.R. 7473. The first witness was Judge Walter E. Hoffman, Chairman of the Advisory Committee on Criminal Rules of the Judicial Conference of the United States.[24/] He reported that the ABA's proposal had been discussed by his Committee on September 27, 1979 and had been "unanimously rejected."[25/] Following rejection of the proposal, the Committee authorized its chairman to refer the matter to the Federal Judicial Center for a study and report on the subject. At the time of Judge Hoffman's testimony the Center was engaged in completing the requested study but had not yet issued its findings. Nonetheless, in his judgment the bill was "wholly deficient."[26/] Judge Hoffman

---

22/ Id.

23/ Id., at 69.

24/ Id., at 104-13.

25/ Id., at 106.

26/ Id., at 111.

argued that the result would be to: (1) abolish the individual calendar system used by 82 of the 94 districts, (2) enlarge administrative problems involving the exchange of cases between judges, (3) complicate the setting and resetting of cases for trial, and (4) increase the time and expense of notifying the parties and counsel involved. He concluded his testimony by requesting that the Committee await the Federal Judicial Center's study before considering legislation involving peremptory challenges.

The second witness testifying on H.R. 7473 was Richard J. Wilson, Executive Director of the Defender Division of the National Legal Aid and Defender Association (NLADA). On behalf of NLADA, Mr. Wilson urged adoption of the judicial peremptory challenge bill.[27/] He argued that experience in the states had "proven that providing this right has salutory effects on the criminal justice system...."[28/] Like Mr. Cleary who had testified three days earlier, Mr. Wilson argued that "reciprocity in the use of the challenge should not be afforded to prosecutors, due to institutional differences in the role played by the prosecutor in the criminal justice system."[29/] One of the differences, he pointed out, was that United States Attorneys handle all of the criminal cases in their districts. Therefore, they "could effectively 'freeze out' a specific judge from handling any criminal case."[30/] Moreover, the vast majority of federal district judges, he claimed, come from prosecutors' offices or civil practice and not from the defense bar.

27/ Id., at 196-209.

28/ Id., at 198.

29/ Id.

30/ Id., at 202.

OTHER CONGRESSIONAL PROPOSALS

During the same session of Congress, Representative Daniel Lungren of California also introduced a bill to provide for the peremptory challenge of federal district judges.[31/] Subsequently, with co-sponsors, he introduced the bill into the 97th, 98th and 99th Congresses.[32/] H.R. 7165 was much more expansive than Congressman Drinan's proposal.[33/] It allowed challenges to be exercised by both sides in all criminal and civil cases before federal district and bankruptcy judges. All parties on one side had to agree to the challenge and the chief judge of the court of appeals for the circuit was to resolve any controversies. The challenge had to be filed not later than 20 days after a case was initially assigned to a judge or 20 days after the date of the service of process on the most recently joined party filing the application, whichever was later. Only one challenge was allowed. In his letter accompanying submission of the bill in 1981, Congressman Lungren, who was joined by Congressman Romano L. Mazzoli, explained that the purpose of the bill was "to address the question of accountability within the federal judiciary."[34/] "Our proposal," they stated, "seeks the establishment of a self-disciplinary mechanism to achieve a more responsive federal judiciary without relying on the unwieldy and frequently excessive remedy of impeachment."[35/] It was their belief that H.R. 1649 would "moderate aberrant judicial behavior" and "provide litigants with a

---

31/ H.R. 7165, 96th Cong., 2d Sess. (1980).

32/ H.R. 1649, 97th Cong., 1st Sess. (1981); H.R. 3125, 98th Cong., 1st Sess. (1983); and H.R. 1419, 99th Cong., 1st Sess. (1985).

33/ H.R. 7473 in Hearings on 7473 and H.R. 7817, supra note 2, at 6-8.

34/ Letter of Congressmen Daniel E. Lungren and Romano L. Mazzoli, February 23, 1981.

35/ Id.

means of ensuring judicial impartiality, without the acrimony associated with the present law requiring that a factual showing of prejudice be made before a federal judicial officer can be disqualified."[36/]

REACTION TO THE RECENT PROPOSALS

The Chicago Bar Association. On October 1, 1981 the Board of Managers of the Chicago Bar Association approved a report prepared by its Committee on the Judiciary.[37/] The report addressed the question of whether a peremptory challenge statute which would apply to civil and criminal cases at the federal level should be enacted.[38/] Members of the Committee reviewed the current method of disqualifying judges and the arguments for and against the concept in considerable detail. They found that:

(1) Present-day judicial disqualification laws are inadequate.

(2) Federal district judges are often unable or unwilling to recognize their partiality.

(3) The selection procedure does not insulate federal judges from bias.

(4) The judicial system is not so weak that providing a right to substitute a case will have an adverse affect on the system.

(5) Delay will not result.

(6) Judge-shopping will not become routine.

(7) Judges will benefit from the procedure.

(8) The procedure will reduce unseemly public controversy.

36/ Id.

37/ Chicago Bar Association, Judiciary Committee, Preliminary Report of the Subcommittee on the Peremptory Challenge Act of 1980 Relating to Federal Judges, approved by the Board of Managers, October 1, 1981.

38/ The Committee was mindful of the Lungren Bill but did not focus on its specific provisions. Rather, it addressed "the philosophy and legal questions surrounding the necessity for, and ramifications of, such a law." Id., at 4. Nonetheless, the Committee recommended using the Lungren Bill as a model for a statute, with one modification. It disapproved the idea of allowing prosecutors to exercise the challenge. Id., at 16.

The report concluded that:

> It is difficult to imagine that any real damage would be done to the judicial system if parties to civil suits and defendants in criminal cases were to be given a single opportunity to remove themselves from a given judge without going through costly and time consuming procedures such as filing and briefing disqualification motions, engaging in hearings and filing appeals.[39/]

To them, the arguments supporting a federal peremptory challenge law for judges were persuasive. Such a law would improve the federal judicial system by eliminating costly and time-consuming proceedings, by providing litigants with a single opportunity to offset the "luck of the draw," and by exercising a form of accountability over those few judges who act in the extreme.[40/]

The New York City Bar Association. During that same year, the Committee on Federal Courts of the New York City Bar Association also explored the issue of judicial peremptory challenges.[41/] Its investigation, too, was stimulated by the Drinan and Lungren proposals. Committee members examined the essential features of the bills, reviewed the existing state provisions permitting peremptory challenges and summarized the principal arguments for and against the concept.

Committee members recognized that they did not have the means to conduct a thorough investigation about how the system had been working in the states. However, they did speak with a number of "leading lawyers" in California and

---

39/ Id., at 15.

40/ Id., at 16.

41/ New York City Bar Association, Committee on Federal Courts, "A Proposal for Peremptory Challenges of Federal Judges in Civil and Criminal Cases," Record of the New York City Bar Association, 36 (April, 1981), 231-48.

Illinois and observed that most of them "reported that the peremptory challenge procedures are used only sparingly, and that the mere existence of the procedures has had a salutary effect."[42/] The Committee acknowledged that one California attorney did report that his firm routinely challenged certain judges in a particular type of civil case.

Committee members examined the empirical studies conducted on peremptory challenges in Oregon and California.[43/] They noted that the Oregon statute "had not created undue administrative burdens,"[44/] and that in California "challenges were not so common as to cause serious problems of delay or loss of faith in the judiciary."[45/]

The committee also examined the views of the National Conference of Commissioners on Uniform State Laws,[46/] the American Bar Association, the Chief

---

42/ Id., at 233.

43/ See "Disqualification of Judges for Prejudice or Bias--Common Law Evolution, Current Status and the Oregon Experience," Oregon Law Review, 48 (1969), 311-410; and Judicial Council of California, "Disqualification of Judges," 1962 Annual Report of the Administrative Office of the California Courts (January, 1963), 34-39; summarized in "Disqualification of Judges for Bias in the Federal Courts," Harvard Law Review, 79 (May, 1966), 1435-52.

44/ New York City Bar Association, supra note 41, at 233.

45/ Id.

46/ In August, 1974, the Conference approved Rule 741 calling for the substitution of a judge "on demand." The proposed law would allow only one challenge per side unless a motion for severance of the defendants had been denied. It had to be filed at least 10 days before the time set for trial and at least three days before the time set for any other proceeding. See Uniform Rules of Criminal Procedure (1974) in Hearings on H.R. 7374 and H.R. 7817, supra note 2, at 56-61.

Judge of the Court of Appeals of the Second Circuit, the Judges of the United States District Courts for the Southern and Eastern Districts of New York, other district court judges, United States Attorneys and trial lawyers. After reviewing the empirical studies and personal views of numerous individuals the committee observed that "peremptory challenges involved a number of important competing considerations which cannot be easily or quickly resolved."[47/] The majority concluded, however, that "on balance...procedures for peremptory challenges warrant consideration, preferably on an experimental basis."[48/] "We believe," it stated, "that the advantages gained from the procedure more than offset the few abuses that may occur."[49/] As a result, the committee recommended extending the peremptory challenge concept to the federal level.

Five members of the 22-person committee dissented from the majority view.[50/] They agreed that the present mechanisms for handling judicial misconduct are inadequate but argued that the use of peremptory challenges is not the most appropriate solution to the problem.[51/] The dissenters believed that the system is undesirable because it allows the removal of judges solely because of their judicial philosophy. They noted that the procedures appeared to have worked "reasonably well" in the states but that "experience in these states does not provide a sufficient basis for adopting a comparable system in the federal courts."[52/]

47/ New York City Bar Association, supra note 41, at 238.

48/ Id.

49/ Id., at 239.

50/ Id., at 241-43.

51/ Id., at 241.

52/ Id.

The State Bar of California. On May 1, 1982, the Board of Governors of the State Bar of California approved a report calling for the "permissive substitution of federal district court judges in civil and criminal cases."[53/] Its Committee on Federal Courts had reviewed the history of the present federal disqualification statutes and concluded that challenged judges have determined the sufficiency of affidavits with "virtual impunity" and that there is "no immediate review, save by mandamus."[54/] Committee members also examined the question of whether Congressional enactment of a peremptory challenge procedure might violate the Separation of Powers Doctrine. It was their opinion that although the question has by no means been decided, the "proposed peremptory challenge statute is not constitutionally infirm."[55/]

Subsequently, the Committee examined peremptory challenge procedures in the states, the position of the Ninth Circuit Conference Committee on Peremptory Challenge, the resolution of the Los Angeles County Bar Association on peremptory challenges and two articles appearing in the Los Angeles Lawyer which presented a debate about the concept.[56/] They also examined the procedural problems involved in reassigning civil cases and the potential ethical problems.

53/ The State Bar of California, Federal Courts Committee, Report and Recommendations on Permissive Substitution of Federal District Judges, approved by the Board of Directors, May 1, 1984, at 2.

54/ Id., at 4.

55/ Id., at 7.

56/ See Thomas Workman and Vicky Arends, "A Tool For Abuse," Los Angeles Lawyer (September, 1980), 10-16; and Russell Iungerich, "The Time Has Come," Los Angeles Lawyer, (September, 1980), 16-19.

Having reviewed all of these considerations, the committee concluded that at the federal level "there is no adequate protection against perceived bias."[57/] They noted that exercising a challenge should not be done often but, nevertheless, it is a procedure which "protects litigants when truly needed."[58/] Thus, the committee recommended adoption of legislation which would give parties the right to substitute federal district judges.

Other Bar Associations. Numerous other state, local and specialized bar associations considered proposals, subsequent to the American Bar Association recommendations and Drinan and Lungren bills, to extend the concept of judicial peremptory challenges to the federal district courts. Richard M. Coleman, Past-President of the Los Angeles County Bar Association and a strong advocate of the concept, reported that prior to 1985 at least seven state bar associations, ten local bar associations and six specialized bar associations adopted proposals in support of the concept.[59/] They are listed in Table XII-1. Unfortunately, no similar list is available for those associations which considered the proposals and recommended against their adoption.

The Federal Judicial Center. In February, 1981, the Federal Judicial Center issued a report[60/] requested by the Advisory Committee on Criminal Rules of the Judicial Conference of the United States.[61/] Its author, Alan J. Chaset, noted

---

57/ The State Bar of California, supra note 53, at 16.

58/ Id.

59/ Letter from Richard M. Coleman to Larry Berkson, February 22, 1985.

60/ Alan J. Chaset, Disqualification of Federal Judges by Peremptory Challenge (Washington: Federal Judicial Center, 1981).

61/ See statement of Walter F. Hoffman in Hearings on H.R. 7473 and 7817, supra note 2, at 106 and 113.

Table XII-1

BAR ASSOCIATIONS SUPPORTING THE CONCEPT OF EXTENDING PEREMPTORY CHALLENGES TO THE FEDERAL LEVEL

STATE BAR ASSOCIATIONS

State Bar of Arizona
State Bar of California
State Bar of New Mexico
State Bar of Nevada
State Bar of Alaska
State Bar of South Dakota
State Bar of Wyoming

LOCAL BAR ASSOCIATIONS

Los Angeles County Bar Association
Bar Association of the City of New York
Milwaukee Bar Association
Chicago Bar Association
The Bar Association of Metropolitan St. Louis
Sacramento County Bar Association
Maricopa County Bar Association (Phoenix)
Santa Clara County Bar Association
Denver Bar Association
Bar Association of San Francisco

SPECIALIZED BAR ASSOCIATIONS

California Trial Lawyers Association
American Board of Trial Advocates
San Francisco Trial Lawyers Association
Lawyers Club of San Francisco
Los Angeles Trial Lawyers Association
Western States Trial Lawyers

at the outset that the report reflected "the perspective of the federal judiciary" but that he had "attempted to be evenhanded, presenting some of the arguments of those who seek to change the status quo."[62/]

The report examined in detail the legislative history of federal judicial disqualification statutes and related case law. A review of the proposals for peremptory challenge procedures before Congress was conducted. Subsequently, the report examined how the procedures were working in the states and reviewed in detail studies by the Oregon Law Review staff and the California Judicial Council.[63/]

Although the report relied primarily on previously published articles and reports upon which to base its conclusions, some original statistical data was gathered. First, it was found that for the fiscal year ending June 30, 1980, attorneys in Nevada exercised the challenge only 33 times.[64/]

Second, the researchers found that 2,199 disqualifications were filed in 53,517 New Mexico Cases in 1979.[65/] About 10% of the disqualifications required the acquisition of judges from another district. About one-half of the challenges and most of the out-of-district designations occurred in districts with three or fewer judges.

62/ Chaset, supra note 60, at 3.

63/ See citations in supra note 43.

64/ Chaset, supra note 60, at 35.

65/ Id., at 35-36.

Third, the researchers found that 750 challenges were filed in Alaska's district and superior courts during 1979.[66/] Challenges were made in approximately two percent of the 40,813 cases filed that year.

The researchers also gathered some original perceptual data. One Illinois attorney stated that "we unquestionably favor the...procedure.... [It] works no hardship in the administration of justice here and in our judgment facilitates it."[67/] Conversely, Dave Shultz of the University of Wisconsin claimed that "[i]t was the general consensus...that the automatic substitution provision is unnecessary and that it is often used for delay."[68/]

After reviewing the experience with peremptory challenges at the state level, Mr. Chaset considered the issue of whether they would work in the federal courts. He noted that the federal system is "distinctly different" from the states and thus use of the procedure may produce different results. Among the distinctions he noted were: (1) the small number of judges within each district, which enhances the potential for abuse and judge-shopping, (2) the inflexible system of intra and intercircuit transfers, (3) the complex nature of many types of federal cases, (4) the presence of the individual calendar system in most federal courts, and (5) the Speedy Trial Act.

Subsequently, Mr. Chaset explored the argument that current disqualification procedures fail to afford parties with effective relief when they believe a

---

66/ Id., at 36.

67/ Id., at 40, n.121.

68/ Id., at 40, n.122.

judge is biased or prejudiced. His analysis led him to conclude that "a peremptory challenge procedure is not the answer to these complaints."[69/]

Finally, Mr. Chaset examined the issues of public confidence in the judiciary and judicial independence. With regard to the former he concluded that:

> Far from increasing public confidence in the judiciary system as a whole, a peremptory challenge procedure would serve to exacerbate any existing belief that judges are not to be trusted and that the system is an irrational one designed to allow legal maneuvering, manipulation, and sharp practice. Public frustration with the delays of justice would increase.[70/]

With respect to the latter he concluded that peremptory challenges "could well stunt the growth of the law and eliminate all but the most passive decision making."[71/]

The Department of Justice. Shortly after the Hearings on H.R. 7473 Alan A. Parker, Assistant Attorney General, forwarded a letter to Congressman Robert F. Drinan on behalf of the United States Department of Justice.[72/] "The Department," he wrote, "strongly opposes enactment of this legislation as unnecessary, unlikely to achieve the goals of its proponents, and otherwise inappropriate."[73/] It was his belief that the current statutory law and rules of professional ethics adequately protect litigants in criminal cases. In

---

69/ Id., at 57.

70/ Id., at 63.

71/ Id., at 64.

72/ Hearings on H.R. 7473 and H.R. 7817, supra note 2, at 221-25.

73/ Id., at 221.

addition, "the defendant has the remedy of appeal to a higher court if prejudicial conduct has taken place."[74/]

Attorney General Parker rejected the analogy of judicial peremptory challenges to the peremptory challenge of jurors as a false one. He explained that federal district judges are subject to investigations by the President, senators, Federal Bureau of Investigation, the Bar and general public. "Jurors, on the other hand," he wrote, "are an anonymous group temporarily drawn from the body of the public, about whom next to nothing is known or can be learned...."[75/] He also claimed that the fact that several states had adopted the procedure should not be determinative of needs in the federal system. The federal judicial selection process, he argued, "is less likely to be infected by political consideration, personal bias, or personal prejudice than judges chosen by other methods from a local bar to serve a smaller community."[76/]

Attorney General Parker rejected several other arguments made by proponents of peremptory challenges. First, he suggested the procedure would not necessarily enhance public confidence in the judiciary. "There is no assurance," he stated, "that a defendant...will be satisfied with a second one so chosen."[77/] Furthermore, the bill "would serve to vindicate any existing belief that judges are not to be trusted, and that the system is not a rational one...."[78/]

74/ Id., at 222.

75/ Id.

76/ Id.

77/ Id.

78/ Id., at 224.

Second, he rejected the idea that peremptory challenges would serve as a moderating influence on extreme judges. Indeed, he argued, they will never be given a chance to prove that they have changed: "All that will happen is that [their] colleagues will bear the brunt of...[their] being out of favor with the criminal populace and the defense bar."[79/]

Third, Attorney General Parker rejected proponents' assertion that peremptory challenges were needed because of close relationships between judges and prosecutors. On the contrary. "In actual practice," he wrote, "it is often the government which suffers unequal treatment."[80/]

The assistant attorney general also made it clear that even if H.R. 7473 contained a provision allowing the government to exercise the challenge, the Department of Justice would oppose it. To him, granting the right to both parties would only exacerbate some of the problems with the bill. It would cause increased opportunities for delay, disrupt orderly calendaring procedures, inject "an even greater degree of chance and gamesmanship" into the judicial process than presently exists and frustrate the Speedy Trial Act of 1974. Moreover, he argued, excluding districts with fewer than three active judges violates "the principle that justice should be uniformly and even-handedly administered throughout the U.S." and "raises equal protection problems of the first magnitude."[81/] He also raised similar objections with respect to the requirement that all defendants must concur in filing a notice of disqualification.

79/ Id., at 223.

80/ Id.

81/ Id.

In conclusion, Attorney General Parker wrote that the problems associated with rescheduling, the additional time and expense requirements, and the waste of preparation time by judges "impose costs far outweighing any putative benefit to the defendant or the public."[82/]

SUMMARY

This review of recent proposals to extend judicial peremptory challenges to the federal level makes it clear that the practicing bar is very much in favor of the concept. It is supported by the American Bar Association and numerous state and local groups. The arguments in support of their position are discussed in the next chapter.

82/ Id., at 225.

Chapter XIII:
The Case For Extending Peremptory Challenges To The Federal Level

CHAPTER XIII

THE CASE FOR EXTENDING PEREMPTORY CHALLENGES TO THE FEDERAL LEVEL

There are numerous arguments to suggest that judicial peremptory challenges should be adopted at the federal level. Many of them parallel those raised by proponents of the concept at the state level. Because these were discussed in Chapter IV they will not be repeated here. Several others, unique to the federal system, however, are discussed below.

PROBLEMS WITH THE CURRENT DISQUALIFICATION STATUTES

As noted in the Chapter XI, Sections 144 and 455 of the Judicial Code constitute the present means of disqualifying federal judges.[1/] They are criticized, however, as failing to achieve the goals advanced by Congress in 1974.[2/] They simply have not, it is argued, adequately broadened and clarified the grounds for federal judicial disqualification. Nor have the revisions eliminated other lingering problems. First, it is noted that the trial judges still rule on motions for their own disqualification.[3/] To many individuals, this task is difficult at best. As Ellen Martin has written, "...the requirement that he [the judge] totally divorce his own evaluations of the allegations from his deliberations and that he instead base his decision on the perception of

---

1/ There is one other statute dealing with the disqualification of federal judges. See 28 U.S.C. sec. 47 (1970) which prohibits an appellate judge from reviewing a case he has tried while serving as a district court judge.

2/ For the goals see H.R. Rep. No. 93-1453, 93d Cong., 2d Sess. 1, reprinted in [1974] U.S. Code Cong. and Ad. News 6351.

3/ D.B.H.M., Jr., "Mitchell v. Sirica: The Appearance of Justice, Recusal, and the Highly Publicized Trial," Virginia Law Review, 61 (1975), 236, 251; Gary L. Karl, "Disqualification of Federal District Court Judges for Bias or Prejudice: Problems, Problematic Proposals and a Proposed Procedure," Albany Law Review, 46 (Fall, 1981), 229, 231; and Helena K. Kobrin, "Disqualification of Federal District Judges--Problems and Proposals," Seton Hall Law Review, 7 (Spring, 1976), 612, 619.

either an uninvolved reasonable person or the reasonable person in the shoes of the affiant may prove an impossible task."[4] According to critics, the current process violates the cardinal principal that no person shall be a judge in his own case.[5]

Second, in most instances there is no review until the final judgment in the case is appealed.[6] At this juncture, it is argued, reversal of a failure to disqualify rarely occurs because the test applied is whether the judge "clearly abused" his discretion.[7]

In some instances review is allowed before a final judgment is rendered through the use of a writ of mandamus. This procedure, however, is usually limited to "egregious circumstances".[8] In Davis v. Board of School Commissioners,[9] the Court of Appeals for the Fifth Circuit held that although Section 455 is self-enforcing, a writ of mandamus could be obtained from an

---

4/ Ellen M. Martin, "Disqualification of Federal Judges for Bias Under 28 U.S.C. Section 144 and Revised Section 455," Fordham Law Review, 45 (1976), 139, 156.

5/ Id., at 157. See also Brian P. Leitch, "Judicial Disqualification in the Federal Courts: A Proposal to Conform Statutory Provisions to Underlying Policies," Iowa Law Review, 67 (March, 1982), 525, 541; and remarks of Senator Bayh in Hearings on S. 1064 Before the Subcomm. on Improvements on Judicial Machinery of the Senate Comm. on the Judiciary, 93d Cong., 1st Sess. (1971-73), at 13 and 76.

6/ David C. Hjelmfelt, "Statutory Disqualification of Federal Judges," University of Kansas Law Review, 30 (Winter, 1982), 255, 262-63; and Kobrin, supra note 3, at 623.

7/ Karl, supra note 3. See also Leitch, supra note 5, at 540-41.

8/ Karl, supra note 3, at 231.

9/ 517 F.2d 1044 (5th Cir. 1975), cert. denied, 96 S. Ct. 1685 (1976).

appellate court to force a judge to disqualify himself. Similarly, mandamus has been held as an appropriate vehicle in the Fourth,[10] Seventh[11] and Tenth[12] Circuits. The Sixth Circuit, on the other hand, has taken the opposite view. In City of Cleveland v. Krupansky [13] it held that mandamus may only be used to compel a judge to perform ministerial duties and not when it involves the exercise of a judge's legitimate discretion.

Third, it is noted that there is confusion about the standard to be used in disqualifying federal judges. The language under Section 455(b)(1) is identical to that of Section 144 which has long been held as governed by a "bias-in-fact" standard.[14] Thus, it has been deemed reasonable to conclude that Section 455(b)(1) applies the same test.[15] However, there is a question about subsection (a) of Section 455 which requires disqualification when a judge's impartiality may "reasonably be questioned." This language suggests an "appearance-of-bias" test, a test supported by the Section's legislative history and adopted by most courts. However, there have been exceptions. For example,

---

10/ In re Rodgers, 537 F.2d 1196 (4th Cir. 1976).

11/ SCA Services, Inc. v. Morgan, 557 F.2d 110 (7th Cir. 1977).

12/ Bell v. Chandler, 569 F.2d 556 (10th Cir. 1978).

13/ 619 F.2d 572 (6th Cir. 1980), cert. denied, 425 U.S. 944 (1976).

14/ Randall J. Litteneker, "Disqualification of Federal Judges for Bias or Prejudice," University of Chicago Law Review, 46 (Fall, 1978), 236, 247. See also, H. Steven Walton, "Extra-Judicial Associations and the Appearance of Prejudice Test of 28 U.S.C. sec. 455(a)," University of Kansas Law Review, 31 (Fall, 1982), 200, 210.

15/ Id.

in United States v. Olander [16] the Ninth Circuit rejected it in favor of a "bias-in-fact" test.[17]

Fourth, it is argued that even the more objective "appearance to community" standard is too vague.[18] Section 455 provides that a judge should disqualify himself if there is any reasonable factual basis for the challenge but as Barton has suggested, "[a]s with any reasonable man standard...the vagueness inherent in the concept of reasonableness permits a large element of discretion to be exercised by the decisionmaker."[19]

Fifth, it is argued that the courts have continued to interpret the federal disqualification sections very narrowly.[20] Davis v. Board of School Commissioners [21] is a frequently cited example.[22] In that case the Court of Appeals for the Fifth Circuit held that verbal attacks made by a trial judge on

---

16/ 584 F.2d 876 (9th Cir. 1978).

17/ Litteneker, supra note 14, at 248.

18/ Susan E. Barton, "Judicial Disqualification in the Federal Courts: Maintaining an Appearance of Justice Under 28 U.S.C. sec. 455," University of Illinois Law Forum, 4 (1978), 863, 871; "Disqualification of Judges and Justices in the Federal Courts," Harvard Law Review, 86 (Fall, 1973), 736, 741; and Sharon T. Jacobson, "The Elusive Appearance of Propriety: Judicial Disqualification Under Section 455," De Paul Law Review, 25 (Fall, 1975), 104, 106.

19/ Barton, supra note 18, at 871.

20/ See e.g., Ernest J. Getto, "Peremptory Disqualification of the Trial Judge," Litigation, 1 (Winter, 1975), 22; Karl, supra note 3, at 232; and Kobrin, supra note 3, at 616.

21/ 517 F.2d 1044 (5th Cir. 1975), cert. denied, 425 U.S. 944 (1976).

22/ See Martin, supra note 4, at 154.

the petitioners in another case a month earlier were not grounds for disqualification. It concluded that the judge's statements were made in Court and in a judicial opinion and therefore were not "personal bias or prejudice." The statutory language referred to has been interpreted to require that bias sufficient to disqualify must be from an extra-judicial source.[23/] Nor was the alleged bias "personal," the court added, because it was directed at the petitioner's attorneys rather than the petitioners themselves. To many individuals, the opinion contravenes the intent of Congress. Ellen Martin, for example, has concluded that "the Davis opinion rendered the intended statutory reform ineffective in the Fifth Circuit less than one year after its enactment."[24/]

Another frequently cited case is Parrish v. Board of Commissioners.[25/] Members of the Black Lawyers Association charged the Board of Commissioners and Bar Examiners of the Alabama State Bar Association with racial discrimination concerning policies and practices governing admission to the state bar.[26/] They sought to disqualify District Court Judge Robert E. Vaner, the former president of a segregated bar association and an acquaintance of the defendants and their counsel. The Court of Appeals for the Fifth Circuit held that the judge's prior activities were essentially general or impersonal and revealed no facts which would indicate bias. Further, it held that the judge's relationship with the defendants and their counsel was not grounds for disqualification.

23/ Id., at 155.

24/ Id.

25/ 524 F.2d 98 (5th Cir. 1975) (en banc), cert. denied, 425 U.S. 944 (1976).

26/ For an analysis see Michael J. Rusnak, "Fifth Circuit Adopts Standards for Disqualification of Judges for Bias," Cumberland Law Review, 7 (Spring, 1976), 185-92.

Sixth, it is argued that despite Congressional intent to abolish the "duty-to-sit" doctrine, some judges have continued to rely on the rationale as a means of remaining on cases after they have been challenged.[27/] Idaho v. Freeman [28/] is often cited as an example.[29/] The widely-discussed case involved the refusal of Judge Marion J. Callister to disqualify himself from hearing a case involving the validity of Idaho's rescission of its ratification of the Equal Rights Amendment and the constitutionality of the extension of the ratification deadline.[30/] Judge Callister was a Regional Representative of the Mormon Church which had strongly and publicly opposed ratification of the Equal Rights Amendment.

Another case often referred to is Potashnick v. Port City Construction Co. [31/] In that instance the judge hearing the case was involved in business dealings with the plaintiff's attorney, and the judge's father was the senior

---

27/ Barton supra note 18, at 870; Hjelmfelt, supra note 6, at 260-61; Karl, supra note 3, at 232; and Chicago Bar Association, Judiciary Committee, Preliminary Report to the Subcommittee on the Peremptory Challenge Act of 1980 Relating to Federal Judges, approved by the Board of Managers, October 1, 1981, at 6. But see Litteneker, supra note 14, at 267.

28/ 478 F. Supp. 33 (D. Idaho 1979).

29/ See also Lazofsky v. Sommerset Co., Inc., 389 F. Supp. 1041 (E.D. N.Y. 1975) and Duplan Corp. v. Deering Milliken, Inc., 400 F. Supp. 497 (D.S.C. 1975).

30/ For an analysis supporting Judge Callister's decision see Jake Garn and Lincoln C. Olipant, "Disqualification of Federal Judges Under 28 U.S.C. sec. 455(a): Some Observations on and Objections to an Attempt by the United States Department of Justice to Disqualify a Judge on the Basis of His Religion and Church Position," Harvard Journal of Law and Public Policy, 4 (Summer, 1981), 1-66.

31/ 609 F.2d 1101 (5th Cir., 1980). After an appeal, the decision was affirmed on remand by another district judge. For a discussion see Chicago Bar Association, supra note 27, at 7.

partner in the firm representing the plaintiff. The law firm also represented the judge in unrelated matters. Further, the judge received one percent of the income of this law firm.

Seventh, the statutes are criticized for their lack of clarity. For example, it is pointed out that both demand a test of reasonableness before a judge may be disqualified.[32] However, it is unclear whether the requirement is to be determined from the litigant's point of view or from that of an uninvolved observer. In the Parrish case cited above,[33] the majority used the test of a detached person while the dissent considered reasonableness from the point of view of the litigants. If the statute's purpose is to reassure litigants that there is no bias, it is argued, the majority in Parrish was erroneous.[34]

The statutes are also unclear about whether a judge should be disqualified for bias against an attorney, a litigant or both.[35] This has resulted in different opinions in the circuits. For example, the Court of Appeals for the Fifth Circuit has held that asserted bias against an attorney rather than a "party" is not grounds for disqualification.[36] Conversely, the Court of Appeals for the Tenth Circuit has held that bias against an attorney is a sufficient reason for disqualification.[37]

32/ Martin, supra note 4, at 148.

33/ Parrish v. Board of Commissioners, supra note 25.

34/ Cf. Martin, supra note 4, at 151.

35/ Cf. Litteneker, supra note 14, at 257.

36/ Davis v. Board of School Commissioners, supra note 21.

37/ United States v. Ritter, 540 F.2d 459 (10th Cir. 1976). See Mark T. Coberly, "Caeser's Wife Revisited - Judicial Disqualification after the 1974 Amendments," Washington and Lee Law Review, 34 (1977), 1201, 1207 and 1211.

Eighth, a question is raised about how the procedure stated in Section 144 relates to Section 455.[38/] The latter section, with the exception of its waiver provision, contains no procedural guidance. Some courts thus have held that Section 144 supplies the procedural requirements for motions under Section 455.[39/] It is argued that this is potentially dangerous because the stringent procedural rules that have emerged governing Section 144 may "mute the effect of the liberal disqualification standards of section 455."[40/]

Finally, it is argued that proof of the current system's inadequacy lies in the infrequent success rate of challenges exercised by litigants and attorneys. As Helen Kobrin asserts, "...although the filing of disqualification motions is not uncommon, success is rare."[41/] This observation has been recognized, accepted, and confirmed by some members of the judiciary.[42/] For example, Judge Hemphill of the South Carolina District Court has declared that "...a successful disqualification motion has been...an unusual and extraordinary occurrence."[43/]

38/ Davis v. Board of School Commissioners, supra note 21.

39/ See citations in Leitch, supra note 5, at 530, n.36; and Litteneker, supra note 14, at 259, n.132.

40/ Litteneker, supra note 14, at 259.

41/ Kobrin, supra note 3, at 615. See also Richard N. Coleman, "An Idea Whose Time Has Come," Los Angeles Lawyer, 4 (September, 1981), at 6; and D.B.H.M., Jr., supra note 3, at 251.

42/ Duplan Corp. v. Deering Milliken, Inc., supra note 29, at 497.

43/ Id., at 513.

To summarize, it is argued by critics of current disqualification provisions that the Congressional intent of Section 455 is not being met.[44/] This view is perhaps best expressed by Mark T. Coberly. "Although the courts considering the statute have attempted to apply a broadened standard for disqualification, the varying interpretations and inconsistent results indicate that the objective of clarification was not achieved."[45/] Similarly, Terri Lacy has concluded, "...the revision of section 455 has not resolved the ambiguity within the statute, nor does it assure litigants of a fair trial under a judge in whom they have confidence."[46/]

To critics of the current statutes there is a sense of futility caused by what they consider "unduly restrictive" treatments of section 144 by the courts.[47/] Congressional attempts to make disqualification easier have been frustrated by narrow readings of Sections 144 and 455. For these individuals, "[i]t remains for the Supreme Court to breathe life into section 455(a) or for Congress to try once more to ensure the right to trial before an impartial judge."[48/]

44/ See, e.g., Barton, supra note 18, at 884.

45/ Coberly, supra note 37, at 1206-07. See also Hjelmfelt, supra note 6, at 260.

46/ Terri J. Lacy, "Disqualification of Federal Judges, Statutory Right to Recusal and the 1974 Amendments to Title 28," Southwestern Law Journal, 31 (Fall, 1977), 887, 904.

47/ Hjelmfelt, supra note 6, at 263.

48/ Id.

FAILURE OF THE IMPEACHMENT PROCESS

Those who favor adoption of the concept at the federal level argue that the impeachment process is inadequate for holding federal judges accountable and that peremptory challenges will help remedy the situation.[49/] They have referred to impeachment as "unworkable"[50/] and an "incomplete answer to a real problem."[51/] They point out that the United States Senate's enormous workload precludes impeachment trials for even a single judge. "Indeed," Russell Iungrich has written, "there has not been an impeachment proceeding for a federal judge since the early part of this century."[52/] This view is perhaps best summarized by Peter Galbraith. "Virtually everyone who has ever written on the subject of impeachment," he has stated, "has concluded that it is a cumbersome, ineffective, and therefore seldom used method of removing judges."[53/]

The impeachment process is also criticized by proponents of peremptory challenges because it does not help the litigant at trial.[54/] It is pointed

---

49/ For a discussion of the inadequacies see Larry Berkson and Irene Tesitor, "Holding Federal Judges Accountable," Judicature, 60 (May, 1978), 442, 443-47.

50/ Testimony of John J. Cleary in Hearings on H.R. 7473 and H.R. 7817, Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary, 96th Cong., 2d Sess. (June 6 and 9, 1980), at 62. [Hereinafter cited as Hearings on H.R. 7473 and H.R. 7817].

51/ New York City Bar Association, Committee on Federal Courts, "A Proposal for Peremptory Challenges of Federal Judges in Civil and Criminal Cases," Record of the New York City Bar Association, 36 (April, 1981), 231.

52/ Russell Iungrich, "The Time Has Come," Los Angeles Lawyer (September, 1980), 16.

53/ Peter A. Galbraith, "Disqualifying Federal District Judges Without Cause," Washington Law Review, 50 (1974), 109, 132.

54/ Iungrich, supra note 52, at 16.

To summarize, it is argued by critics of current disqualification provisions that the Congressional intent of Section 455 is not being met.[44/] This view is perhaps best expressed by Mark T. Coberly. "Although the courts considering the statute have attempted to apply a broadened standard for disqualification, the varying interpretations and inconsistent results indicate that the objective of clarification was not achieved."[45/] Similarly, Terri Lacy has concluded, "...the revision of section 455 has not resolved the ambiguity within the statute, nor does it assure litigants of a fair trial under a judge in whom they have confidence."[46/]

To critics of the current statutes there is a sense of futility caused by what they consider "unduly restrictive" treatments of section 144 by the courts.[47/] Congressional attempts to make disqualification easier have been frustrated by narrow readings of Sections 144 and 455. For these individuals, "[i]t remains for the Supreme Court to breathe life into section 455(a) or for Congress to try once more to ensure the right to trial before an impartial judge."[48/]

44/ See, e.g., Barton, supra note 18, at 884.

45/ Coberly, supra note 37, at 1206-07. See also Hjelmfelt, supra note 6, at 260.

46/ Terri J. Lacy, "Disqualification of Federal Judges, Statutory Right to Recusal and the 1974 Amendments to Title 28," Southwestern Law Journal, 31 (Fall, 1977), 887, 904.

47/ Hjelmfelt, supra note 6, at 263.

48/ Id.

out that the aggrieved litigant must go to trial with an allegedly biased or prejudiced judge before he can make a complaint to the appropriate House of Representatives Committee where impeachment begins. Others have argued that the process "is not designed to deal with injudicious temperament or bias in particular cases"[55/] and that it is not "a viable procedure for removal of judges who might be incompetent, disabled or irrational."[56/] Moreover, it is pointed out that impeachment is not a reasonable alternative to every case where a peremptory challenge could be used. An otherwise exemplary judge may be perceived as biased or prejudiced in one case while his conduct may be beyond reproach in all others.[57/]

FAILURE OF CURRENT DISCIPLINARY PROCEDURES

Proponents also argue that current disciplinary procedures for dealing with recalcitrant judges are inadequate and that peremptory challenges would help rectify the situation. They argue that although the Judicial Council Reform and Judicial Conduct Act of 1980[58/] does provide a procedure for handling complaints against federal judges, it is "less than effective."[59/] Richard

---

55/ Richard M. Coleman, "An Idea Whose Time Has Come," Los Angeles Lawyer, 4 (September, 1981), 6.

56/ Remarks of John J. Cleary in Hearings on H.R. 7473 and H.R. 7817, supra note 5, at 62.

57/ Iungrich, supra note 52, at 16.

58/ 28 U.S.C. sec. 372.

59/ Coleman, supra note 55, at 6. For an analysis of the Act see Eric Neisser, "The New Federal Judicial Discipline Act: Some Questions Congress Didn't Answer," Judicature, 65 (September, 1981), 142-60. See also Stephen B. Burbank, "Procedural Rulemaking Under the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980," University of Pennsylvania Law Review, 131 (December, 1982), 283-352.

Coleman points out that after two years experience in the Ninth Circuit, only 12 complaints had been received from the nine-state, 130-judge area.[60/] Most had been filed by laypersons and none was found to have any substance.

Mr. Coleman's views are substantially confirmed by information supplied by the Center for Judicial Conduct Organizations. This service of the American Judicature Society closely monitors the judicial discipline issues. Each year its staff solicits information from the circuits regarding the discipline cases.[61/] Although the numbers reported may be slightly less than the numbers actually reviewed by the circuit councils, they give some indication of how infrequently the procedure is used. They also indicate how infrequently discipline is actually imposed. According to the Center's Assistant Director, Terrence Brooks, as of the Spring, 1985, no cases had been reported from the First, Second or Third Circuits. The Fourth, Sixth and Eighth Circuits had reported one case each. All were dismissed after brief discussion. The Ninth Circuit reported four cases, all of which were dismissed after brief discussion. The Seventh Circuit had reported seven cases and in one the Chief Judge issued a public censure to a judge for permitting a law firm to draft his opinions. By far the largest number of cases had been reported from the Fifth Circuit. It reported 38 cases but in none of them was any discipline imposed.

Support for those who argue that the 1980 Act is not working effectively is also offered by scholars who have investigated its operation. Perhaps the

---

60/ Coleman, supra note 55, at 6.

61/ Letter from Terrence J. Brooks, Assistant Director, The Center for Judicial Conduct Organizations, to Larry Berkson, June 13, 1985.

most thorough analysis has been undertaken by Professor Stephen B. Burbank of the University of Pennsylvania who served as co-reporter for the rules to implement the act in the Third Circuit.[62/] He suggests five major deficiencies. First, the rules promulgated by the judicial councils of the circuits leave important matters undefined. Second, the rules are not uniform and thus invite claims of unequal treatment. Third, some of the rules promulgated by the councils are inconsistent with the act's specific procedural directives. Fourth, the councils have not embraced the Congressional goal of enhancing public accountability by its rulemaking procedures. Finally, the method of reporting information about the number of complaints filed and related data make it difficult, if not impossible, to assess the Act's effectiveness.

Russell Iungrich has pointed out another flaw of the Judicial Conduct Act, one similar to that suggested about the impeachment process.[63/] He notes that the aggrieved litigant must go to trial with a judge perceived to be biased. Subsequently the individual may write a letter to the chief judge of the circuit "which may be helpful as therapy...[but] does little to create the appearance of fairness within the federal judicial system."[64/]

THE POSITIVE STATE EXPERIENCE

One of the most frequently stated arguments for extending peremptory challenges to the federal level is the claim that the procedure has worked well

---

62/ Stephen B. Burbank, "The Federal Judicial Discipline Act: Is Decentralized Self-regulation Working?," Judicature, 67 (October, 1983), 183-99.

63/ Iungrich, supra note 52, at 16.

64/ Id.

in the states.[65/] Even those opposed to extending the concept to the federal level often agree with this assessment.[66/] And as observed in Chapter V, the authors of most of the scholarly studies on peremptory challenges also conclude that they are working relatively well in the states as have the authors of this study.[67/]

MISCELLANEOUS ARGUMENTS

The Juror Analogy. Another argument raised by proponents of federal peremptory challenges is based on the juror analogy. Presently, in criminal cases, federal statutes allow for 20 peremptory challenges of jurors per side if the charge is punishable by death.[68/] If the offense is punishable by imprisonment for more than one year, the prosecution is allowed six challenges and the defense, ten. If the offense is punishable by less than one year or by a fine, each side is entitled to three. In civil cases each side is allowed three challenges.[69/] The contention is made that if challenges are allowed to be invoked to perempt jurors (when a collective vote of 12 is involved) it is inconsistent not to allow them when a decision rests on the "sole vote of a judge."[70/] As John J.

65/ See Ch. V, fn.1.

66/ See, e.g., Karl, supra note 3; and New York City Bar Association, supra note 51, at 241 (dissenting opinion).

67/ See Ch. VII.

68/ 18 U.S.C. Fed. R. Crim. Pro. 24(b).

69/ 28 U.S.C. 1870.

70/ Testimony of John J. Cleary in Hearings on H.R. 7473 and H.R. 7817, supra note 5, at 64.

Cleary has stated, "[a] mechanism which has worked so well for ensuring impartiality of the jurors could be...applied to the bench."[71/]

The Magistrate Example. A final argument raised on behalf of implementing peremptory challenges at the federal level is that, to a limited extent, Congress has already provided for such a system which is working well.[72/] United States magistrates must have the written consent of a defendant before they are allowed to hold trial.[73/] If the consent is not forthcoming, the trial is held before a district court judge. According to proponents, although this is a rare occurrence, "it is an existing safety valve that operates in the nature of a peremptory challenge to the particular magistrate."[74/]

Proponents note that the difference between magistrates and federal district judges has been substantially lessened in recent years.[75/] Today, magistrates with 10 years of experience earn only $7,600 less than federal district judges.[76/] Moreover, the Magistrates' Act of 1968[77/] greatly enhanced

---

71/ Id., at 39.

72/ Id.

73/ 18 U.S.C. sec. 3401(b).

74/ Testimony of John J. Cleary in Hearings on H.R. 7473 and H.R. 7817, supra note 5, at 40.

75/ Id.

76/ District Judges earn $76,000 (28 U.S.C. sec. 135) and magistrates earn $68,400 (5 U.S.C. sec. 5307).

77/ P.L. 90-578 (October 17, 1968).

the magistrate's authority and responsibilities.[78/] Many of the duties of district judges have been transferred to magistrates in order to cope with the ever-increasing caseloads. Today, they are not only responsible for misdemeanor trials but for conducting initial hearings, bail hearings, discovery and other preliminary proceedings in felony cases as well.[79/]

SUMMARY

A relatively strong case can be made for extending peremptory challenges to the federal district courts. First, the present systems for handling the disqualification and discipline are inadequate. Section 144 and 455 of the Judicial Code have numerous weaknesses, the impeachment process for holding judges accountable is simply inoperable, and current disciplinary procedures are seriously flawed.

Second, experience with peremptory challenges at the state level is relatively positive. Indeed, the authors of all serious examinations of the subject have reached this conclusion.

Finally, the fact that jurors and United States magistrates may be peremptorily challenged adds credence to the idea that the concept should be extended to federal district judges.

78/ See, e.g., "Article III Constraints and the Expanding Civil Jurisdiction of Federal Magistrates: A Dissenting View," Yale Law Journal, 88 (April, 1979), 1023-61; Thomas J. Platt, "The Expanding Influence of the Federal Magistrate," The John Marshall Law Review, 14 (Spring, 1981), 465-89; and Steven Puro, et al., "The Evolving Role of U.S. Magistrates in the District Courts," Judicature, 64 (May, 1981), 436-49.

79/ F.R. Crim. Proc. 5(a).

Despite these arguments, however, these are certain costs and problems involved if peremptory challenges are allowed in the federal district courts. It is to this subject that we now turn.

Chapter XIV:
Potential Problems Of Implementing Peremptory Challenges At The Federal Level

CHAPTER XIV

POTENTIAL PROBLEMS OF IMPLEMENTING PEREMPTORY CHALLENGES AT THE FEDERAL LEVEL

Chapter IV discussed numerous arguments against the use of judicial peremptory challenges. There is no need to repeat them here. However, there are several other factors specific to the federal judiciary which should be considered before a decision is reached about whether they should be extended to the federal level.

First, a determination must be made about whether peremptory challenges are permissible under the federal constitution. Second, there are numerous administrative considerations which may mitigate against the use of the procedure in the federal judiciary. Third, there is a question about how they will impact on the Speedy Trial Act[1/] and bankruptcy proceedings. Finally, there are a number of miscellaneous factors which must be considered, such as whether other solutions may be more appropriate, whether the state experience is applicable to the federal system and whether the juror analogy is appropriate.

CONSTITUTIONAL IMPEDIMENTS

The threshold concern is whether a Congressionally-enacted peremptory challenge statute can pass constitutional scrutiny.

Separation of Powers Considerations. The most common assertion is that a peremptory challenge system constitutes a legislative usurpation of judicial power in violation of the separation of powers doctrine inherent in the

---

1/ 18 U.S.C. secs. 3161-74 (1976).

constitution.[2/] It is further argued that federal judges should be guaranteed judicial independence and that to allow them to be disqualified by litigants jeopardizes this important philosophical embodiment of Article III.[3/] Indeed, in cases involving contemporary social issues such as desegregation, abortion and obscenity challenges could be used as "a potent weapon in avoiding constitutional restraints."[4/]

Two groups of state cases are instructive in helping to resolve questions about the constitutionality of a federal peremptory challenge statute. The first involves rulings on statutes which require that challenges be accompanied by a statement alleging a good faith belief that the judge is biased or prejudiced. The statutes involved do not require the enumeration of specific grounds for such a belief and thus are broadly considered peremptory in nature.[5/]

In one early opinion a statute of this description was declared unconstitutional.[6/] The law provided, in effect, that a judge was to be disqualified

---

2/ See, e.g., John S. Evans, "Civil and Criminal Procedure - Disqualification of District Judges for Prejudice in Wyoming," Land and Water Law Review, 6 (1971), 743, 747; and Robert A. Levinson, "Peremptory Challenges of Judges in the Alaska Courts," UCLA - Alaska Law Review, 6 (Spring, 1977), 269, 292. Cf. "Disqualification of Judges for Prejudice or Bias--Common Law Evolution, Current Status and the Oregon Experience," Oregon Law Review, 48 (1969), 311, 348-49 [hereinafter cited as Oregon Study].

3/ The State Bar of California, Federal Courts Committee, Report and Recommendations on Permissive Substitution of Federal District Judges, approved by the Board of Directors, May 1, 1984, at 4-5.

4/ Id., at 6.

5/ Oregon Study, supra note 2.

6/ Diehl v. Crump, 179 P. 4 (1919). See 5 A.L.R. 1275 (1920).

upon the mere filing of an affidavit which alleged that a fair and impartial trial could not be received.[7] The Oklahoma Supreme Court declared the statute void because it did not provide for a hearing or determination of whether the affidavit was true or false.[8] The sole precedent for the decision was Ex parte N.K. Fairbank Co.,[9] decided by a federal district court for Alabama. However, this decision was eventually overruled sub silento by the United States Supreme Court in 1921.[10] It will be recalled that in Berger v. United States the Court upheld a federal statute which provided for the disqualification of a judge upon the filing of an affidavit generally stating the facts and reasons for the belief that bias or prejudice exists.[11] As a consequence, the Oklahoma decision is of little precedential value.[12]

Ccurts in at least five other states have subsequently upheld the constitutionality of statutes similar to the one in Oklahoma.[13] These include

---

7/ Id., at 5.

8/ Id., at 6.

9/ 194 F. 978 (N.D. Ala. 1912).

10/ Berger v. United States, 225 U.S. 22 (1921). See Oregon Study, supra note 2, at 349, n.210; and U'ren v. Bagley, 118 Ore. 77, 245 P. 1074, 1076 (1926).

11/ Berger v. United States, supra note 10, at 27. See Chapter XI for a more detailed analysis.

12/ See Oregon Study, supra note 2, at 349.

13/ Some individuals might include a sixth state, Ohio. See State ex rel. Wulle v. Dirlam, 28 Ohio C.C. 69 (1906) as discussed in 5 A.L.R. 1275, 1276-77 (1920). It is omitted here because of the belief that the statute involved was not peremptory in nature. See Chapter 1, fn.97.

opinions from Montana,[14] Oregon,[15] New Mexico,[16] California,[17] and Alaska.[18] The rationale of these decisions is well summarized by Justice Dimond in Channel Flying v. Bernhardt.[19] In the absence of an affidavit of prejudice or bias, he asserted, a "...judge may be disqualified for good cause, bad cause--or no cause at all."[20] On the other hand, "...where an affidavit is required, the assertion of bias or prejudice under oath is at least some showing or an important imputation of the fact that the judge is disqualified, and this is sufficient to save the statute from successful attack on constitutional grounds."[21] Moreover, Justice Dimond wrote, a "litigant is entitled to a fair hearing before a tribunal which is disinterested, impartial and unbiased, and a statute which affords him that right by providing some means of showing bias or the lack of impartiality does not offend the principal of separation of powers of government."[22]

14/ See State ex rel. Anaconda Copper Mining Co. v. Clancy, 30 Mont. 529, 77 P. 312 (1904); State ex rel. Durand v. Second Judicial District Court, 30 Mont. 547, 77 P. 318 (1904); and State ex rel. Peery v. District Court, 145 Mont. 287, 400 P.2d 648 (1965).

15/ U'ren v. Bagley, supra note 10.

16/ State ex rel. Hannah v. Armijo, 38 N.M. 73, 28 P.2d 511 (1933).

17/ Johnson v. Superior Court, 50 Cal.2d 693, 329 P.2d 5 (1958).

18/ See also, Hornaday v. Rowland, 674 P.2d 1333 (Alaska 1983).

19/ Id. For an analysis see Levinson, supra, note 2, at 293ff.

20/ Id.

21/ Id.

22/ Id.

The second group of cases involves rulings on statutes which do not require challenges to be accompanied by general statements alleging bias or prejudice. Until recently the courts were unanimous in rejecting these procedures. A California appellate court apparently established the precedent in 1937.[23/] The ruling was affirmed by the California Supreme Court a year later.[24/] These decisions were subsequently followed by others in Nevada[25/] and Oregon.[26/]

In 1982 the Wisconsin Supreme Court interrupted this chain of opinions and became the first and only court to date to uphold a pure peremptory challenge statute.[27/] The law simply provides that, upon a written request by a defendant or his attorney, the assigned judge has no authority to act further in the case.[28/] No assertions have to be made about the bias or prejudice of a judge. In addressing the separation of powers issue,[29/] Justice Abrahamson noted that a

---

23/ Daigh v. Schaffer, 23 Cal. App.2d 449, 73 P.2d 927 (1937).

24/ Austin v. Lambert, 11 Cal.2d 73, 77 P.2d 849 (1938). See John W. Willis, "Civil Procedure - Judges - Peremptory Challenge of Judge - Cal. Code Civ. Proc. (1937), sec. 170.5," Southern California Law Review, 11 (1938), 517-21.

25/ State ex rel. Clover Valley Lumber Co. v. Sixth Judicial District Court, 58 Nev. 456, 83 P.2d 1031 (1938); and Johnson v. Goldman, 94 Nev. 6, 575 P.2d 929 (1978).

26/ State ex rel. Bushman v. Vandenberg, 203 Ore. 326, 280 P.2d 344 (1955).

27/ State v. Holmes, 106 Wis.2d 31, 315 N.W.2d 703 (1982). For an analysis see Linda De La Mora, "Statute Allowing Substitution of Judge Upon Peremptory Challenge Does Not Violate Separation of Powers Doctrine, State v. Holmes, 106 Wis.2d 31, 315 N.W.2d 703 (1982)," Marquette Law Review, 66 (1983), 414-31.

28/ Wis. Stat. sec. 971.20 (1969).

29/ The court noted that the separation of powers doctrine is implicit in the Wisconsin Constitution. State v. Holmes, supra note 27, at 708.

presumption of constitutionality attends legislative acts and that the burden of proving a statute unconstitutional beyond a reasonable doubt rests upon the attacking party.[30/] Further, the doctrine "...does not demand a strict, complete, absolute, scientific division of functions between the three branches of government."[31/] Rather, it maintains the principal of shared, not separate powers. Regulating the substitution of judges falls within "vast stretches of ambiguous territory" which overlap judicial and legislative authority. "Both the judiciary and the legislature," Justice Abrahamson wrote, "are empowered to ensure not only that the fairness and integrity of the courts be maintained but also that the operation of the courts be conducted in such a manner as will avoid even the suspicion of unfairness."[32/] Furthermore, the legislature, as well as the judiciary, has the responsibility of promoting the public interest by enacting laws to assure fair trials.[33/] The Court acknowledged the line of cases holding similar statutes unconstitutional but held that it was not persuaded by those decisions because they were "based on a misconception of the purpose of the peremptory substitution statutes."[34/] According to the Court, the legislative objective of statutes without a required affidavit of prejudice is identical to that of statutes requiring affidavits of prejudice, "namely, to ensure the right to a fair trial by permitting parties to strike a judge who is prejudicial or gives the appearance of being prejudiced."[35/] The lack of an

---

30/ State v. Holmes, supra note 27, at 708.

31/ Id., at 709.

32/ Id.

33/ Id., at 710.

34/ Id., at 715.

35/ Id.

affidavit requirement "is merely a change in the method of accomplishing the legitimate objective of assuring a fair trial, not a change of objective."[36/] The purpose of eliminating the affidavit "was to remedy the ills" caused by its requirement. The Court further reasoned:

> In weighing the merits of alternative approaches to substitution the legislature obviously concluded that...on balance [disallowing the affidavit] is a commendable procedure to protect the defendant's right to a fair trial, to protect the judge from having his or her impartiality unfairly impugned, to avoid having the lawyer file an affidavit of prejudice without having guidelines as to the proper use of the affidavit, and to promote the bench's and public's interest in preserving confidence in the judiciary.[37/]

Moreover, the Court stated, "...the legislature evidently decided that the inefficiencies, inconveniences and higher costs caused by peremptory substitution are an acceptable price to be paid for the benefits to be derived from peremptory substitution."[38/]

Justice Abrahamson noted that despite the legislature's authority to enact reasonable laws regulating the substitution of judges to assure a fair trial, the separation of powers doctrine nonetheless prohibits it from "unduly burdening or substantially interfering with the judicial branch."[39/] Several arguments were considered from this perspective. First, the Court dealt with the question of whether peremptory challenges defeated the exercise of judicial power. Justice Abrahamson declared that the effect of the statute "...is at

---

36/ Id., at 716.

37/ Id., at 717.

38/ Id., at 718.

39/ Id., at 721.

most to remove the individual judge assigned to the case or the department, but not to deprive the court of the power to hear such cases by assignment of another judge."[40/]

Second, the Court considered the question of whether the operation of the statute materially impaired the proper functioning of the judiciary. It examined statistics supplied by the Office of the Director of State Courts and found that challenges during 1981 were probably filed in less than two percent of the cases overall.[41/] "Considered in terms of percentages of total cases," wrote Justice Abrahamson, "the substitution requests do not seem to play a role in the operation of the judicial system of this state."[42/]

The Court also noted that common sense would indicate that challenges cause delay in the judicial process. However, the justices suggested that the legislature had attempted to keep this to a minimum by placing time limitations within which a request could be made. Moreover, it was held, the legislature's balancing of the costs of delay and the beneficial aspects of the statute would "be accepted unless the statute practically defeats the exercise of judicial power or materially impairs the operation of the judicial system."[43/] The Court concluded that on the record before it this had not been demonstrated. Indeed, it noted that those cases in which challenges had been made were being heard and

---

40/ Id., quoting Solberg v. Superior Court, 561 P.2d 1148, 1161, n.22, 137 Cal. Rptr. 460, 473, n.22 (1977).

41/ State v. Holmes, supra note 27, at 722.

42/ Id.

43/ Id.

disposed of even though perhaps not as efficiently as if there were a more restrictive substitution procedure.[44/]

Third, the Court considered the impact of the statute on trial judges. In doing so, it quoted sympathetically a lower court opinion of Judge Weisel. "Under these statutes," he wrote, "a judge lives knowing...that at any time the Bar can exercise its potential power and literally force out that judge of even trying another case in the county in which he has been elected as circuit judge."[45/] Any honest judge will admit that he is bothered by this, claimed Judge Weisel. "Should we, as an independent judiciary," he asked, "have to live under that cloud?"[46/] To him this threat "...cannot help but have a stifling effect upon the innovation of court procedures" and will result in "the loss of the independence of the judiciary."[47/] Despite this rationale, the Supreme Court, after weighing the competing interests, was unwilling to invalidate the statute.

Finally, the Court considered the question of whether abuses of the statute were sufficient to declare it void. The justices rejected the idea that peremptory challenges permit judge-shopping. They noted that the statute simply gives litigants the power to disqualify a single judge, not to select a judge to

---

44/ Id., at 723.

45/ Id.

46/ Id.

47/ Id.

hear the case.[48] The Court further noted that the legislature was sensitive to the abuses and was ready to modify the statute to correct these problems.[49]

Equal Protection Considerations. A second constitutional concern is that peremptory challenge provisions may violate equal protection guarantees.[50] Two separate issues have evolved. The first involves the question of whether granting the challenge to the defendant and not to the prosecution denies equal protection. In Daigh v. Schaffer[51] a California court of appeals held that it did. "[T]here can be no doubt," the Court stated, "that the uniform operation of the law would require that ...[the statute] apply to the State and the District Attorney in the same manner that it applies to other litigants."[52] The California Supreme Court, however, refused to affirm this opinion.[53] It noted that there were numerous instances in which legislation had accorded advantages to the accused and denied them to the prosecution.[54] As a result, the Court concluded that the statute was not subject to attack on equal protection grounds.[55] Thus, the Daigh opinion is of no precedential value.

48/ Id., at n.33.

49/ Id., at 724.

50/ See, e.g., New York Bar Association, Committee on Federal Courts, "A Proposal for Peremptory Challenges of Federal Judges in Civil and Criminal Cases," Record of the New York City Bar Association, 36 (April, 1981), 231, 237.

51/ Daigh v. Schaffer, supra note 23.

52/ Id., at 934; citing State v. Brown, 8 Okla. Cr. 40, 126 P. 245 (1912).

53/ Austin v. Lambert, supra note 24.

54/ Id., at 80.

55/ Id.

Moreover, Illinois and Wisconsin currently limit the use of challenges to defendants in criminal cases,[56] and in neither state has the procedure been successfully challenged as violating equal protection considerations.

The second issue which has evolved is whether a statute prohibiting the exercise of peremptory challenges in districts with relatively few judges but allowing them in multi-judge districts denies equal protection of the law. Such a procedure, it is argued, deprives litigants in some districts, especially defendants in criminal cases, of rights enjoyed by those residing in others.[57] This controversy has been stimulated primarily by the 1979 American Bar Association proposal which provides for peremptory challenges in districts with three or more judges.[58] There has been no litigation in the states addressing this issue because no state has a statute with such a distinction. Thus there is no guidance as to how the courts would resolve the dispute. It should be noted, however, that there are those who believe that such an exclusion is constitutionally permissible. John J. Cleary, for example, in his testimony before a Congressional subcommittee on criminal justice argued that the procedure is allowable because there is a rational basis for line drawing.[59] To him, no problem exists unless it can be shown that there is a compelling necessity to

---

56/ For citations see Table II-1 in Chapter II.

57/ New York City Bar Association, supra note 50. See also letter of Alan A. Parker in Hearings on H.R. 7473 and H.R 7817 Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary, 96th Cong., 2d sess. (June 6 and 9, 1980) [hereinafter cited as Hearings on H.R. 7473 and H.R. 7817].

58/ American Bar Association, Section on Criminal Justice, "Report to the House of Delegates," approved by the House of Delegates, August, 1979.

59/ Remarks of John J. Cleary in Hearings on H.R. 7473 and H.R. 7817, supra note 57, at 69.

grant the right because the privilege is not an inherent, fundamental, constitutional one. It should also be noted that the numerous bar associations which have called for passage of the ABA proposal implicitly suggest that the exclusion of courts in small districts is permissible.[60/]

Summary. Should the United States Supreme Court be called upon to review a peremptory challenge statute it seems likely that it would not find a violation of the separation of powers doctrine as long as the statute contains a requirement that the challenge be accompanied by an affidavit of prejudice or like document. After all, it would simply be affirming its earlier decision in Berger and several state court opinions. However, if the statute does not contain such a requirement the outcome is difficult to predict. The Court could simply affirm the long line of state cases which have declared this type of statute unconstitutional or they could adhere to the more recent reasoning found in State v. Holmes[61/] by upholding a pure peremptory challenge procedure.

Case law and practice in the states suggests that the Supreme Court might uphold a statute which allows the defense to exercise peremptory challenges but not the prosecution for two reasons. First, the case of Austin v. Lambert[62/] seems to be controlling at this time. Second, both Illinois and Wisconsin allow the procedure. Importantly, in State v. Holmes[63/] this issue was not even mentioned by the Court. As for the question of whether the Court might allow

---

60/ Some have been explicit. See The State Bar of California, supra note 3, at 7.

61/ 106 Wis.2d 31, 315 N.W.2d 703 (1982).

62/ 11 Cal.2d 73, 77 P.2d 849 (1938).

63/ 106 Wis.2d 31, 315 N.W.2d 703 (1982).

defendants the right to a challenge in large districts but not in small ones, the outcome again is uncertain. Despite the arguments presented by Mr. Cleary, the Court might reasonably conclude that the distinction is impermissible. After all, the right to a fair and impartial trial is a constitutional guarantee and therefore a procedure perceived as making it "more fair" for some and "less fair" for others may be viewed as a violation of the Constitution.

ADMINISTRATIVE CONCERNS

There are several administrative concerns which must be considered before a decision about implementing peremptory challenges at the federal level can be determined.

Case Assignment and Calendaring Procedures. The most often cited impediment to the use of peremptory challenges at the federal level is that they will seriously disrupt calendaring procedures and cause delay.[64/] The federal courts use two assignment systems. The most prevalent is the individual calendar. Indeed, during 1980, 82 of the 94 federal district courts used this procedure.[65/] Under this system a case is assigned randomly to a judge who hears all matters related to it. Under the less prevalent master calendar system, the case is sent to any judge available when motions must be disposed of or the case must be tried. The former system is generally heralded as best suiting the federal system. It provides continuity in the handling of cases and

---

64/ See, e.g., Alan J. Chaset, Disqualification of Federal Judges By Peremptory Challenges (Washington: Federal Judicial Center, 1981), 45-48.

65/ Letter of Walter E. Hoffman in Hearings on H.R. 7473 and H.R. 7817, supra note 57, at 111.

allows the judge to whom the case has been assigned to become familiar with all of the facts and issues involved. Because of his familiarity with the case the judge can rule on motions more rapidly and thereby conserve time. Focusing responsibility for the processing of cases on a single judge also has the effect of motivating him to expedite his cases and clear backlogs.[66/]

Most critics evidence little concern about the use of peremptory challenges where the master calendar system exists.[67/] The effect would be to simply return the case to the pool for reassignment.

Because the individual calendar is used in over 87% of the federal district courts it is important to consider how it will be affected by a system of peremptory challenges. Critics claim that the impact will be negative.[68/] The crux of their argument is well stated by Gary L. Karl. "The individual calendar system," he has written, "...is inflexible when last-minute trial reassignment is necessary; the problems caused by that inflexibility would increase the number of reassignments between judges."[69/] Similarly, Thomas Workman and Vicky Arends have suggested that "[i]mplementation of peremptory challenges would substantially dilute the presently existing direct calendar system.... The last party served in a case could exercise the right as long as

---

66/ See, e.g., Chaset, supra note 64, at 46; and Gary L. Karl, "Disqualification of Federal District Court Judges for Bias or Prejudice: Problems, Problematic Proposals and a Proposed Procedure," Albany Law Review, 46 (Fall, 1981), 229, 239.

67/ See, e.g., Chaset, supra note 64, at 45-48; and Letter of Alan A. Parker in Hearings on H.R. 7473 and H.R. 7817, supra note 57, at 224. But see letter of Walter E. Hoffman in Hearings on H.R. 7473 and H.R. 7817, supra note 57, at 112.

68/ See e.g., Chaset, supra note 64, at 47-48 and n.135.

69/ Karl, supra note 66, at 239.

months after the case was commenced."[70/] Former Assistant Attorney General Alan A. Parker has carried the analysis further. To him, not only will peremptory challenges disrupt orderly calendaring procedures, but will result in increased opportunities for delay as well.[71/]

In evaluating these predictions three factors should be noted. First, statutory time limitations could limit the use of peremptory challenges to a short time after the case has been assigned.[72/] In most instances this would occur well before motions are heard or the trial commences. The procedure has been used effectively in the states and might very well eliminate the necessity of last minute trial reassignments in all but exceptional circumstances.

Second, the "number of reassignments" may be considerably controlled by restricting the number of challenges allowed. Some states permit more than one challenge,[73/] and most allow each party on each side to exercise it.[74/] Even the strongest proponents of peremptory challenges for the federal courts, however, believe that these procedures are too permissive. Most suggest

---

70/ Thomas Workman and Vicky Arends, "A Tool For Abuse," Los Angeles Lawyer (September, 1980), 10, 15. See also letter of Alan A. Parker in Hearings on H.R. 7473 and H.R. 7817, supra note 57, at 223-24.

71/ Letter of Alan A. Parker, in Hearings on H.R. 7473 and H.R. 7817, supra note 57, at 223-24.

72/ See, e.g., Chicago Bar Association, Judiciary Committee, Preliminary Report of the Subcommittee on Peremptory Challenge Act of 1980 Relating to Federal Judges, approved by the Board of Managers, October 1, 1981; John P. Frank, "Disqualification of Judges: In Support of the Bayh Bill," Law and Contemporary Problems, 35 (Winter, 1970), 43, 67; and Ernest J. Getto, "Peremptory Disqualification of the Trial Judge," Litigation, 1 (Winter, 1975), 22, 25.

73/ Illinois, Montana and Oregon.

74/ Arizona, Idaho, Illinois, Minnesota, Missouri, Montana, North Dakota, Oregon, South Dakota, Washington and Wyoming.

limiting challenges to one per side.[75/] Again, these restrictions have apparently worked relatively well in the states.

Third, how much delay will occur in the processing of cases is open to question. Administrators may be able to follow the example set by some states in establishing procedures for quickly reassigning judges, the result being very little, if any, increase in case processing time. Russell Iungerich has succintly summarized this view. "In short," he has written, "intelligent judicial administrators should be able to devise a simple system for handling reassignments."[76/]

Impact on Small Districts. The federal judicial system is characterized by districts composed of relatively few judges. Sixty-one of the 91 districts have five or fewer judges.[77/] Thirty-nine have three or fewer and five have only one judge.[78/] Thus, in many of the districts there is limited opportunity for intra-district switching. Further, Alan J. Chaset points out that these figures may be misleadingly high.[79/] He notes that many of the smaller courts have only one judge sitting in a division or assigned to a particular court location. The possibility that judicial peremptory challenges will cause delay when they are

---

75/ See, e.g., Frank, supra note 72, at 66; and Getto, supra note 72, at 25.

76/ Russell Iungerich, "The Time Has Come," Los Angeles Lawyer (September, 1980), 16, 17.

77/ P.L. 93-353 (1984); 28 U.S.C. sec. 133.

78/ Id.

79/ Chaset, supra note 64, at 41-42.

exercised in these jurisdictions appears to be considerable.[80/] In the majority of cases, arrangements would have to be made for the inter-district transfer of judges. This could pose scheduling, transportation and logistical problems resulting in delay and increased costs.

When evaluating the extent of these potential problems, several factors should be considered. First, viewed from a different perspective, in districts having three or more judges inter-district transfers would probably be rare if each side is allowed only one challenge. In two-judge districts the likelihood of inter-district transfers increases but nonetheless the exercise of a single challenge is unlikely to cause this result. In the five single-judge districts, inter-district transfers would be required. However, in all of these jurisdictions there are other districts within the same state.[81/] Iowa has four district judges,[82/] Arkansas has six while Kentucky and Oklahoma each have nine. It must also be remembered that the overwhelming number of cases in the federal system are heard in districts with large numbers of judges.[83/]

80/ Ellen M. Martin, "Disqualification of Federal Judges for Bias Under 28 U.S.C. Section 144 and Revised Section 455," Fordham Law Review, 45 (1976), 139, 163.

81/ Only Idaho, Maine, New Hampshire, North Dakota, Vermont and Wyoming have fewer than three federal district judges.

82/ Iowa has two single-judge districts.

83/ See statement of John P. Frank in Hearings on S. 1064 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary, 93rd Cong., 1st sess. (1971-73), at 63 [hereinafter cited as Hearings on S. 1064].

Second, it should be noted that transferring cases from one judge to another within the same district is not uncommon.[84/] Nor is it uncommon to transfer a judge to another district.[85/]

Third, it may be possible to replace many challenged judges by efficient use of statutory provisions for visiting judges.[86/] If, as alleged by some, this procedure is "not very flexible and requires significant time and energy to implement,"[87/] it could, and perhaps in any event should, be changed by Congress to allow greater ease of usage.[88/]

Fourth, most districts have a number of senior judges who are available for assignment to cases in which a peremptory challenge has been exercised.[89/] During the summer of 1985, for example, there were 55 judges holding senior status in the circuit courts and 195 holding senior status in the district

---

84/ Getto, supra note 72, at 25.

85/ Remarks of Senator Birch Bayh in Hearings on S. 1064, supra note 83, at 18.

86/ Martin, supra note 80, at 163. But see Chaset, supra note 64, at 43.

87/ Chaset, supra note 64, at 42. Under the current statute, assignment of district court judge requires the consent of the chief judge or the judicial council of the judges home circuit. 28 U.S.C. 295. Further, the system requires the chief justice to select judges for inter-circuit transfers and the chief judge of the circuit to choose judges for intra-circuit transfers. This "handpicking" could be a problem in a system of peremptory challenges. See Chaset, supra note 64, at 44.

88/ Even under a more flexible system of transfers there could be troublesome consequences. Protracted litigation would require judges to travel frequently and result in additional costs for travel, per diem and other expenses. See Chaset, supra note 64, at 43.

89/ Martin, supra note 80, at 163.

courts.[90] Nearly every district had at least one senior judge and several had more than three.

Administrative Burdens and Costs. Another potential impediment to the use of peremptory challenges at the federal level is that they will add to the administrative burdens and costs of the federal district courts.[91] Indeed, even if it is possible for administrators to establish procedures for quickly reassigning cases, it may take a considerable amount of personnel time and resources to do so. Not only would administrators be required to arrange for the exchange of cases between judges, but it would also be necessary for them to notify all parties and their counsel as well.[92] Additionally, many federal cases involve protracted litigation and require lengthy trials.[93] Should judges be required to travel only minimal distances the increased costs could be severe.

Summary. When considering these potential impediments, one first must again remember that experience in the states has been that costs generally have not been excessive. In large districts cases are simply shifted to another judge and in small districts peremptory challenges are rarely exercised.

90/ Data provided by Administrative Office of the United States, June 26, 1985.

91/ Chaset, supra note 64, at 43; Iungerich, supra note 76, at 17; and Alan A. Parker in Hearings on H.R. 7473 and H.R. 7817, supra note 57, at 225.

92/ See letter of Walter Hoffman in Hearings on H.R. 7473 and H.R. 7817, supra note 57, at 111.

93/ Chaset, supra note 64, at 48-49.

Second, one must balance the increased administrative workload with the rationale for having a system of peremptory challenges.[94] If, indeed, the system is needed to assure a fair trial or the appearance of a fair trial it is likely that the former concern must give way to the latter, for delay and inconvenience are not likely to be acceptable reasons for subverting an important safeguard of the American citizenry. If, on the other hand, peremptory challenges are not viewed as a crucial or important safeguard to receiving a fair trial the administrative burdens and costs may be sufficiently high enough to prohibit their usage. There is some indication that the courts may adhere to the former view. For example, while discussing the disqualification of federal judges in a recent case, the Fifth Circuit Court of Appeals stated:

> The growing number of federal judges, and the availability of rapid transportation to move those judges from place to place when necessary, make the decision to disqualify much less burdensome on the judicial system than in past times; and inconvenience which does arise is more than outweighed by the need to protect the dignity and integrity of the judicial process.[95]

SPEEDY TRIAL CONSIDERATIONS

Another potential impediment to the use of peremptory challenges at the federal level is the Speedy Trial Act.[96] It has been asserted that the two may be inconsistent.[97] Section 3161(a) calls for the trial of a case at the

---

94/ Iungerich, supra note 76, at 17.

95/ Potashnick v. Port City Const. Co., 609 F.2d 1101, 1112 (Fifth Cir. 1980). See also State ex rel. Greely v. Dist. Ct. of the 4th Jud. Dist., 590 P.2d 1104, 1108 (Mont. 1979).

96/ 18 U.S.C. secs. 3161-74 (1976).

97/ See, e.g., Karl supra note 66, at 240.

earliest practical time on a certain day. Peremptory challenge procedures appear to interfere with this stricture. As Gary L. Karl has written, "[t]he exercise of a peremptory challenge would result in automatic reassignment of a case to the bottom of the new judge's calendar, thus consuming much of the time available under the Act to commence trial...."[98/] Alan Chaset has taken the same view.

> The act sets strict time limits within which indictments must be filed and trials begun. Providing each side in a criminal case with ten or twenty days in which to exercise a challenge would lead to...consumption of much of the time available under the act.... In small courts, even more of the limited time would be used up in arranging for visiting judges.[99/]

Further, it is argued that delays resulting from peremptory challenges may not be exempted from the Act as it is currently written.[100/] Thus, defendants could invoke peremptory challenges simply to postpone the judicial process until after the statutory time limitations for their trials have expired.

In evaluating the impact of peremptory challenges on speedy trial requirements several factors must be kept in mind. First, 14 of the 15 states using peremptory challenges have speedy trial statutes or court rules.[101/] No evidence has been found to suggest that challenges have interfered with their

---

98/ Karl, supra note 66, at 240. See also letter of Alan A. Parker in Hearings on H.R. 7473 and H.R. 7817, supra note 57, at 224.

99/ Chaset, supra note 64, at 50.

100/ See especially Chaset, supra note 64, at 51. See also Karl, supra note 66, at 240.

101/ Montana and South Dakota rely on state and federal constitutional provisions to ensure a speedy trial. See Robert L. Misner, Speedy Trial: Federal and State Practice (Charlottesville: The Michie Co., 1983), 330-735.

operation. To avoid difficulties at the federal level Congress might consider amending the Speedy Trial Act or including a special provision in its peremptory challenge statute. Nevada, for example, has specifically incorporated a provision in its law which provides that in the event a defendant disqualifies a judge, "the time within which a defendant must be given a speedy trial...shall commence to run anew on the date of such disqualification."[102/]

Second, peremptory challenges are only "inconsistent" with the Speedy Trial Act if the Act's sole purpose is to speed up the judicial process and prevent delays for any reason.[103/] If, on the other hand, the purpose is more broadly viewed as achieving justice and a fair trial, the inconsistency wanes. A limited amount of delay in this instance may be viewed as a necessary and useful part of due process of law.

Third, there are those who believe that the Speedy Trial Act, as currently structured, can accommodate peremptory challenges.[104/] For example, Richard J. Wilson, testifying on behalf of the National Legal Aid and Defender Association before a Committee of Congress argued that any delays caused by peremptory challenges would be covered by Section 3161(h)(1)(F) of the Act.[105/] Excluded from time computations under that section are any periods of delay resulting from the filing of any pretrial motions and the disposition thereof.

102/ Ida. Crim. R. 25 (1983).

103/ See Workman and Arends, supra note 70, at 15. Cf. Karl, supra note 66, at 240; and letter of Alan A. Parker in Hearings on H.R. 7473 and H.R. 7817, supra note 57, at 224.

104/ See, e.g., New York City Bar Association, supra note 57, at 238.

105/ Statement of Richard J. Wilson, Hearings on H.R. 7473 and H.R. 7817, supra note 57, at 202.

IMPACT ON BANKRUPTCY PROCEEDINGS

Another consideration which must be explored before making a decision about implementing peremptory challenges at the federal level is their impact on bankruptcy proceedings. Twelve districts have three bankruptcy judges, 27 have two judges and 31 have only one judge.[106/] Because there are even fewer of these judges than district judges, the potential negative consequences of their being challenged are more greatly enhanced.[107/] Further, as Alan J. Chaset has written:

> These judges handle not only litigation, but also administrative determinations such as the allowance of fees and the consideration of plans of reorganization. The number of interested parties in the administrative aspects of a bankruptcy case is large. Managing a challenge system in this context would be extraordinarily difficult.

The potential problems resulting in the application of peremptory challenges to bankruptcy judges appear severe indeed. A single challenge would require the transfer of a judge in one-third of the districts. Even if the challenges were exercised infrequently it appears that not only would there be a tremendous increase in per diem and travel costs to the judicial system, but also personal hardships for these judges as well.

Despite these problems two considerations should be kept in mind. First, it should be noted that there are innumerable one and two-judge districts in the states which have functioned perfectly well with a peremptory challenge system

---

106/ Data provided by the Bankruptcy Division, Administrative Office of United States Courts, June 20, 1985.

107/ Chaset, supra note 64, at 52.

in operation. This has been the case even in rural areas where substitute judges must travel great distances.

Second, the fact that peremptory challenges may present severe problems for bankruptcy proceedings should not, alone, be determinative of whether they should be implemented at the federal level. Alternatively, Congress could exempt bankruptcy judges from any peremptory challenge statute that might be adopted.

OTHER CONSIDERATIONS

Three other considerations must be explored before a determination can be reached about whether peremptory challenges should be extended to the federal level.

Other Solutions May Be More Appropriate. It will be recalled that proponents of federal peremptory challenges rest their initial argument on the premise that the present procedures for disqualification and disciplining judges are inadequate. Their arguments are so persuasive that only the most vigorous adherents to the current system of federal disqualifications claim that the present procedures adequately protect litigants from partial, disabled, extreme, intemperate or incompetent judges.[108/] Indeed, many opponents of peremptory challenges accept this assessment about the current statutes.[109/] Nonetheless, a strong case can be made for the proposition that implementation of peremptory

---

108/ See John R. Bartels, "Peremptory Challenges to Federal Judges: A Judges View," American Bar Association Journal, 68 (April, 1982), 449. See also Chicago Bar Association, supra note 72, at 4; and letter of Alan A. Parker in Hearings on H.R. 7473 and H.R. 7817, supra note 57, at 221-22.

109/ See, e.g., Karl, supra note 66, at 249.

challenges is an inappropriate remedy to the problems at hand and that other less radical solutions may be more appropriate and feasible.[110/]

First, it may be argued that if the problem is one of extreme sentencing practices, Congress can better deal with it directly rather than by allowing peremptory challenges to be invoked on judges perceived to be harsh or lenient sentencers.[111/] For example, it might consider an appellate review of sentence statute[112/] similar to ones used in the states[113/] or it may explore a whole host of other alternatives.[114/]

Second, if the problem is one of judicial discipline or disability, it can be argued that Congress should confront it directly by reconsidering the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980.[115/] Initially, it might reconsider adoption of the Judicial Tenure Act proposed by

---

110/ See, e.g., Karl, supra note 66, at 245. Workman and Arends liken adoption of peremptory challenges as being "akin to throwing out the baby with the bath water." Workman and Arends, supra note 70, at 16.

111/ Karl, supra note 66, at 242.

112/ See, e.g., letter of Alan A. Parker in Hearings on H.R. 7473 and H.R. 7817, supra note 57, at 223.

113/ See, e.g., Larry Berkson, "Appeal From Sentence: A Remedy For Harsh But Constitutionally Permissible Sentences," State and Local Government Review, 8 (January, 1976), 4-9.

114/ See, e.g., "Symposium on Sentencing, Part II," Hofstra Law Review, 7 (Winter, 1979), 243-456.

115/ Pub. L. No. 96-458, 94 Stat. 2035 (1980); 28 U.S.C. sec. 372. See Karl, supra note 66, at 243. See also Workman and Arends, supra note 70, at 15-16.

Senator Sam Nunn in 1976.[116/] This Bill was passed by the Senate but failed in the House. It called for the establishment of a system similar to those found in the states. A 12-member commission would be created to review complaints about judges and make recommendations to a Court on Judicial Conduct and Disability. The Court could dismiss the case, order censure, removal or involuntary retirement.

Finally, if the problem is that judges are simply not appropriately recusing themselves for bias or prejudice under the current disqualification statutes, it may be argued that the present laws should be revised to alleviate the problem.[117/] Gary L. Karl, for example, has suggested repeal of 28 U.S.C. sec. 144 and replacing it with a statute which would make disqualification more available, but not automatic, to litigants.[118/] The principal changes would be a commitment to the "appearance of bias" standard found in 28 U.S.C. 455(a) and a provision for review of disqualification denials by other judges.

The statute proposed by Karl would allow "any party" in any federal court to move that a judge disqualify himself. It would require the filing of an affidavit alleging, with reasonable specificity, the perceived bias. The statute would not require "personal" bias as under the current statute, but only bias in the instant case. The affidavit would not have to contain great detail but a bold conclusion such as "I believe Judge X to be biased" would not suffice.

116/ Hearings on the Judicial Tenure Act Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary, 94th Cong., 2d Sess. (1976). For an analysis see Larry C. Berkson and Irene A. Tesitor, "Holding Federal Judges Accountable," Judicature, 61 (May, 1978), 442, 455-57.

117/ Karl, supra note 66, at 245.

118/ Id., at 245-48.

A determination of whether a judge should be disqualified would be made on the allegations in the affidavit. This would keep the focus on the reasonableness of the affiant's belief and prevent the expense of time and effort for additional fact-finding. A judge's impartiality could not be questioned on the basis of his race, sex or opinions on the applicable law. The opposing side would be allowed to submit responding affidavits. The standard for disqualification would be the same as in 28 U.S.C. sec. 455: when the judge's "impartiality might reasonably be questioned." If a judge failed to grant the motion, there would be an independent review of the affidavits by a panel of three judges from within the circuit.[119/] This procedure would encourage the trial judge to carefully consider motions for disqualification and assure the complaining party of fair treatment of his allegations. In addition, the proposal would include filing deadlines[120/] to prevent parties from seeking disqualification after adverse rulings and would allow exceptions for "good cause" when newly discovered facts arise after the expiration of time limits.

In assessing whether these solutions are more appropriate than judicial peremptory challenges, several considerations should be made. First, they are less radical than peremptory challenge procedures and thus might elicit greater support from judges, Congress, and the public.

119/ Karl suggests that the best approach might be to use a panel of retired judges in each circuit.

120/ The affidavit would be timely if filed (1) not less than 20 days before the time first set for trial, (2) within 10 days after the filing party is first given notice of the identity of the trial judge, or (3) when good cause is shown for failure to file the affidavit within such times.

Second, they do not appear to have the monetary implications associated with peremptory challenges or create the potential burdens for federal court administrators.

Third, despite these attractive features, securing passage of t ree separate procedures to deal with the problems would be difficult at best. The federal courts do not have an appellate review of sentence statute and adopting one is sure to meet with strong resistance. Modifying the Judicial Councils and Judicial Conduct and Disability Act of 1980 would be extremely difficult as evidenced by the controversy surrounding consideration of the Nunn Bill. It also may be exceptionally difficult to persuade Congress to revise the disqualification statutes. After all, they did so less than 10 years ago.

Fourth, even if Congress makes revisions in the three areas suggested above one problem suggested by the advocates of peremptory challenges remains--how to deal with the extremely mediocre judge. It is suggested that "obviously untenable decisions" are best handled on appeal.[121/] However, this view overlooks the fact that most decisions are not appealed and that appellate courts are extremely reluctant to chastise their brethren for mediocre performance.

The State Experience May Not Be Applicable. One of the most compelling foundations upon which proponents of peremptory challenges rest their case is the claim that because the concept works well in the states it should be applied to

---

121/ See Bartels, supra note 108, at 450.

the federal judiciary.[122/] However, experience in the states may not be entirely applicable to the federal courts.[123/]

First, it should be noted that the process for selecting judges is considerably different at the federal level.[124/] Prospective judges at that level undergo comparatively rigorous screening procedures by the FBI, White House selection committees, American Bar Association, Senate Judiciary Committee of the U.S. Congress and interest groups. Often, they are investigated by panels of lay persons and attorneys.[125/] Conversely, at the state level the breadth and rigor of screening is considerably less comprehensive. Thirty-three states initially elect general jurisdiction trial court judges.[126/] The only scrutiny that takes place in these situations occurs when candidates raise questions about the background, character and competence of their opponents. Often, this does not take place because state judicial candidates run unopposed.

The highly selective standards for federal judges, it may be argued, produce more qualified judges than those generally found in the states.[127/] As a

---

122/ Cf. statement of John J. Cleary in Hearings on H.R. 7473 and H.R. 7817, supra note 57, at 47.

123/ New York City Bar Association, supra note 57, at 237 and 241.

124/ Peter A. Galbraith, "Disqualifying Federal District Judges Without Cause," Washington Law Review, 50 (1974), 109, 111; and New York City Bar Association, supra note 57, at 241.

125/ During the Carter Administration this was particularly prevalent. See Alan Neff, The United States District Judge Nominating Commissions: Their Members, Procedures and Candidates (Chicago: American Judicature Society, 1981).

126/ See Larry Berkson, Judicial Selection in the United States: "A Special Report," Judicature, 64 (October, 1980), 176, 178.

127/ Workman and Arends, supra note 70, at 12. See also Chicago Bar Association, supra note 72, at 8-9.

result, there is considerably less chance that they will be influenced by bias or prejudice or will exhibit incompetence or intemperance. Thus, there simply is not as great a need for peremptory challenges at the federal level as at the state level.[128/]

Second, it should be noted that the federal judiciary is comprised of considerably fewer judges within a given geographical area than state courts.[129/] Thus, costs associated with travel, administrative problems and inconvenience to judges are likely to be more severe if peremptory challenges are implemented at the federal level.

Third, federal judges are far more often required to become involved in complex political and policy issues than state judges.[130/] Consequently, there is a much greater danger that federal district judges will be challenged in response to their substantive views on controversial laws.[131/] As a result, there is a much greater chance for abuse of peremptory challenges at the federal level.

In assessing the impact of these differences between the state and federal judiciaries two observations should be noted. First, even high standards of selection do not screen out all poorly-qualified candidates.[132/] Further, they

---

128/ New York City Bar Association, supra note 57, at 242.

129/ Id., at 241.

130/ Id.

131/ Karl, supra note 66, at 238-39, and New York City Bar Association, supra note 57, at 242.

132/ See, e.g., Galbraith, supra note 124, at 111 who states "...few would deny that there are inadequate judges on the federal bench."

have no impact upon qualified candidates who subsequently undergo a change in character, competency, physical health or mental capacity. Nor can they insulate federal judges from bias. As a committee of the Chicago Bar Association has written, "if this were the case, Congress would not have felt compelled to enact statutes providing for disqualification when bias in fact can be shown."[133/]

Second, federal judges are appointed for life.[134/] Thus, it can be argued that they tend to be removed from the "arena of accountability,"[135/] and that there is a greater need for peremptory challenges there than at the state level where periodic elections are held.[136/]

The Juror Analogy May Be Misleading. It will be recalled that proponents of peremptory challenges at the federal level argue that if challenges are allowed to be used to perempt jurors they should certainly be allowed to be used to perempt judges if impartiality is to be ensured.[137/] However, the analogy may be a false one.[138/] Alan J. Chaset, for example, points out that unlike jurors,

---

133/ Chicago Bar Association, supra note 72, at 9.

134/ U.S. Const. Art. II, sec. 1.

135/ Chicago Bar Association, supra note 72, at 9. See also Galbraith, supra note 124, at 111; and statement of John J. Cleary in Hearings on H.R. 7473 and H.R. 7817, supra note 57, at 47 and 62.

136/ New York City Bar Association, supra note 57, at 245, n.22.

137/ See e.g., testimony of John J. Cleary in Hearings on H.R. 7473 and H.R. 7817, supra note 57, at 64.

138/ See e.g., Chaset, supra note 64, at 222; and letter of Alan A. Parker in Hearings on H.R. 7473 and H.R. 7817, supra note 57, at 222. See also Austin v. Lambert, supra note 24, at 79.

about whom relatively little is known or learned through a brief voir dire, a federal district judge is appointed to office by the President of the United States with the advice and consent of the Senate.[139] "He may have been reviewed by selection commissions; in any event, the judge is always investigated by the ABA and the FBI and is subjected to public scrutiny and confirmation hearings."[140] Further, jurors act in secret and render decisions that "are substantially immune from revision or review," while judges "act in open court and on the record." Moreover, "...their actions are subject to both public view and appellate review."[141]

Even if the juror analogy is misleading the arguments by opponents of peremptory challenges on this issue appear to be very weak. No matter how carefully federal judges are selected, they may still be biased or prejudiced in certain situations or may change and become vindictive, arbitrary or incompetent in later years.

SUMMARY

It is clear that there are several potentially serious impediments to the use of peremptory challenges at the federal level. A strong possibility exists that a judicial peremptory challenge statute, absent an affidavit of prejudice

---

139/ U.S. Const. Art. III, sec. 1.

140/ Chaset, supra note 64, at 60. See also letter of Alan A. Parker in Hearings on H.R. 7473 and H.R. 7817, supra note 57, at 222.

141/ Chaset, supra note 64, at 60. In a 1938 case the California Supreme Court made another distinction. It reasoned that "[T]he juror challenge is not lodged against one sworn to try the case but only against one sought to become qualified to try a case." Austin v. Lambert, supra note 24, at 79.

requirement, would be declared unconstitutional as violative of the Separation of Powers Doctrine. Moreover, even with such a provision, narrow construction by the courts might nullify Congressional intent as was the case after passage of 28 U.S.C. 144.[142/] There is also a possibility that any Congressionally-drawn statute granting the right to defendants and not to prosecutors might be declared unconstitutional as violative of the Equal Protection Clause of the United States Constitution. A statute prohibiting exercise of the right in districts with relatively few judges raises even more serious equal protection considerations.

Potentially the most serious negative consequence of peremptory challenges at the federal level concerns judicial administration. Devising a system for quickly reassigning judges may be possible but the varieties of implementing it may cause considerable difficulties. At a minimum, a system of peremptory challenges in the federal judiciary may result in the need for at least some additional administrative assistance and some increase in expenditures by the courts. Further, while the impact on the Speedy Trial Act may be minimized, the consequences to bankruptcy proceedings could be serious indeed.

It is also clear that other less drastic measures are available to deal with the perceived problems. Congress could amend existing disqualification and disciplinary statutes and create a system for appellate review of sentence. Finally, it may reasonably be argued that the positive state experience is not applicable to the federal courts and that the juror analogy is misleading.

142/ For a discussion see Chapter XI.

Chapter XV:
Conclusions And Recommendations

CHAPTER XV

CONCLUSIONS AND RECOMMENDATIONS

Despite the problems that judicial peremptory challenges could create for the federal courts, it appears that a carefully constructed plan might work reasonably well. As Ernest Getto has stated, "[t]he major argument--that it [a system of peremptory challenges] would be unworkable--seems extreme."1/ Various plans have been held constitutional in the states, and most of them have been operating with little or no difficulty. The argument that the state experience may not be applicable to the federal courts is not without merit, but the differences between the two systems are not so great that experimenting with peremptory challenges at the federal level should be foreclosed. Further, the argument that Congress could adopt less drastic measures to deal with incompetent, extreme, intemperate, biased or prejudiced judges does not appear compelling.

On the other hand, as observed in the previous chapter, the problems of implementing peremptory challenges at the federal level are potentially serious and should not be ignored. It appears extreme in the other direction to conclude, as has the Judiciary Committee of the Chicago Bar Association, that the complications of "delay and inconvenience" which might result "are ill-founded."2/

1/ Ernest J. Getto, "Peremptory Disqualification of the Trial Judge," Litigation, 1 (Winter, 1975), 22,25.

2/ Chicago Bar Association, Judiciary Committee, Preliminary Report of the Subcommittee on the Peremptory Challenge Act of 1980 Relating to Federal Judges, approved by the Board of Managers, October 1, 1981, at 10.

Because of the potential negative consequences three considerations should guide any recommendations about the adoption and contents of a federal peremptory challenge provision. First, it appears prudent, at least at the outset, to carefully limit the number of challenges to as few individuals as possible within constitutional constraints and fundamental notions of equity.

Second, it appears judicious to limit the provision to an experimental trial period. The length of the experiment would have to be sufficient to give the judges, attorneys and administrators involved an opportunity to become acclimated to the new system. A period of one year might be adequate. Upon completion of the experimental stage a thorough review of the impact and consequences of the new procedure should be conducted by an independent group of consultants who have no connections with the judicial branch of government. A university consortium study group, for example, might be considered. The results of that study should dictate whether the procedure should be allowed to continue.

Third, it is preferable that the right to a peremptory challenge be adopted by each Circuit Council, the Judicial Conference of the United States, or the Supreme Court rather than by Congress.[3/] This could avoid any controversy which might arise about whether such a provision violates the Separation

---

3/ Apparently, only the Ninth Circuit Judicial Conference has discussed the subject thoroughly. In 1979 a resolution to adopt a peremptory challenge procedure was defeated by one vote. In 1980 after legislation was introduced into Congress, a Committee on Peremptory Challenges was appointed to re-examine the issue. They found that by and large attorneys favored the procedure, but judges opposed it. During its July, 1980 meeting the conference passed a resolution opposed to legislation permitting peremptory challenges. In 1981 the Committee on Peremptory Challenge submitted its final report and declined to recommend a position to the conference. History of Judicial Peremptory Challenge Proposals in the Ninth Circuit, Memorandum from Mary Heim, law clerk, to James K. Browning, Chief Judge, United States Court of Appeals, Ninth Circuit, August 2, 1985.

of Powers Doctrine. Unfortunately, given the general antagonism among federal judges about adopting peremptory challenge provisions,[4/] it is unlikely that this course of action will be followed.

The recommendations outlined below are intended to serve as a guide for either judicially-created rules or Congressionally-enacted legislation. They are intended to apply mainly to districts with individual calendar systems (which constitute 87% of all federal trial courts). Minor adjustment may be made where the master calendar system is in use.

RECOMMENDATION

The provision should contain explicit language indicating that the challenge is peremptory in nature.

In 1911 Congress passed a disqualification statute which was clearly intended to be peremptory in nature. It was upheld in Berger v. United States, but the Supreme Court declared that a judge could pass on the sufficiency of the affidavit. In the decades which followed, lower federal courts construed the

---

4/ To ascertain the current views among federal judges about peremptory challenges, a letter of inquiry was sent to the 12 chief judges of the Courts of Appeals asking for their personal opinion on the subject and for information about any action taken on it by their judicial conferences. Responses were received from all but two chief judges. Seven personally opposed peremptions, two offered no opinion and one stated that it was inappropriate for him to comment. Three indicated that the subject had not been discussed in their conference meetings and three that no position had been taken by their conferences. In the Ninth Circuit, as discussed above, a formal vote was taken against the concept. A survey by the circuit executive in the Eleventh Circuit found no judge in favor of the idea. Discussion in the District of Columbia Conference following the letter of inquiry indicated no support for the concept.

statute very narrowly and generally found the facts alleged insufficient to disqualify them from hearing cases. This practice resulted in nullifying Congressional intent.

To avoid a recurrence of this problem, specific language should be included in the provision to indicate that the challenge is peremptory in nature. Further, it should be specifically stated that judges are prohibited from passing on the sufficiency of the claims alleged in the pleading. In other words, mere filing of a challenge should direct an immediate cessation of a judge's actions. This requirement is found in various forms in the provisions of 10 states and is practiced in the remainder of the states.

RECOMMENDATION

The pleading should be referred to as an "application for reassignment."

Nearly all of the pleadings in early state statutes were referred to as affidavits of prejudice. However, only two states, Oregon and Washington, still use the phrase. This language is highly objectionable to many judges because it has serious negative connotations. Moreover, challenges often are not made because of bias or prejudice but for other reasons.

The phrases "peremptory challenge" and "peremptory disqualification" are also objectionable to some individuals. To avoid any suggestion that the judge initially assigned to the case is unfair, it is suggested that the pleading be referred to as an "application for reassignment." Today, approximately nine states use such neutral phrases.

RECOMMENDATION

The provision should allow the exercise of peremptory challenges regardless of the number of judges sitting in the district court.

Several proposals, including that of the American Bar Association, have suggested that challenges be proscribed in districts having three or fewer judges. However, this approach raises serious constitutional concerns. Indeed, many individuals believe that limiting the right to districts with large numbers of judges denies equal protection of the law. Further, fundamental notions of equity suggest that a party or attorney in a small district should not be prohibited from challenging an allegedly intemperate, arbitrary, excessive, incompetent, biased or prejudiced judge any more than those in large districts. To avoid this inequity and the possibility that such a provision would be declared unconstitutional on equal protection grounds, it is recommended that the provision should allow the exercise of a peremptory challenge regardless of the number of judges sitting in the district. No state permits the distinction, and there do not appear to be serious problems in one- or two-judge courts at that level.

RECOMMENDATION

The provision should be available to both the prosecution and defense.

Two states, Illinois and Wisconsin, allow peremptory challenges to be exercised by the defense only. Some of the recent proposals have suggested that this procedure be followed in any federal provision which is adopted. However, there is a possibility that such a limitation would be viewed by the Supreme Court as denying equal protection of the law. Moreover, fundamental notions of

equity seem to dictate that the prosecutor be granted the right as well as the defendant or his counsel. A biased, prejudiced, disabled, mediocre, intemperate or extreme judge affects all parties involved, not simply those on the defense. Indeed, it may be reasonbly asserted that the "people" represented by the prosecutor have as much of a right to a fair trial as defendants and their attorneys. The procedure of allowing peremptory challenges to be exercised by both sides in criminal cases is currently used in 12 states.

RECOMMENDATION

The provision should be available to both the parties involved and their attorneys.

Some states restrict the exercise of peremptory challenges to the parties involved in the case. In other words, attorneys are not permitted to exercise the right. Because bias or prejudice toward attorneys affects the right to a fair trial as much as bias or prejudice directed toward litigants, it appears prudent to allow both to invoke the challenge. Further, both attorneys and litigants should be allowed to sign the pleading. Most states permit this practice, and it seems to cause no difficulties.

RECOMMENDATION

The provision should contain clearly delineated time frames for filing the application for reassignment.

Early state statutes providing for judicial peremptory challenges did not provide clear time frames, and consequently, attorneys were able to invoke the procedure for purposes of delay. This clearly was an abuse of the procedure and interfered with the efficient administration of justice. Much of this problem has been overcome with clearly delineated time frames. Any provision should

RECOMMENDATION

The provision should restrict the exercise of peremptory challenges to federal district courts.

To foreclose any confusion about whether the right exists to disqualify appellate judges, the provision should specifically state that the challenge cannot be exercised to substitute circuit judges or district judges when they are serving in an appellate capacity. Today, all 16 states which allow peremptory challenges employ this limitation.

RECOMMENDATION

The provision should initially be applied to criminal cases only.

Currently, all but three states--Illinois, Indiana and Nevada--allow peremptory challenges to be exercised in both criminal and civil cases. However, to keep the potential negative effects of the procedure at the federal level to a minimum, it is suggested that during an initial experimental stage the challenge be restricted to criminal cases. Such an approach would also eliminate the difficulties inherent in complex civil litigation.

Restricting peremptory challenges to criminal cases is currently the procedure used successfully in Illinois. If the experiment produces similar results, strong consideration should be given to extending the right to civil proceedings.

If Congress decides to include civil litigation within a peremptory challenge statute it may nonetheless be advisable to prohibit peremptions in bankruptcy proceedings. Today, 58 district courts have fewer than three bankruptcy judges. The potential administrative problems and costs, even with

relatively infrequent peremptory challenges, could be overwhelming. To avoid this possibility it is recommended that, if peremptory challenges are allowed in civil proceedings, they should initially be prohibited in bankruptcy proceedings.

RECOMMENDATION

> **The provision should include a clause prohibiting the exercise of peremptory challenges in any proceeding for contempt committed in the presence of the court.**

To avoid delays and an unnecessary diminution of a judge's authority, the provision should prohibit use of the challenge in any proceeding for contempt committed in the presence of the court. The clause might be modeled after that which is currently used in South Dakota.

RECOMMENDATION

> **The provision should limit the number of challenges to one per side.**

The number of peremptory challenges which may be exercised in the states is carefully restricted to prevent delay, judge-shopping and numerous administrative difficulties. Most states allow one per party. However, even with this limitation several challenges may be exercised in a single case when multiple parties are involved. To avoid this possibility and the potential problems which may arise, it appears prudent to initially restrict challenges to one per side. In instances where the various parties on a single side are unable to agree, the trial judge, in his discretion, should be allowed to grant the defendants more than one challenge. This procedure is used in Alaska. Allowing one challenge per side has been used successfully there and in California, Illinois and Wisconsin.

be liberal enough to allow the individuals involved requisite time to file the affidavit. At the same time, it must be strict enough to prevent litigants from using the procedure to substitute judges once an unfavorable ruling has been made or to prevent undue interference with the efficient scheduling of hearings and trials. Time frames also must outline (a) when a challenge can be made prior to the first hearing or trial, (b) when it can be exercised once a peremption has been exercised by the opposing party or attorney and a substitute judge is assigned, (c) when a mistrial is declared, and (d) when an appellate court orders a new trial.

To prevent attorneys or litigants from using the challenge to substitute a judge after he has issued an unfavorable ruling, a specific structure should be incorporated into the federal provision prohibiting the exercise of a challenge after any ruling whatsoever has been made in the case. However, as in the state of Washington, it may be desirable to specifically exclude "rulings" on (a) the arrangement of the calendar, (b) the setting of an action, motion or proceeding for hearing or trial, (c) the arraignment of the accused, and (d) the fixing of bail.

It seems most reasonable to restrict the time in which an initial challenge can be made to 10 days after the judge is assigned. This procedure has worked well in Arizona, Illinois, Montana and North Dakota. Similarly, the opposing party or attorney should be allowed 10 days after the initial challenge has been made to exercise his right to a challenge. This time frame is also used successfully in several states. Similar time frames could be adopted in instances where mistrials are declared or new trials are ordered by appellate courts.

RECOMMENDATION

The provision should include a clause declaring that the time frames in the Speedy Trial Act begin anew on the date an application for reassignment is made.

Some commentators have suggested that delays resulting from peremptory challenges may not be exempted from the Speedy Trial Act. If so, a defendant could invoke the right and delay trial until after the statutory time limitations have expired. To avoid this abuse the provision should include a clause declaring that the time frames of the Speedy Trial Act begin anew on the date a challenge is exercised. This procedure is found in the Idaho provisions and appears to work very well.

RECOMMENDATION

The provision should outline when the right to a peremptory challenge has been waived.

Most states do not have explicit provisions outlining when the right to a peremptory challenge has been waived. In some instances this has led to controversies about the consequences of not complying with the time restrictions. To avoid such difficulties it is recommended that a clause be included detailing when the right to a peremptory challenge has been waived. Provisions in the six states which currently use them may serve as a model. In those states the right is lost (1) if a party once agrees to the assignment of a judge or, (2) if a party participates before a judge in any omnibus hearing, any subsequent pretrial hearing or the commencement of a trial.

RECOMMENDATION

The provision should mandate a procedure which will allow judges to recuse themselves before a formal application for reassignment is filed.

The mere filing of a pleading seeking removal, no matter how neutral the phraseology of its title, is a source of irritation to some judges. For this reason proponents of peremptions suggest that it is preferable to afford judges an opportunity to initially recuse themselves once they are made aware that an application for reassignment will be filed. Voluntary withdrawal, it is argued, leads to greater public confidence in the judiciary than the practice of involuntary removal.

To deal with these concerns it is recommended that an informal procedure be established which will allow judges to recuse themselves, at the request of a litigant or attorney, before a formal application for reassignment is filed. This procedure is currently used in South Dakota, and the federal provision could be modeled after it. There, three informal methods are provided: (1) letter, (2) oral communication, and (3) dictation into the record in open court or chambers. If the challenged judge refuses to recuse himself, the parties are notified in writing and the more formal procedures may be initiated.

RECOMMENDATION

> **The provision should contain a requirement that attorneys explain the right of a challenge to their clients.**

To prevent the peremptory challenge from becoming the exclusive domain of attorneys the provisions should mandate that lawyers explain the right to their clients. Further, they should be required to inform clients when they themselves intend to file an application for reassignment. Finally, this aspect of the provision should include the requirement that attorneys explain that the right should not be exercised frivolously or in hopes of gaining delay and that

the client should truly believe that he will not receive a fair trial if brought before the assigned judge.

RECOMMENDATION

The pleading should require a statement under oath by the party or attorney invoking the challenge that it is not being filed frivolously.

There is little doubt that a system of peremptory challenges will be abused by some parties and attorneys. To help keep this to a minimum the individual filing an application for reassignment should be required to swear under oath that it is submitted in good faith and not to hinder, delay or obstruct the administration of justice. Requiring attorneys and litigants to sign such a statement calls attention to the seriousness of exercising the right and serves as a reminder that it should not be used routinely. Similar requirements are perceived as effective in the provisions of at least nine states.

RECOMMENDATION

The pleading should require a general statement about why the challenge is being exercised.

Some judges become personally irritated when affidavits of disqualification are filed against them. The more specific the allegations the greater the possibility that the judge will be affected by the challenge and the greater the chance that he will not remain objective in future cases involving the same litigants or attorneys. Subliminal reprisals might even extend to partners of the attorney's law firm. To reduce the potential negative impact of these problems as well as to avoid damaging the reputations of innocent judges (who do not have the opportunity to refute the charges), it appears preferable to prohibit the stating of any allegations whatsoever in the pleading. However, such an

approach raises serious constitutional questions. Of particular concern is the Separation of Powers Doctrine. To date, only one state supreme court has upheld a statute not requiring an allegation of bias or prejudice, while several others have rejected them.

To minimize the chance that a federal provision will be declared unconstitutional, it should be required that the pleading contain a general statement that the party or attorney believes he cannot receive a fair trial. No reference should be made to the judge. If it is believed that such a statement is not sufficient to protect the provision from constitutional condemnation, wording might be incorporated requiring the party or attorney to state he believes that on account of a personal attribute, bias, prejudice or interest of the judge he cannot obtain a fair and impartial trial. Similar phrases have protected peremptory challenge provisions in the states from being declared unconstitutional.

RECOMMENDATION

> **The provision should require the individual invoking the challenge to notify the perempted judge, the chief judge, the court clerk, the court administrator and all parties involved.**

In several states the court clerk is charged with the responsibility of notifying the judges, attorneys and litigants involved that a challenge has been made. In some instances, as in Washington, they are required to send certified copies. This procedure places additional administrative burdens on court clerks which seem unnecessary. It appears preferable to mandate that the person invoking the challenge be responsible for notifying all appropriate individuals. This practice is currently used successfully in at least eight states.

The notice should be sent by certified mail to avoid questions about when the time frame for invoking the challenge begins for the other side. To avoid unnecessary delays the provision should contain a requirement that the notification be mailed within a short period of time, perhaps 24 hours, after an application for reassignment is filed.

RECOMMENDATION

The provision should require that a system of random assignments be used for selecting the substitute judge.

Most states authorize the chief judge of the court in which a trial judge is challenged to secure a substitute. In some instances the process is random but in others it is not. In Illinois and Montana, for example, the challenged judge is allowed to choose the substitute. A widely-held perception in these non-random systems is that a substitute judge is purposefully selected who will be even more detrimental to the individual invoking the challenge than the originally assigned judge. When in fact this actually occurs, or when it is perceived to occur, there is a hesitancy on the part of parties and attorneys to exercise the challenge even when there are genuinely legitimate reasons. This severly limits the use of peremptory challenges and interferes with the goal of achieving a fair trial.

To avoid this problem a federal provision should provide for a random system of assignment. The chief judge of the district should be responsible for the system in districts with three or more judges. In districts with only one or two judges, or in instances when the chief trial judge is challenged, the chief judge of the circuit should be responsible for the system.

RECOMMENDATION

> The provision should require the individual responsible for calendaring cases to reassign them immediately upon receipt of an application for reassignment.

One of the greatest potential abuses of peremptory challenges is that they will be used by unscrupulous litigants and attorneys to delay their cases. In some states, before strict time frames were established, it is clear that peremptions were often used for this purpose. Even with carefully drawn time restrictions litigants and attorneys may effectively use the challenge to gain a continuance. To reduce this possibility the individual responsible for calendaring cases should be required to reassign them immediately upon receipt of an application for reassignment. Moreover, once the random assignment has been made, every effort should be expended to schedule the hearing or trial during approximately the same time period in which it was originally scheduled to be heard. In other words, the case should not automatically be placed at the bottom of the substitute judge's docket.

RECOMMENDATION

> The provision should include a clause requiring that accurate statistics be kept by each court on the number of self-initiated recusals, voluntary recusals resulting from requests by parties and attorneys, and applications for reassignment.

One of the difficulties in assessing the consequences of peremptory challenge provisions is determining how frequently they are used. In some states challenges go unrecorded because judges voluntarily recuse themselves once the right is exercised. In others, clerks or assignment judges automatically exclude the assignment of judges they perceive will be

challenged. In still others, clerks take little care in compiling accurate statistics, are told not to keep statistics, or intentionally or unintentionally under or over report the frequency with which challenges are exercised. Because an experimental federal provision is being recommended it is important to compile accurate data for analysis at the end of the trial period. Minnesota has such a clause in its provision and it apears to be working very well.

Appendix A:

State Statutes and Court Rules On Judicial Peremptory Challenge Provisions

ALASKA

STATE STATUTES

Alaska Stat. sec. 22.20.022 (1976)

> 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.
>
> (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 signed to a judge, whichever event occurs later, unless good cause is shown for the failure to file it within that time.
>
> (d) A party or a party's attorney may not file more than one affidavit under this section in an action and no more than two affidavits in an action.

COURT RULES

Alaska R. Crim. P. 25(d)

> (d) Change of Judge as a Matter of Right. In all courts of the state, 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 five 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 names 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.

(4) Timeliness. Failure to file a timely request precludes a change of judge under this rule as a matter of right.

(5) Waiver. A party loses his rights under this rule to change a judge when he agrees to the assignment of the case to a particular judge or participates before him in an omnibus hearing, any subsequent pretrial hearing, a hearing under Rule 11, or the commencement of trial. No provision of this rule shall bar a stipulation as to the judge before whom a plea of guilty or of nolo contendere shall be taken under Rule 11.

Alaska Civ. R. Ct. 42(c)

(c) 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 Proceedings. 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 action shall constitute an exercise of the requesting party's right to change of judge.

(2) Filing and Service. The notice of change of judge shall be filed and copies served on the parties, the presiding judge, and the area court administrator, if any, in accordance with Rule 5, Alaska Rules of Civil Procedure.

(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. In a court location having a single resident judge of the level of court in which the case is filed, the case shall be assigned to that judge when it is at issue upon a question of fact and the clerk shall immediately notify the parties in writing of such assignment. 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 the 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.

(5) 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. Should that judge be challenged, the presiding judge shall continue to assign the case to new judges within the judicial district until all parties have

exercised or waived their right to change of judge or until all superior court judges, or all district court judges, within the judicial district have been challenged peremptorily or for cause. Should all such judges in the district be disqualified, the presiding judge shall immediately notify the administrative director in writing and request that he obtain from the Chief Justice an order assigning the case to another judge.

If a judge to whom an action has been assigned later becomes unavailable because of death, illness, or other physical or legal incapacity, the parties shall be restored to their several positions and rights under this rule as they existed immediately before the assignment of the action to such judge.

STATE STATUTES

Ariz. Rev. Stat. Ann. ch. 4 sec. 12-409 (civil)

§12-409. Change of judge; grounds; affidavit

A. If either party to a civil action in a superior court files an affidavit alleging any of the grounds specified in subsection B, the judge shall at once transfer the action to another division of the court if there is more than one division, or shall request a judge of the superior court of another county to preside at the trial of the action.

B. Grounds which may be alleged as provided in subsection A for change of judge are:

1. That the judge has been engaged as counsel in the action prior to appointment or election as judge.

2. That the judge is otherwise interested in the action.

3. That the judge is of kin or related to either party to the action.

4. That the judge is a material witness in the action.

5. That the party filing the affidavit has cause to believe and does believe that on account of the bias, prejudice, or interest of the judge he cannot obtain a fair and impartial trial.

COURT RULES

Ariz. R. Crim. P. 10.2, 10.4-10.6

Rule 10.2 Change of judge upon request

a. Entitlement. In any criminal case in Superior Court, any party shall be entitled to request a change of judge.

b. Procedure. A party may exercise his right to a change of judge by filing a pleading entitled "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. Assignment to another judge shall be made in accordance with the provisions of this rule.

c. Time for Filing. A notice of change of judge shall be filed, or informal request made, within 10 days after any of the following:

1. Arraignment, if the case is assigned to a judge and the parties are given actual notice of such assignment at or prior to the arraignment;

2. Filing of the mandate from an Appellate Court with the clerk of the Superior Court;

3. In all other cases, actual notice to the requesting party of the assignment of the case to a judge.

Rule 10.4 Waiver and renewal

a. Waiver. A party loses his right under Rule 10.2 to a change of judge when he participates before that judge in any contested matter in the case, an omnibus hearing, any pretrial hearing, a proceeding under Rule 17, or the commencement of trial. A party loses his right under Rules 10.1 and 10.3 when he allows a proceeding to commence or continue without objection after learning of the cause for challenge.

b. Renewal. When an action is remanded by an Appellate Court for a new trial on one or more offenses charged in the indictment or information, all rights to change of judge or place of trial are renewed, and no event connected with the first trial shall constitute a waiver.

Rule 10.5 Transfer to another judge or county

a. Designation of New Judge. After a request under Rule 10.2 has been filed or a motion under Rules 10.1 or 10.3 granted, the case shall be transferred immediately to the presiding judge who shall reassign the case to a new judge. No further change of judge under Rule 10.2 shall be permitted to the party making such request. If there are multiple defendants, notice of change of judge by one or more defendants pursuant to Rules 10.1 or 10.2 does not require a change as to the other defendants, even though such notice of change of judge may result in severance for trial purposes.

b. Proceedings on Transfer. When a transfer is ordered, the judge or clerk shall transmit to the new judge all papers in the proceeding. In addition, if the case is

transferred to another county, the clerk shall transmit to the clerk of the court to which the proceedings are transferred all papers in the proceeding, any evidence in his custody, and any appearance bond or security taken, and the sheriff shall transfer custody of the defendant, if in custody, to the sheriff of the county to which the proceeding is transferred. The file shall retain the case number and designation of the originating county.

Rule 10.6 Duty of judge upon filing of motion or request under Rule 10.1 or 10.2.

When a motion or 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 necessary in the interest of justice before the action can be transferred to the presiding judge. However, if the named judge is the presiding judge, he shall continue to perform the functions of the presiding judge.

Ariz. R. Civ. P. 42(f)

42(f) Change of judge.

1. Change as a matter of right.

(A) Nature of proceedings. In any action pending in superior court, each side is entitled as a matter of right to a change of one judge and of one court commissioner. Each action, whether single or consolidated, shall be treated as having only two sides. Whenever two or more parties on a side have adverse or hostile interests, the presiding judge may allow additional changes of judge as a matter of right but each side shall have the right to the same number of such changes. 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 requesting change of judge. Such action shall constitute an exercise of the requesting party's right to change of judge.

(B) Filing and service. The notice shall be filed and copies served on the parties, the presiding judge and the court administrator, if any, in accordance with Rule 5, Arizona Rules of Civil Procedure.

(C) Time. Failure to file a timely notice precludes change of judge as a matter of right. A notice is timely if filed sixty (60) or more days before the date set for trial. Whenever an assignment is made which identifies the trial judge for the first time or which changes the trial judge, a notice shall be timely filed as to the newly assigned judge if filed within ten (10) days after such new assignment and before trial commences.

(D) Waiver. A party waives his right to change of judge as a matter of right when, after a judge is assigned to preside at trial or is otherwise permanently assigned to the action, the party agrees to the assignment or participates before the 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 a trial.

(iv) If the party agrees upon a judge to whom the case is to be assigned.

Such waiver is to apply only to such assigned judge.

(E) Cases remanded from appellate courts. When an action is remanded by an appellate court and the opinion or order requires a new trial on one or more issues, then all rights to change of judge are renewed and no event connected with the first trial shall constitute a waiver.

(F) Assignment of action. At the time of the filing of a notice of change of judge, the parties shall inform the court in writing if they have agreed upon a judge who is available and is willing to have the action assigned to him. An agreement of all parties upon such judge shall be honored and shall preclude further changes of judge as a matter of right unless the judge agreed upon becomes unavailable. If no judge has been agreed upon, then the presiding judge shall immediately reassign the action.

If a judge to whom an action has been assigned by agreement later becomes unavailable because of a change of calendar assignment, death, illness or other legal incapacity, the parties shall be restored to their several positions and rights under this rule as they existed immediately before the assignment of the action to such judge.

CALIFORNIA

STATE STATUTES

Cal. Civ. Proc. Code sec. 170.6 (1982)

§170.6. Peremptory Challenge.

(1) No judge, court commissioner, or referee of any superior, municipal or justice court of the State of California shall try any civil or criminal action or special proceeding of any kind or character nor hear any matter therein which involves a contested issue of law or fact when it shall be established as hereinafter provided that such judge or court commissioner is prejudiced against any party or attorney or the interest of any party or attorney appearing in such action or proceeding.

(2) Any party to or any attorney appearing in any such action or proceeding may establish such prejudice by an oral or written motion without notice supported by affidavit or declaration under penalty of perjury or an oral statement under oath that the judge, court commissioner, or referee before whom such action or proceeding is pending or to whom it is assigned is prejudiced against any such party or attorney or the interest of such party or attorney so that such party or attorney cannot or believes that he cannot have a fair and impartial trial or hearing before such judge, court commissioner, or referee. Where the judge, court commissioner, or referee assigned to or who is scheduled to try the cause or hear the matter is known at least 10 days before the date set for trial or hearing, the motion shall be made at least five days before that date. If directed to the trial of a cause where there is a master calendar, the motion shall be made to the judge supervising the master calendar not later than the time the cause is assigned for trial. If the court in which the action is pending is authorized to have no more than one judge and the motion claims that the duly elected or appointed judge of that court is prejudiced, the motion shall be made before the expiration of 30 days from the date of the first appearance in the action of the party who is making the motion or whose attorney is making the motion. In no event shall any judge, court commissioner, or referee entertain such motion if it be made after the drawing of the name of the first juror, or if there be no jury, after the making of an opening statement by counsel for plaintiff, or if there be no such statement, then after swearing in the first witness or the giving of any evidence or after trial of the cause has otherwise commenced. If the motion is directed to a hearing (other than the trial of a cause),

the motion must be made not later than the commencement of the hearing. In the case of trials or hearings not herein specifically provided for, the procedure herein specified shall be followed as nearly as may be. The fact that a judge, court commissioner, or referee has presided at or acted in connection with a pretrial conference or other hearing, proceeding or motion prior to trial and not involving a determination of contested fact issues relating to the merits shall not preclude the later making of the motion provided for herein at the time and in the manner herein before provided.

(3) If such motion is duly presented and such affidavit or declaration under penalty of perjury is duly filed or such oral statement under oath is duly made, thereupon and without any further act or proof, the judge supervising the master calendar, if any, shall assign some other judge, court commissioner, or referee to try the cause or hear the matter. In other cases, the trial of the cause or the hearing of the matter shall be assigned or transferred to another judge, court commissioner, or referee of the court in which the trial or matter is pending or, if there is no other judge, court commissioner, or referee of the court in which the trial or matter is pending, the Chairman of the Judicial Council shall assign some other judge, court commissioner, or referee to try such cause or hear such matter as promptly as possible. Under no circumstances shall a party or attorney be permitted to make more than one such motion in any one action or special proceeding pursuant to this section; and in actions or special proceedings where there may be more than one plaintiff or similar party or more than one defendant or similar party appearing in the action or special proceeding, only one motion for each side may be made in any one action or special proceeding.

(4) Unless required for the convenience of the court or unless good cause is shown, a continuance of the trial or hearing shall not be granted by reason of the making of a motion under this section. If a continuance is granted, the cause or matter shall be continued from day to day or for other limited periods upon the trial or other calendar and shall be reassigned or transferred for trial or hearing as promptly as possible.

(5) Any affidavit filed pursuant to this section shall be in substantially the following form:

(Here set forth court and cause)

	)	PEREMPTORY
State of California,	) ss.	
County of	)	CHALLENGE
	)	

.....being duly sworn, deposes and says: That he is a party (or attorney for a party) to the within action (or special proceeding). That.....the judge, court commissioner, or referee before whom the trial of the (or a hearing in the) aforesaid action (or special proceeding) is pending (or to whom it is assigned), is prejudiced against the party (or his attorney) or the interest of the party (or his attorney) so that affiant cannot or believes that he cannot have a fair and impartial trial or hearing before such judge, court commissioner, or referee.

.....

Subscribed and sworn to before me this.....
day of....., 19..

(Clerk or notary public or other officer administering oath)

(6) Any oral statement under oath or declaration under penalty of perjury made pursuant to this section shall include substantially the same contents as the affidavit above.

(7) Nothing in this section shall affect or limit the provisions of Section 170 and Title 4, Part 2, of this code and this section shall be construed as cumulative thereto.

(8) If any provision of this section or the application to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of the section which can be given effect without the invalid provision or application and to this end the provisions of this section are declared to be severable.

COURT RULES

(There are no court rules concerning judicial peremptory challenges in California.)

IDAHO

STATE STATUTES

(There are no state statutes concerning judicial peremptory challenges in Idaho)

COURT RULES

Idaho Crim. R 25 (1983)

First disqualification of judge.- In any action the district court or the magistrates division thereof, any party may disqualify one (1) judge by filing a motion of disqualification which shall not require the stating of any grounds therefor, and the granting of such motion for disqualification, if timely, shall be automatic. A motion for automatic disqualification shall not be made under this rule to hinder, delay or obstruct the administration of justice. Such motion must be made not later than 5 days after service of a notice setting the action for trial, pre-trial, or hearing on the first contested motion, and must be made before any contested proceeding in such action has been submitted for decision to the judge; provided, where a new trial has been ordered by the trial court or any appellate court on appeal, any party may make such motion not later than five (5) days after service of an order setting the action for re-trial. In the event there are multiple parties plaintiff, defendant or otherwise, the trial court shall determine whether such coparties have an interest in common in the action so as to be required to join in any automatic disqualification, or that such coparties have an adverse interest in the action so that each adverse coparty will have the right to file one (1) automatic disqualification. The right to one (1) automatic disqualification under this rule shall not apply to a district judge when acting in an appellate capacity rather than in a fact finding capacity. The right to one (1) automatic disqualification under this rule shall not apply to a post-conviction proceeding under Chapter 49 of Title 19. Idaho Code, when that proceeding has been assigned to the judge who entered the judgement and sentence being challenged by that proceeding, but if the proceeding is assigned to another judge, the petitioner may exercise the automatic disqualification under this rule within seven (7) days after service of an answer or motion to the petition for post conviction relief, in the event a defendant disqualifies a judge under this rule, the time within which a defendant must be given a speedy trial or a trial pursuant to sec. 19-3501 Idaho Code, shall commence to run anew on the date of such disqualification."

Idaho R. Civ. P. 40(d)(1)(1983)

Rule 40(d)(1). First disqualification of judge. - In any action in the district court or the magistrates division thereof, any party may disqualify one (1) judge by filing a motion of disqualification which shall not require the stating of any grounds therefor, and the granting of such motion for disqualification, if timely, shall be automatic. A motion for automatic disqualification shall not be made under this rule to hinder, delay or obstruct the administration of justice. Such motion must be made not later than 5 days after service of a notice setting the action for trial, pre-trial, or hearing on the first contested motion, and must be made before any contested proceeding in such action has been submitted for decision to the judge; provided, where a new trial has been ordered by the trial court or any appellate court on appeal, any party may make such motion not later than five (5) days after service of an order setting the action for re-trial. In the event there are multiple parties plaintiff, defendant or otherwise, the trial court shall determine whether such coparties have an interest in common in the action so as to be required to join in any automatic disqualifcation, or that such coparties have an adverse interest in the action so that each adverse coparty will have the right to file one (1) automatic disqualification. The right to one (1) automatic disqualification under this rule shall not apply to a district judge when action in an appellate capacity rather than in a fact finding capacity. The right to one (1) automatic disqualification under this rule shall not apply to a post-conviction proceeding under Chapter 49 of Title 19. Idaho Code, when that proceeding has been assigned to the judge who entered the judgment and sentence being challenged by that proceeding, but if the proceeding is assigned to another judge, the petitioner may exercise automatic disqualification under this rule within seven (7) days after service of an answer or motion to the petition for post-conviction relief.

STATE STATUTES

Ill. Crim. Law and Proc. ch. 38, secs. 114-15 (1979).

§114-5. Substitution of Judge. (a) Within 10 days after a cause involving only one defendant has been placed on the trial call of a judge the defendent may move the court in writing for a substitution of that judge on the ground that such judge is so prejudiced against him that he cannot receive a fair trial. Upon the filing of such a motion the court shall proceed no further in the cause but shall transfer it to another judge not named in the motion. The defendant may name only one judge as prejudiced, pursuant to this subsection; provided, however, that in a case in which the offense charged is a Class X felony or may be punished by death or life imprisonment, the defendant may name two judges as prejudiced.

(b) Within 24 hours after a motion is made for substitution of judge in a cause with multiple defendants each defendant shall have the right to move in accordance with subsection (a) of this Section for a substitution of one judge. The total number of judges named as prejudiced by all defendants shall not exceed the total number of defendants. The first motion for substitution of judge in a cause with multiple defendants shall be made within 10 days after the cause has been placed on the trial call of a judge.

(c) In addition to the provisions of subsections (a) and (b) of this Section any defendant may move at any time for substitution of judge for cause, supported by affidavit. Upon the filing of such motion a hearing shall be conducted as soon as possible after its filing by a judge not named in the motion provided, however, that the judge named in the motion need not testify, but may submit an affidavit if the judge wishes. If the motion is allowed, the case shall be assigned to a judge not named in the motion. If the motion is denied the case shall be assigned back to the judge named in the motion.

COURT RULES

(There are no court rules concerning judicial peremptory challenges in Illinois)

INDIANA

STATE STATUTES

(There are no controlling statutes concerning judicial peremptory challenges in Indiana.)

COURT RULES

Ind. R. Trial P. 76 (1984)

Trial Rule 76
CHANGE OF VENUE

(1) In all cases where the venue of a civil action may now be changed from the judge or the county, such change shall be granted upon the filing of an unverified application or motion without specifically stating the ground therefor by a party or his attorney. Provided, however, a party shall be entitled to only one (1) change from the county and only one (1) change from the judge.

(2) In any action except criminal no change of judge of venue from the county shall be granted except within the time herein provided. Any such application for a change of judge or change of venue shall be filed not later than ten (10) days after the issues are first closed on the merits.

(3) Provided, however, in those cases where no pleading or answer may be required to be filed by the defending party to close issues (or no responsive pleading is required under a statute), each party shall have thirty (30) days after the filing of such case within which to request a change from the judge or the county.

(4) Provided further, in those cases of claims in probate and receivership proceedings and remonstrances and similar matters, the parties thereto shall have thirty (30) days from the date the same is placed and entered on the issues and trial docket of the court.

(5) Provided further, when a new trial is granted, whether the result of an appeal or not, the parties thereto shall have ten (10) days from the date the order granting the new trial is entered on the record of the trial court.

(6) Provided further, in the event a change is granted from the judge or county within the prescribed period, as stated above, a request for a change of judge or county may be made by a party still entitled thereto within ten (10) days after the special judge has qualified or the moving party has knowledge the cause has reached the receiving county or there has been a failure to perfect the change. Provided, however, this subdivision (6) shall operate only to enlarge the time allowed for such request under such circumstances, and it shall not operate to reduce the period prescribed in subdivisions (2), (3), (4) or (5).

(7) Provided further, a party shall be deemed to have waived a request for a change of judge or county if a cause is set for trial before the expiration by an order-book entry and no objection is made thereto by a party as soon as such party learns of the setting for trial. Such objection, however, must be made promptly and entered of record, accompanied with a motion for a change from the judge or county (as the case may be) and filed with the court.

(8) Provided, however, if the moving party first obtains knowledge of the grounds for change of venue from the county or judge after the time above limited, he may file said application, which must be verified personally by the party himself, specifically alleging when the cause was first discovered, how discovered, the facts showing the grounds for a change, and why such cause could not have been discovered before by the exercise of due diligence. Any opposing party shall have the right to file counter-affidavits on such issue within ten (10) days, and the ruling of the court may be reviewed only for abuse of discretion.

(9) Whenever a change of venue from the county is granted, if the parties to such action shall agree in open court, within three (3) days from the granting of the motion or affidavit for the change of venue, upon the county to which the change of venue shall be changed, it shall be the duty of the court to transfer such action to such county. In the absence of such agreement, it shall be the duty of the court within two (2) days thereafter to submit to the parties a written list of all the counties adjoining the county from which the venue is changed, and the parties within seven (7) days thereafter, or within such time, not to exceed fourteen (14) days, as the court shall fix, shall each alternately strike off the names of such counties. The party first filing such motion shall strike first.

and the action shall be sent to the county remaining not stricken under such procedure. If a moving party fails to so strike within said time, he shall not be entitled to a change of venue, and the court shall resume general jurisdiction of the cause. If the nonmoving party fails to strike off the names of such counties within the time limited, then the clerk shall strike off such names for such party. (As amended March 28, 1972.)

Ind. R. Trial P. 79 (1984)

Trial Rule 79
SPECIAL JUDGES-SELECTION

Hereafter whenever in any proceeding, whether civil, statutory or criminal, except in actions under Trial Rule 60.5, in any court except the courts of magistrates, it shall become necessary to select a special judge, the exclusive manner of his selection shall be as follows:

(1) Whenever the regular judge or presiding judge of any court or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such person

(a) Is a party to the proceeding or an officer, director or trustee or a party, or

(b) Is acting as a lawyer in the proceeding, or

(c) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding.

the venue of which is before such judge, he shall disqualify himself immediately and cause such fact to be certified to the Supreme Court which shall thereupon appoint a special judge.

(2) In an adversary proceeding the parties shall endeavor in good faith to agree and any person, eligible as hereinafter defined, who shall be designated by their agreement shall be appointed. Provided, however, that the provisions of this subdivision shall not apply in any criminal, dissolution of marriage or annulment of marriage proceeding or matter, nor an election contest involving the nomination or election of the judge of the court in which such contest is filed.

(3) If the parties fail or have no right to agree upon an appointee as provided for in subdivision (2) the parties may agree or the party in an exparte proceeding may consent to the selection and appointment of a special judge by the judge before whom the case is then pending or, if there be no such judge, by the regular judge of the court wherein said proceeding is pending.

(4) If neither method provided for the subdivisions (2) and (3) for the selection of a special judge be adopted, then the presiding judge, or if there be no such judge, the regular judge of the court, shall submit a list of three (3) persons from which by striking, an appointee may be selected. In an adversary proceeding each party shall strike one (1) name and in an exparte proceeding said party shall be entitled to strike one (1) name from such list. The moving party shall strike first. From the name or names remaining the judge submitting such list shall select and appoint the special judge.

In cases other than those enumerated in subdivision (1) where a judge on his own motion disqualifies himself, the plaintiff side shall strike first. If the special judge selected hereunder qualifies then subsequently becomes disqualified by reason other than the filing of a motion for change from the judge, or disqualifies himself, such fact shall be certified to the Supreme Court which thereupon shall appoint a special judge.

(5) If a special judge selected by any of the means aforesaid shall not within ten (10) days after his appointment appear and qualify, his failure so to do shall revoke his appointment and it shall be the duty of the presiding judge, or if there be none, the regular judge of the court, to select another as such special judge in the same manner as is herein provided for the original selection of the special judge.

(6) If, after two (2) panels for the appointment of a special judge have been submitted for striking in any case, and when, after striking from such second panel, a special judge has been named, but, after ten (10) days the judge so selected has failed to qualify or, having qualified has become disqualified, such facts shall be certified to the Supreme Court which shall thereupon appoint a special judge.

(7) In the event any special judge appointed by the court of appeals in any case shall fail, neglect or refuse within ten (10) days after his appointment to appear and qualify or after assuming jurisdiction shall otherwise become disqualified or unable to continue jurisdiction, such failure, refusal, disqualification or inability to continue jurisdiction shall be certified to the Supreme Court for the selection by it of another special judge.

(8) Provided, however, subdivisions (1), (6) and (7) shall not apply to any court from which an appeal is allowed to the circuit court or a court of coordinate jurisdiction.

(9) All of the proceedings hereunder shall be taken expeditiously. It shall be the duty of the party who files an application or motion for change of judge to bring it to the attention of the presiding judge although the opposing party may do so. In all other cases when it becomes necessary to select a special judge either party may bring this fact to the attention of the judge authorized to make such selection.

(10) When it becomes necessary to submit a written list under subdivision (4) of this rule, the presiding judge, within two (2) days after his attention has been called to that fact, shall submit to the party or parties a written list in accordance with subdivision (4) of this rule. The party or parties shall strike from the written list as provided in subdivision (4) of this rule within not less than seven (7) nor more than fourteen (14) days thereafter as the court may allow. If the moving party fails to strike within the time allowed, he shall not be entitled to a change of venue from the judge and the presiding judge shall resume jurisdiction over the case. If the non-moving party fails to strike within the time allowed, the clerk shall strike for him.

(11) Any regular judge of a circuit, superior, criminal, probate or juvenile court and any member of the bar in this state shall be eligible for appointment in any of such courts as a special judge in any case pending in which he has not sat as judge or been named on a previous panel, unless he is disqualified by interest or relationship or is then serving as bailiff, reporter, probate commissioner, referee or other such appointed official of the court in which the case is pending. In courts other than those named, a special judge shall be selected from judges of courts having the same or similar jurisdiction or from members of the bar.

(12) A special judge so selected need not reside in the county where the case is pending or an adjoining county, but his accessibility should be considered in making the selection.

(13) The term "presiding judge" as used herein shall mean the judge before whom the case is pending when it becomes necessary to select a judge under this rule.

(14) All special judges shall be paid as compensation for their services the sum of twenty-five dollars ($25.00) per day or part thereof actually served, as long as such service involved the physical presence of special judges in the courts where they served as special judges. No regular judge shall be compensated as special judge in any case in any court in the county in which he presides unless such court and case are located in a different city. In the event special judges resided outside the county in which they served as special judges, they shall be entitled to mileage at a rate equal to the allowable mileage rate paid other public officials as established by public law of this state for each mile necessarily traveled each day in going to and returning from the place where the court was held, plus motel or hotel accommodations and reimbursement for meals. Compensation for special judges shall be paid as follows: on presentation of an order made by the court below for the allowance specifying the time or service, supported by an affidavit of the special judge that he actually served such time, stating the reason for the service of such special judge, the same shall be paid out of the county treasury, for the time being, for which the county shall have credit on settlement of the treasurer with the state. Such allowance shall be paid without an appropriation for same in the county where the special judges have served.

(15) Unless the special judge is unavailable by reason of death, sickness, absence or unwillingness to act, the jurisdiction of a special judge shall continue in all proceedings filed under a given cause number, including without limitation, proceedings to enforce the judgement or to modify or revoke orders pertaining to custody, visiting, support, maintenance and property dispositions and for post-conviction relief.

(16) Nothing herein shall be construed as limiting or changing the right to a change of venue from a judge as it now exists.

STATE STATUTES

Minn. Stat. Ann. sec. 487.40 (1982)

487.40. Notice to Remove (county courts)

Subd. 2. Initial and subsequent disqualification. (a) Any party or his attorney, to a cause pending in a court, within one day after it is ascertained which judge is to preside at the trial or hearing thereof, or at the hearing of any motion or order to show cause, may make and file with the clerk of the court in which the action is pending and serve on the opposite party a notice to remove. Thereupon, without any further act or proof, the chief judge of the judicial district shall assign any other judge of any court within the district to preside at the trial of the cause or the hearing of the motion or order to show cause, and the cause shall be continued on the calendar, until the assigned judge can be present. In criminal actions the notice to remove shall be made and filed with the clerk by the defendant, or his attorney, not less than two days before the expiration of the time allowed him by law to prepare for trial and in any of the cases the presiding judge shall be incapacitated to try the cause. In criminal cases, the chief judge for the purpose of securing a speedy trial, may in his discretion change the place of trial to another county.

(b) After a litigant has once disqualified a presiding judge as a matter of right under this subdivision, he may disqualify the substitute judge, but only by making an affirmative showing of prejudice. A showing that the judge might be excluded for bias from action as a juror in the matter constitutes an affirmative showing of prejudice. If a litigant makes an affirmative showing of prejudice against a substitute judge, the chief judge of the judicial district shall assign any other judge of any court within the district to hear the cause.

Minn. Stat. Ann. sec. 542.16 (1982)

542.16 Notice to Remove (district courts)

Subdivision 1. Initial Disqualification. Any party, or his attorney, to a cause pending in a district court, within one day after it is ascertained which judge is to preside at the trial or hearing thereof, or at the hearing

of any motion, order to show cause, or argument on demurrer, may make and file with the clerk of the court in which the action is pending and serve on the opposite party a notice to remove, and thereupon without any further act or proof, secure some other judge of the same or another district to preside at the trial of the cause or the hearing of the motion, demurrer, or order to show cause, and the cause shall be continued on the calendar, until another judge can be present. In criminal actions the notice to remove shall be made and filed with the clerk by the defendant, or his attorney, not less than two days before the expiration of the time allowed him by law to prepare for trial and in any of those cases the presiding judge shall be incapacitated to try the case. In criminal cases, the judge, for the purpose of securing a speedy trial, may in his discretion change the place of trial to another county.

Subdivision 2. Subsequent Disqualification. After a litigant has once disqualified a presiding judge as a matter of right under subdivision 1, he may disqualify the substitute judge, but only by making an affirmative showing of prejudice. A showing that the judge might be excluded for bias from acting as a juror in the matter constitutes an affirmative showing of prejudice. If a litigant makes an affirmative showing of prejudice against a substitute judge the chief judge of the judicial district shall assign any other judge of any court within the district to hear the cause.

Minn. R. Civ. P. 63.03 (1982) (municipal and district courts)

Rule 63.03. Affidavit of Prejudice

Any party or his attorney may make and serve on the opposing party and file with the clerk an affidavit stating that, on account of prejudice or bias on the part of the judge who is to preside at the trial or at the hearing of any motion, he has good reason to believe and does believe that he cannot have a fair trial or hearing before such judge. The affidavit shall be served and filed not less than 10 days prior to the first day of general term, or five days prior to a special term or a day fixed by notice of motion, at which the trial or hearing is to be had or, in any court having two or more judges, within one day after it is ascertained which judge is to preside at the trial or hearing. Upon the filing of such affidavit, with proof of service, the clerk shall forthwith assign the cause to another judge of the same court, or if there be only one judge of the court, then to a special municipal judge if there be one.

Minn. R. Civ. P. 63.04 (1982) (municipal and district courts)

Upon receiving notice as provided in Rule 63.02 and 63.03, the chief justice shall assign a judge of another district, accepting such assignment, to preside at the trial or hearing, and the trial or hearing shall be postponed until the judge so assigned can be present.

COURT RULES

Administrative Policy No. 10 (1984)

Policy Regarding Use of Notice to Remove and Affidavits of Prejudice.

The Conference of Chief Judges and Assistant Chief Judges met on March 23, 1984 and considered issues raised with respect to the use of notices to remove and affidavits of prejudice.

With respect to that subject and the questions raised, and with the consent and approval of the Conference of Chief Judges and Assistant Chief Judges, the State Court Administrator hereby issues the following administrative policy:

A. In regard to a litigant's right to disqualify one judge without a showing of prejudice:

(1) The filing of an affidavit of prejudice is not required. Instead, the Notice to Remove procedure set forth in Minnesota Statutes Sections 542.16, Subd. 1, and 487.40, dunf. 2(a) shall apply in both civil and criminal matters;

(2) Judges must require that notices be formally filed. Under no circumstances should a judge recuse simply because he is asked to by counsel;

(3) When a notice to remove a judge is filed, the clerk shall immediately notify the judge against whom the removal has been filed. The judge shall determine whether the notice was timely filed and advise the clerk of the determination. The clerk shall in turn notify the chief judge and the court administrator of the filing of the notice and whether it was timely;

(4) Formal assignments will be effectuated by the chief judge of the judicial district or by another judge or court administrator designated by the chief judge to perform that function.

B. After the litigant has once disqualified a judge by filing a Notice to Remove, he may disqualify the substituted judge by making an affirmative showing of prejudice and by seasonably implementing such showing by appropriate motion or by obtaining a writ of prohibition.

STATE STATUTES

Mo. Stat. Ann. sec. 545.650 (1984)

545.650. Change of venue and disqualification of judges in multiple-judge circuits

In all circuits composed of a single county having more than one judge, no change of venue shall be allowed by said circuit court to the circuit court of any other county in this state for the cause that the judge sitting for the trial of said suit is prejudiced, nor for the cause that the opposite party has undue influence over the judge, but if any such legal objection is made to the judge assigned to try any case, then such case shall be transferred to another division of said circuit court presided over by a different judge. Only one such application shall be made by the same party in the same case, and shall be made as to only one of the judges of said court. (R.S. 1939, §2232, A.1949 H.B. 2142).

COURT RULES

Mo. R. Crim. P. 32.06 - 32.09

32.06. Felonies - Preliminary Examination - Change of Judge - Procedure

a. A change of judge shall be ordered before a preliminary examination upon the filing of a written application therefor, not less than three days prior to said examination. The application need not allege or prove any reason for such change. The application need not be verified and may be signed by any party or an attorney for any party.

b. A copy of the application and a notice of the time when it will be presented to the court shall be served on all parties.

c. If the application is timely filed the judge shall promptly sustain the application and notify the presiding judge who shall assign a judge within the circuit or request this court to transfer a judge.

32.07. Misdemeanors or Felonies - Change of Judge - Procedure

a) A change of judge shall be ordered upon the filing of a written application therefor by any party. The applicant need not allege or prove any reason for each change. The application need not be verified and may be signed by any party or an attorney for any party.

b) In misdemeanor cases the application must be filed not later than ten days before the date set for trial. If the designation of the trial judge occurs less then ten days before trial, the application may be filed anytime prior to trial.

c) In felony cases the application must be filed not later than thirty days after arraignment if the trial judge is designated at arraignment. If the trial judge is not designated at arraignment, the application must be filed no later than thirty days after the designation of the trial judge and notification to the parties or their attorneys. If the designation of the trial judge occurs less than thirty days before trial, the application must be filed prior to commencement of any proceeding on the record.

d) A copy of the application and a notice of the time when it will be presented to the court shall be served on all parties.

e) If the application is timely filed, the judge shall promptly sustain the application, and:

(1) If the case is being heard by an associate circuit judge, the judge shall notify the presiding judge who shall assign a judge within the circuit or request this Court to transfer a judge.

(2) If the case is being heard by the only circuit judge in the circuit, or by an associate circuit judge after the disqualification of the only circuit judge in the circuit, then the judge shall request this Court to transfer a judge.

(3) If the case is being heard by a circuit judge in a circuit having two circuit judges, the judge shall transfer the case to the other circuit judge or shall request this Court to transfer a judge.

(4) If the case is being heard by a circuit judge in a circuit having three or more circuit judges, the judge shall transfer the case to the presiding judge for assignment by lot or the presiding judge may request this Court to transfer a judge or the case may be assigned in accordance with local court rules.

Rule 32.08. Misdemeanors or Felonies - Joint Application for Change of Venue and Change of Judge-When Required-Procedure-Notice Requirement

(a) A defendant who desires both a change of venue and a change of judge must join both requests in a single application.

(b) A copy of the application and notice of the time when it will be presented to the court shall be served on all parties.

(c) Upon presentation of a timely application for both a change of judge and a change of venue the judge shall promptly sustain the application for change of judge, and:

(1) If the case is being heard by an associate circuit judge, the judge shall notify the presiding judge who shall assign a judge within the circuit or request this Court to transfer a judge to rule on the application for change of venue.

(2) If the case is being heard by the only circuit judge in the circuit, or by an associate judge after the disqualification of the only circuit judge in the circuit, then the judge shall request this Court to transfer a judge to rule on the application for change of venue. If the change of venue is as a matter of right the assigned judge may order the change of venue without his appearance in the county from which the change is taken after giving all parties an opportunity to make suggestions as to where the case should be sent.

(3) If the case is being heard by a circuit judge in the circuit having two circuit judges, the judge shall transfer the case to the other circuit judge or shall request this Court to transfer a judge. If the change of venue is as a matter of right the assigned judge may order the change of venue without his appearance in the county from which the change is taken after giving all parties an opportunity to make suggestions as to where the case should be sent.

(4) If the case is being heard by a circuit judge in a circuit having three or more circuit judges, the judge shall transfer the case to the presiding judge for assignment by lot or the presiding judge may request this Court to transfer a judge or the case may be assigned in accordance with local rules. The assigned judge shall rule on the application for change of venue.

(d) If the application for change of venue is granted, the judge shall order the change of venue. If the change of venue is denied or if the change of venue is to another county in the same circuit, the judge shall continue to act, unless otherwise ordered by this Court.

Rule 32.09. Misdemeanor or Felonies-Only One Change of Venue or Change of Judge Granted to Same Party-Exception

(a) Neither the state nor any defendant shall be allowed more than one change of judge in any criminal proceeding except that the exercise of an application for change of judge prior to the preliminary examination shall not prohibit a party from filing another application for change of judge if the defendant is held to answer for the charge.

(b) No defendant shall be allowed more than one change of venue under Rules 32.01 through 32.08, inclusive.

(c) However, nothing contained in Rules 32.01 through 32.09, inclusive, shall prohibit a judge from ordering a change of venue or change of judge when fundamental fairness so requires.

Mo. R. Civ. Pro. R. 51.05

Rule 51.05. Change of Judge-Procedure

(a) A change of judge shall be ordered in any civil action upon the filing of a written application therefor by any party or by his agent or attorney. The application need not allege or prove any cause for such change of judge and need not be verified.

(b) The application must be filed at least thirty days before the trial date or within five days after trial setting date has been made, whichever date is later, unless the trial judge has not been designated within that time, in which event the application may be filed within ten days after the trial judge has been designated or at any time prior to trial, whichever date is earlier.

(c) A copy of the application and notice of the time when it will be presented to the court shall be served on all parties.

(d) Application for change of judge may be made by one or more parties in any of the following classes: (1) plaintiffs; (2) defendants; (3) third-party plaintiffs (where a separate trial has been ordered); (4) third-party defendants; (5) intervenors . Each of the foregoing classes is limited to one change of judge and any such change granted any one or more members of a class exhausts the right of all members of the class to a change of judge, with this exception: in condemnation cases involving multiple defendants, as to which separate trials are to be held, each such separate trial to determine damages shall be treated as a separate case for purposes of change of judge.

(e) Upon the presentation of a timely application for change of judge, the judge shall promptly sustain the application and:

(1) in a single judge circuit the judge shall request this Court to transfer a judge to try such case, or shall call in another circuit judge as authorized by Article V, §15, of the Constitution, or shall, if the parties so stipulate, call in another judge agreed upon by the parties;

(2) in a circuit in which there are two or more judges the judge shall transfer the civil action to another judge in the same circuit, or shall call in another judge as authorized by Article V, §15, of the Constitution, or shall request this Court to transfer a judge.

(f) If after a change of judge has been granted the action shall be removed on application of another party to some other county in the same circuit, the transferred judge shall continue as the judge therein.

Rule 51.06. Joint Application for Change of Venue and Change of Judge-When Required-Procedure

(a) If a party requests and obtains either a change of venue or a change of judge, he shall not be granted any additional change thereafter. A party who desires both a change of venue and a change of judge must join and present both in a single application.

(b) Upon the presentation of an application requesting a change of venue and a change of judge, the judge promptly shall sustain the application for change of judge, if timely filed, and:

(1) in a single judge circuit the judge shall request this Court to transfer a judge or call in another circuit judge as authorized by Article V, sec. 15, of the Constitution, to order the change of venue granted or, if a hearing is required, to determine the issues on the application for change of venue; and

(2) in a circuit having two or more judges, shall either request this Court to transfer a judge or request another judge in the same circuit to order the change of venue, or, if a hearing is required to determine the issues on the application for change of venue.

If the issues are determined in favor of the applicant, the transferred judge shall order the change of venue. If the change of venue is denied or if the change of venue is to another county in the same circuit the transferred judge shall continue to be the judge in the civil action.

STATE STATUTES

Mont. Code Ann. sec. 3-1-802(1983)

Substitution of Judges - Peremptory Challenges

Peremptory challenges shall apply only to District Court proceedings. A motion for a substitution of a judge may be made by any party to a District Court proceeding. In a civil case, each adverse party is entitled to two substitutions of a judge. In a criminal case, the state and each defendant is entitled to one substitution of a judge.

A motion for substitution of a judge shall be made by filing a written motion for substitution reading as follows:

a. "The undersigned hereby moves for substitution of another judge for Judge _____in this cause." The clerk of court shall immediately give notice to all parties and to the judge named in the motion. Upon filing this notice the judge named in the motion shall have no further power to act in the cause other than to call in another judge, which he, shall do forthwith, and to set the calendar.

b. The first district judge disqualified shall have the duty of calling in all subsequent district judges.

c. When a case is filed in a multi-judge district, it shall be the duty of the clerk of court to stamp the name of the judge to which the case is assigned on the face of the summons, order to show cause, or information and all copies thereof.

Whenever a judge is assigned a case for ten consecutive days and the attorneys of record on both sides have knowledge of the assignment for that period of time, and if during this time no motion for substitution of a judge is filed against him, all rights to move for substitution of a judge shall be deemed waived by all parties, unless the presiding judge disqualifies himself thereafter in which case the right to move for substitution of a judge is reinstated and the ten-day period starts running anew.

Whenever an acceptance of jurisdiction is filed by a new judge, it shall be the duty of the clerk of court to mail a copy of the acceptance of jurisdiction to the original judge who first had jurisdiction of the case, and a copy by certified mail with return receipt requested to each attorney of record. Service to an attorney may be made by delivery of a copy personally to the attorney or by

obtaining a written receipt from the attorney. Proof of service shall be stapled to the acceptance of jurisdiction in the file. The clerk of court shall contact the new judge accepting jurisdiction and request that judge to communicate with the judge having jurisdiction in the first instance, so that calendaring can be expeditiously handled.

When a new trial is ordered in any case, whether by order of the District Court or the Supreme Court, each adverse party shall be entitled to file one motion for substitution of a judge in the manner provided herein, whether or not that party has previously filed motions for substitution of a judge. Such motions must be filed:

a. If the new trial has been ordered by the District Court, within ten days after the time for appealing the order has elapsed.

b. If the new trial has been ordered by the Supreme Court, within ten days after notice of receipt of the remittitur has been received by the respective parties from the clerk of the District Court.

COURT RULES

Mont. Sup. Ct. R. 3-1-802 (1983).

(This rule is identical to the state statute.)

STATE STATUTES

(There are no statutes concerning judicial peremptory challenges in Nevada).

COURT RULES

Nev. S.C. R. 48.1 (1982).

Rule 48.1. Procedure for change of judge by peremptory challenge.

1. In any civil action pending in a district court, which has not been appealed from a lower court, each side is entitled, as a matter of right to one change of judge by peremptory challenge. Each action or proceeding, whether single or consolidated, shall be treated as having only two sides. A party wishing to exercise his right to change of judge shall file a pleading entitled "Peremptory Challenge of Judge." The notice may be signed by a party or 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. If one of two or more parties on one side of an action files a peremptory challenge, no other party on that side may file a separate challenge.

2. A notice of peremptory challenge of judge shall be filed in writing with the clerk of the court in which the case is pending and a copy served on the opposing party. The filing shall be accompanied by a fee of $100, which the clerk shall transmit to the state treasurer. The fee shall be deposited in the state treasury to the credit of the state general fund for the support of district judges' travel.

3. Except as provided in subsection 4, the peremptory challenge shall be filed:

(a) Not less than 30 days before the date set for trial or hearing of the case; or

(b) Not less than 3 days before the date set for the hearing of any pretrial matter.

4. If a case is not assigned to a judge before the time required for filing the peremptory challenge, the challenge shall be filed:

(a) Within 3 days after the party or his attorney is notified that the case has been assigned to a judge; or

(b) Before the jury is sworn, evidence taken, or any ruling made in the trial or hearing, whichever occurs first.

5. A notice of peremptory challenge may not be filed against any judge who has made any ruling on a contested matter or commenced hearing any contested matter in the action.

6. The judge against whom a peremptory challenge is filed shall transfer the case to another department of the court, if there is more than one department of the court in the district, or request the chief justice to assign the case to the judge of another district.

7. The filing of an affidavit of bias or prejudice without specifying the facts upon which the disqualification is sought, which results in a transfer of the action to another district judge is a waiver of the parties' rights under this rule. A peremptory challenge under this rule is a waiver of the parties' rights to transfer the matter to another judge by filing an affidavit of bias or prejudice without specifying the facts upon which the disqualification is sought.

STATE STATUTES

N.D. Cent. Code sec. 29-15-21 (1983 pocket supp.)

29-15-21. Demand for change of judge.

1. Subject to the provisions of this section, any party to a civil or criminal action or proceeding pending in the district court or any county court in this state may obtain a change of the judge before whom the trial or any proceeding with respect thereto is to be heard by filing with the clerk of the court in which the action or proceeding is pending a written demand for change of judge, executed in triplicate either:

   a. By the personal signature of the party, if an individual, and by personal signature of an authorized officer, if a corporation or association; or

   b. By the attorney for a party with the permission of the party, in which event the attorney shall file with the demand a certificate that the attorney has mailed a copy of the demand to such party.

2. The demand is invalid unless it is filed with the clerk of the court not later than ten days after the occurrence of the earliest of any one of the following events:

   a. The date of the notice of assignment or reassignment of a judge for trial of the case;

   b. The date of notice that a trial has been scheduled; or

   c. The date of service of any ex parte order in the case signed by the judge against whom the demand is filed.

3. Any party who has been added, voluntarily or involuntarily, to the action or proceeding after the date of any occurrence in subsection 2 has the right to file a demand for change of judge within ten days after any remaining event occurs or, if all of those events have already occurred, within ten days after that party has been added. In any event, no demand for a change of judge may be made after the judge sought to be disqualified has ruled upon any matter pertaining to the action or proceeding in which the demanding party

was heard or had an opportunity to be heard. Any proceeding to modify an order for alimony, property division, or child support pursuant to section 14-05-24 or an order for child custody pursuant to section 14-05-22 shall be considered a proceeding separate from the original action and the fact that the judge sought to be disqualified made any ruling in the original action shall not bar a demand for a change of judge.

4. The demand for change of judge shall state that it is filed in good faith and not for the purposes of delay. It shall indicate the nature of the action or proceeding, designate the judge sought to be disqualified, and certify that he has not ruled upon any matter pertaining to the action or proceeding in which the moving party was heard or had an opportunity to be heard.

5. Upon the filing of the demand for change of judge, the clerk shall immediately send a copy of the demand for a change of judge to the presiding judge of the judicial district and the judge sought to be disqualified.

6. Upon receipt of a copy of a demand for change of judge, the judge sought to be disqualified has no authority or discretion to determine the timeliness or validity of the demand and shall proceed no further or take any action in the action or proceeding and is thereafter disqualified from doing any further act in the cause unless the demand is invalidated by the presiding judge. The judge sought to be disqualified shall promptly submit to the presiding judge any comments the judge may have regarding the demand. If the presiding judge thereafter invalidates the demand because it was not timely filed or for other reasons, the judge sought to be disqualified shall resume jurisdiction in the case and hear and determine the case to conclusion.

7. If a demand for a change of judge has been made and another judge assigned bv the presiding judge of the judicial district, the presiding judge may decline to grant another demand for a change of judge made by a party whose interests in the matter are not adverse to those of the party whose demand was granted. A judge assigned by the presiding judge pursuant to a demand for change of judge is not disqualified upon a subsequent demand for change of judge unless and until

the subsequent demand is granted and notice thereof is given to him by the presiding judge. A subsequent demand for a change of judge may be made only within five days after receiving notice of the assignment of a judge by the presiding judge pursuant to a previous demand.

8. Upon receipt of a timely filed demand for a change of judge from the clerk of the court, the presiding judge of the judicial district in which the demand is filed shall promptly designate another judge to act in the place and stead of the judge disqualified.

9. The judge designated, after receiving such notice of the assignment from the presiding judge, shall promptly proceed with the hearing or trial, first giving to the parties or their attorneys reasonable notice of the date of the hearing of trial.

COURT RULES

(There are no court rules concerning judicial peremptory challenges in North Dakota)

STATE STATUTES

Ore. Rev. Stat. secs. 14.250 - 14.270 (1983 supp.)

14.250 Disqualification for prejudice

No judge of a circuit court shall sit to hear or try any suit, action, matter or proceeding when it is established, as provided in ORS 14.250 to 14.270, that such judge is prejudiced against any party or attorney appearing in such cause, matter or proceeding. In such case the presiding judge shall forthwith transfer the cause, matter or proceeding to another judge of the court, or apply to the Chief Justice of the Supreme Court to send a judge to try it; or, if the convenience of witnesses or the ends of justice will not be interfered with by such course, and the action or suit is of such a character that a change of venue thereof may be ordered, the presiding judge may send the case for trial to the most convenient court; except that the issues in such cause may, upon the written stipulation of the attorneys in the cause agreeing thereto, be made up in the district of the judge to whom the cause has been assigned.

14.260 Motion for change of judge

Any party to or any attorney appearing in any cause, matter or proceeding in a circuit court may establish the prejudice described in ORS 14.250 by motion supported by affidavit that the judge before whom the cause, matter or proceeding is pending is prejudiced against such party or attorney, or the interest of such party or attorney, so that such party or attorney cannot or believes that such party or attorney cannot have a fair and impartial trial or hearing before such judge, and that it is made in good faith and not for the purpose of delay. The affidavit shall be filed with such motion at any time prior to final determination of such cause, matter or proceedings in uncontested cases, and in contested cases before or within five days after such cause, matter or proceeding is at issue upon a question of fact or within 10 days after the assignment, appointment and qualification or election and assumption of office of another judge to preside over such cause, matter or proceeding. No motion to disqualify a judge shall be made after the judge has ruled upon any petition, demurrer or motion other than a motion to extend time in the cause, matter or proceeding. No motion to disqualify a judge or a judge pro tem, assigned by the Chief Justice of the Supreme Court to serve in a county

other than the county in which the judge or judge pro tem resides, shall be filed more than five days after the party or attorney appearing in the cause receives notice of the assignment. In judicial districts having a population of 100,000 or more, the affidavit and motion for change of judge shall be made at the time and in the manner prescribed in ORS 14.270. No party or attorney shall be permitted to make more than two applications in any cause, matter or proceeding under this section.

14.270 Motion for change of judge in county with presiding judge

In any county where there is a presiding judge who hears motions and demurrers and assigns cases to the other judges of the circuit court for trial, the affidavit and motion for change of judge to hear the motions and demurrers or to try the case shall be made at the time of the assignment of the case to a judge for trial or for hearing upon a motion or demurrer. Oral notice of the intention to file the motion and affidavit shall be sufficient compliance with this section providing that the motion and affidavit are filed not later than the close of the next judicial day. No motion to disqualify a judge to whom a case has been assigned for trial shall be made after the judge has ruled upon any petition, demurrer or motion other than a motion to extend time in the cause, matter or proceeding; except that when a presiding judge assigns to the presiding judge any cause, matter or proceeding in which the presiding judge has previously ruled upon any such petition, motion or demurrer, any party or attorney appearing in the cause, matter or proceeding may move to disqualify the judge after assignment of the case and prior to any ruling on any such petition, motion or demurrer heard after such assignment. No party or attorney shall be permitted to make more than two applications in any action or proceeding under this section.

COURT RULES

(There are no rules concerning judicial peremptory challenge in Oregon.)

STATE STATUTES AND COURT RULES*

S.D. Codified Laws, chapt. 15-12 to 36 (1983 supp.)

15-12-21. Actions in which affidavits for change of judge may be filed. Except where the right is waived or is denied by this chapter, an affidavit for change of a judge or magistrate may be filed in any action pending in the court whether originating therein or pending upon appeal from an inferior court or tribunal to the circuit court. No affidavit for such change may be filed in a criminal action prior to the completion of the preliminary hearing or waiver thereof, in any proceeding for contempt committed in the presence of the court, or habeas corpus.

15-12.21.1. Must request judge to disqualify himself. Prior to filing an affidavit for change of judge, the party or his attorney shall informally request the judge or magistrate who, in the ordinary course, would preside at the hearing or trial, to disqualify himself. He shall not be required to state his reasons, but may if he desires. Informally shall mean by letter, oral communication, or dictating it into the record in open court or chambers; however, the opposing parties should receive copies of any letters, or be apprised of any communications to the court, but cannot contest the request. If the judge or magistrate grants the request, he shall forthwith notify the presiding judge, who shall assign the case to some other judge or magistrate. If the judge refuses the request, he shall forthwith notify in writing the parties or their attorneys. Writing may include a letter, order, or dictation into the record.

15-12-22. Who may file affidavit - Effect of filing. When entitled to do so, any party to an action, or his attorney of record, in any circuit or magistrate court may within the time prescribed by this chapter, file an affidavit as provided by this chapter seeking to disqualify the judge or magistrate who is to preside or is presiding in that action and when properly filed that named judge or magistrate shall proceed no further in said action and shall thereupon be disqualified as to any further acts with reference thereto unless otherwise ordered to proceed by the presiding judge of the circuit involved. However, any order or decree previously signed by such judge or magistrate shall remain in full force and effect, if filed, or becomes effective upon filing, unless thereafter vacated or reversed.

15-12-23. Parties united in interest - Necessity of unity - Effect of one party filing. All parties who are united in interest or representation must unite in the filing of an affidavit for change of judge or magistrate and the filing of such affidavit by one party is deemed to be filed by all of such parties.

15-12-24. Waiver of right by submitting to jurisdictions. The submission to a judge or magistrate of argument or proof in support of a motion or application, or upon trial, is a waiver of the right thereafter to file an affidavit for change of such judge or magistrate by any party or his counsel who submitted the same or who after notice that such matter was to be presented, failed to appear at the hearing or trial. Such waiver shall continue until the final determination of the action and includes all subsequent motions, hearings, proceedings, trials, new trials, and all proceedings to enforce, amend or vacate any order or judgment.

15-12-25. Restriction to one change - Other parties' rights preserved. Not more than one change of judge or magistrate shall be granted request and/or affidavit made by or on behalf of the same party or parties united in interest, but the filing of an affidavit and the first change of judge or magistrate shall not prevent any other party to the action or his attorney from availing himself thereafter under the provisions of §§15-12-20 to 15-12-37, inclusive.

15-12-26. Form and content of affidavits. An affidavit for change of judge or magistrate shall state the title of the action and shall recite that the affidavit is made in good faith and not for the purpose of securing delay, that in the ordinary course of litigation such action or some issue therein is expected to come on for trial before such judge or magistrate sought to be disqualified; that the party making such affidavit has good reason to believe and does actually believe that such party cannot have a fair and impartial trial before the named judge or magistrate. Only one judge or magistrate shall be named in such.

15-12-27. Time for filing affidavit against judge or magistrate presiding in ordinary course. Except as provided in §16-12A-14 an affidavit for change of circuit judge or magistrate, if against the judge or magistrate who, in the ordinary course, would preside at the hearing or trial, must be filed within the following times:

(1) If there be any motion or application to be heard upon notice, the party resisting the same may file an affidavit not less than two days before the hearing; or if the matter is returnable in a shorter time, then before the commencement of such hearing;

(2) If there is no such motion or application:

(a) In actions triable in circuit court without a jury, not less than five days before the date set for trial;

(b) In actions triable by a jury in the circuit court at least ten days prior to the date said action is scheduled for trial;

(3) In all actions pending in any magistrate court which are triable with or without a jury, not less than five days before the day of the trial, provided that if the time of trial has been set on less than five days notice, such affidavit shall be promptly filed thereafter and prior to the commencement of the trial; and

(4) If there has been a prior disqualification and substitution of a judge or magistrate a second or subsequent affidavit for change shall be filed with the clerk of courts of the county wherein such action is pending within two days after receiving notice of the name of the judge or magistrate designated to preside at the trial of said action in place of the judge or magistrate previously disqualified.

15-12-28. Time for filing after unanticipated change of judge or magistrate. If the affidavit for change is against a judge or magistrate who is to preside who was not regularly scheduled to do so, the provision of §15-12-27 shall govern if there be sufficient time after the party has knowledge or notice of such change of judge or magistrate, and if there is not sufficient time, the request for disqualification and the affidavit may be filed promptly after such knowledge or notice, but must be filed prior to the time set for the trial of such action.

15-12-29. Late appointment or employment of counsel - Extending time for filing. If counsel is appointed or retained after the time has passed for compliance with

§15-12-27, the request for disqualification and the affidavit must be promptly filed and the right to file shall be deemed waived if not filed within five days after counsel is so appointed or employed.

15-12-30. Filing of affidavit - Number of copies required - Certification by clerk of courts. The affidavit for change of circuit judge or magistrate shall be filed in triplicate with the clerk of the circuit court of the county in which the action is pending. Unless the presiding judge of the circuit court involved has otherwise provided by order or rule to the contrary, the clerk shall forthwith prepare and cause to be delivered to the presiding judge of his circuit a statement complying with subdivision (3) of §15-12-34 together with a certified copy of such affidavit. Such clerk shall also forthwith deliver a certified copy of such affidavit to the judge or magistrate referred to in said affidavit, or if such judge or magistrate be not then in the county, by registered or certified mail.

15-12-31. Copies of affidavit served on adverse parties - Liability for failure to serve. On the same day that an affidavit for change of judge or magistrate is filed, the party by whom or on whose behalf it is so filed, or his attorney, shall serve a copy of such affidavit, either personally or by mailing, upon all adverse parties, or their attorneys of record. The failure to make such service shall not in any manner destroy the effect of such affidavit so filed, but the party on whose behalf it is filed shall reimburse the other parties to the action and their witnesses for expense incurred by reason of such failure, the amount thereof and the terms under which the same shall be paid to be fixed and imposed by the court upon hearing.

15-12-32. Review of affidavit - Designation of substitute judge or magistrate. The presiding judge of the circuit court or in his absence or disqualification as the judge sought to be changed, the senior judge of the circuit shall review the affidavit and certification, if any, and it is determined that the affidavit is timely and that the right to file the affidavit has not been waived or is not otherwise legally defective, shall assign some other circuit judge or magistrate of that circuit as is appropriate to preside in such action, by filing an order of such appointment with the clerk of the court of the county wherein said action is pending. From the filing of such order the judge or magistrate therein designated shall have full power, authority and jurisdiction to proceed in the matter.

15-12-33. Transmittal of copies of order to substitute judge or magistrate and counsel. When an order appointing a substitute judge or magistrate has been filed with the clerk of the circuit court, that clerk shall notify the appointed judge or magistrate of his appointment by mailing or by personally delivering to him a certified copy of such order of appointment and a statement of the case if one has been prepared or requested by the said substitute, and shall mail a certified copy of such order of appointment to all parties or to their attorneys of record in the action involved.

15-12-34. Disqualification of all judges in circuit - Certification to Supreme Court. In the event it shall be determined that all the judges of the circuit are disqualified or are unable to act in such action, the presiding judge of the circuit shall make and file in the office of the clerk of courts of the court involved an order to that effect. The clerk with whom such order is filed shall forthwith forward to the clerk of the Supreme Court the following:

(1) A certified copy of the affidavit for change of judge;

(2) A certified copy of the order of the presiding judge determining that all the judges of his circuit are disqualified or unable to act; and

(3) A signed statement in duplicate showing the title of the action, the name and address of each attorney of record therein, the date of filing of such affidavit, the general nature of the action and the status thereof.

15-12-35. Assignment of substitute judge by chief justice. Upon receipt of the matter required by §15-12-34, the chief justice of the Supreme Court shall assign some other judge to preside in such action by filing an order with the clerk of the Supreme Court, and from the filing of such order the judge therein designated shall have full power, authority and jurisdiction to proceed in said action. The clerk of the Supreme Court shall thereupon notify the appointed judge, the presiding judge of said circuit, the clerk of the trial court and all attorneys of record in said action of the judge so assigned, which notice may be given orally if the chief justice so directs. The clerk shall mail or deliver to the appointed judge the statement of the action as furnished by the clerk of the trial court.

15-12-36. Jurisdiction of substituted judge or magistrate. The judge or magistrate assigned to replace a disqualified judge or magistrate shall hear the action involved at the time set in any previous order, notice of any calendar assignment or at such other time as he may designate, to the end that the filing of such affidavit for change of judge or magistrate shall not result in any unnecessary delay.

* (In South Dakota statutes and court rules are consolidated in the codified law.)

STATE STATUTES

Wash. Rev. Code Ann. sec. 4.12.040 - .050

4.12.040 Prejudice of judge, transfer to another department, visiting judge - Change of venue generally, criminal cases. No judge of a superior court of the state of Washington shall sit to hear or try any action or proceeding when it shall be established as hereinafter provided that said judge is prejudiced against any party or attorney, or the interest of any party or attorney appearing in such cause. In such case the presiding judge in judicial districts where there is more than one judge shall forthwith transfer the action to another department of the same court, or call in a judge from some other court. In all judicial districts where there is only one judge, a certified copy of the motion and affidavit filed in the cause shall be transmitted by the clerk of the superior court to the clerk of the supreme court or the administrator for the court, and the chief justice of the supreme court shall direct a visiting judge to hear and try such action as soon as convenient and practical.

4.12.050 Affidavit of prejudice. Any party to or any attorney appearing in any action or proceeding in a superior court, may establish such prejudice by motion, supported by affidavit that the judge before whom the action is pending is prejudiced against such party or attorney, so that such party or attorney cannot, or believes that he cannot, have a fair and impartial trial before such judge: Provided, That such motion and affidavit is filed and called to the attention of the judge before he shall have made any ruling whatsoever in the case, either on the motion of the party making the affidavit, or on the motion of any other party to the action, of the hearing of which the party making the affidavit has been given notice, and before the judge presiding has made any order or ruling involving discretion, but the arrangement of the calendar, the setting of an action, motion or proceeding down for hearing or trial, the arraignment of the accused in a criminal action or the fixing of bail, shall not be construed as a ruling or order involving discretion within the meaning of this proviso; and in any event, in counties where there is but one resident judge, such motion and affidavit shall be filed not later than the day on which the case is called to be set for trial: And provided further, That notwithstanding the filing of such motion and

affidavit, if the parties shall, by stipulation in writing agree, such judge may hear argument and rule upon any preliminary motions, demurrers, or other matter thereafter presented: And provided further, That no party or attorney shall be permitted to make more than one such application in any action or proceeding under this section and RCW 4.12.040.

COURT RULES

(There are no court rules concerning judicial peremptory challenges in Washington.)

STATE STATUTES

Wisc. Stat. Ann. sec. 971.20 (Crim.)

971.20. Substitution of judge

(1) Definition. In this section, "action" means all proceedings before a court from the filing of a complaint to final disposition at the trial level.

(2) One substitution. In any criminal action, the defendant has a right to only one substitution of a judge, except under sub. (7). The right of substitution shall be exercised as provided in this section.

(3) Substitution of judge assigned to preliminary examination. A written request for the substitution of a different judge for the judge assigned to preside at the preliminary examination may be filed with the clerk, or with the court at the initial appearance. If filed with the clerk, the request must be filed at least 5 days before the preliminary examination unless the court otherwise permits. Substitution of a judge assigned to a preliminary examination under this subsection exhausts the right to substitution for the duration of the action, except under sub. (7).

(4) Substitution of trial judge originally assigned. A written request for the substitution of a different judge originally assigned to the trial of the action may be filed with the clerk before making any motions to the trial court and before arraignment.

(5) Substitution of trial judge subsequently assigned. If a new judge is assigned to the trial of an action and the defendant has not exercised the right to substitute an assigned judge, a written request for the substitution of the new judge may be filed with the clerk within 15 days of the clerk's giving actual notice or sending notice of the assignment to the defendant or the defendant's attorney. If the notification occurs within 20 days of the date for trial, the request shall be filed within 48 hours of the clerk's giving actual notice or sending notice of the assignment. If the notification occurs within 48 hours of the trial or if there has been no notification, the defendant may make an oral or written request for substitution prior to the commencement of the proceedings.

(6) Substitution of judge in multiple defendant actions. In actions involving more than one defendant, the request for substitution shall be made jointly by all defendants. If severance has been granted and the right to substitute has not been exercised prior to the granting of severance, the defendant or defendants in each action may request a substitution under this section.

(7) Substitution of judge following appeal. If an appellate court orders a new trial or sentencing proceeding, a request under this section may be filed within 20 days after the filing of the remittitur by the appellate court, whether or not a request for substitution was made prior to the time the appeal was taken.

(8) Procedures for clerk. Upon receiving a request for substitution, the clerk shall immediately contact the judge whose substitution has been requested for a determination of whether the request was made timely and in proper form. If no determination is made within 7 days, the clerk shall refer the matter to the chief judge for the determination and reassignment of the action as necessary. If the request is determined to be proper, the clerk shall request the assignment of another judge under s. 751.03.

(9) Judge's authority to act. Upon the filing of a request for substitution in proper form and within the proper time, the judge whose substitution has been requested has no authority to act further in the action except to conduct the initial appearance, accept pleas and set bail.

(10) Form of request. A request for substitution of a judge may be made in the following form:

STATE OF WISCONSIN
CIRCUIT COURT
County
State of Wisconsin
vs.
(Defendant)

Pursuant to s. 971.20 the defendant (or defendants) request(s) a substitution for the Hon... as judge in the above-entitled action.

Dated ....., 19..

....(Signature of defendant or defendants' attorney)

(11) Return of action to substituted judge. Upon the filing of an agreement signed by the defendant or defendant's attorney and by the prosecuting attorney, the substituted judge and the substituting judge, the criminal action and all pertinent records shall be transferred back to the substituted judge.

Wisc. Stat. Ann. sec. 801.58 (Civil)

801.58. Substitution of judge

(1) Any party to a civil action or proceeding may file a written request, signed personally or by his or her attorney, with the clerk of courts for a substitution of a new judge for the judge assigned to the case. The written request shall be filed preceding the hearing of any preliminary contested matters and, if by the plaintiff, not later than 60 days after the summons and complaint are filed or, if by any other party, not later than 60 days after service of a summons and complaint upon that party. If a new judge is assigned to the trial of a case, a request for substitution must be made within 10 days of receipt of notice of assignment, provided that if the notice of assignment is received less than 10 days prior to trial, the request for substitution must be made within 24 hours of receipt of the notice and provided that if notification is received less than 24 hours prior to trial, the action shall proceed to trial only upon stipulation of the parties that the assigned judge may preside at the trial of the action. Upon filing the written request, the filing party shall forthwith mail a copy thereof to all parties to the action and to the named judge.

(2) When the clerk receives a request for substitution, the clerk shall immediately contact the judge whose substitution has been requested for a determination of whether the request was made timely and in proper form. If the request is found to be timely and in proper form, the judge named in the request has no further jurisdiction and the clerk shall request the assignment of another judge under s. 751.03. If no determination is made within 7 days, the clerk shall refer the matter to the chief judge of the judicial administrative district for determination of whether the request was made timely and in proper form and reassignment as necessary. The newly assigned judge shall proceed under s. 802.10(1).

(3) Except as provided in sub. (7), no party may file more than one such written request in any one action, nor may any single such request name more than one judge. For purposes of this subsection parties united in interest and pleading together shall be considered as a single party, but the consent of all such parties is not needed for the filing by one of such parties of a written request.

(4) Upon the filing of an agreement signed by all parties to a civil action or proceeding, by the original judge for which a substitution of a new judge has been made, and by the new judge, the civil action or proceeding and pertinent records shall be transferred back to the original judge.

(5) In addition to other substitution of judge procedures, in probate matters a party may file a written request specifically stating the issue in a probate proceeding for which a request for substitution of a new judge has been made. The judge shall thereupon be substituted in relation to that issue but after resolution of the issue shall continue with the administration of the estate. If a person wishes to file a written request for substitution of a new judge for the entire proceeding, subs. (1) to (4) shall apply.

(6)(a) In probate matters ss. 801.59 to 801.62 apply, except that upon the substitution of any judge, the case shall be referred to the register in probate, who shall request assignment of another judge under s. 751.03 to attend and hold court in such matter.

(b) Ex parte orders, letters, bonds, petitions and affidavits may be presented to the assigned judge, by mail or in person, for signing or approving, wherever the judge may be holding court, who shall execute or approve the same and forthwith transmit the same to the attorney who presented it, for filing with the circuit court of the county where the records and files of the matter are kept.

(7) If upon an appeal from a judgment or order or upon a writ of error the appellate court orders a new trial or reverses or modifies the judgment or order as to any or all of the parties in a manner such that further proceedings in the trial court are necessary, any party may file a request under sub. (1) within 20 days after the filing of the remittitur in the trial court whether or not another request was filed prior to the time the appeal or writ of error was taken.

Wisc. Stat. Ann. sec. 48.29 (1984) (children's code)

48.29 Substitution of judge

(1) The child, or the child's parent, guardian or legal custodian, either before or during the plea hearing, may file a written request with the clerk of the court or other person acting as the clerk for a substitution of the judge assigned to the proceeding. Upon filing the written request, the filing party shall immediately mail or deliver a copy of the request to the judge named therein. In a proceeding under s. 48.12 or 48.13(12), only the child may request a substitution of the judge....Whenever any person has the right to request a substitution of judge, that person's counsel or guardian ad litem may file the request. Except as provided in sub. (2), after a request has been filed, the judge shall be disqualified to act in relation to the matter and shall promptly request assignment of another judge under s. 751.03. Not more than one such written request may be filed in any one proceeding, nor may any single request name more than one judge. This section shall not apply to proceedings under s. 48.21.

(2) If the request for substitution of a judge is made for the judge scheduled to conduct a waiver hearing under s. 48.18, the request shall be filed before the close of the working day preceding the day that the waiver hearing is scheduled. However, the judge may allow an authorized party to make a request for substitution on the day of the waiver hearing. If the request for substitution is made subsequent to the waiver hearing, the judge who conducted the waiver hearing may also conduct the plea hearing.

Wisc. Stat. Ann. 799.205(1979) (small claims)

799.205 Substitution of judge

(1) Any party to a small claims action or proceeding may file a written request with the clerk of courts for a substitution of a new judge for the judge assigned to the case. The written request shall be filed on the return date of the summons or within 10 days after the case is scheduled for trial. If a new judge is assigned to the trial of a case, a request for substitution must be made within 10 days of receipt of notice of assignment, provided that if the notice of assignment is received less than 10 days prior to trial, the request for substitution must be made within 24 hours of receipt of the notice and provided that if notification is received less than 24 hours prior to trial, the action shall proceed to trial only upon stipulation of the

parties that the assigned judge may preside at the trial of the action. Upon filing the written request, the filing party shall forthwith mail a copy thereof to all parties to the action and to the original judge.

(2) After the written request has been filed, the original judge shall have no further jurisdiction in the action or proceeding except to determine if the request is correct as to form and timely filed. If the request is correct as to form and timely filed, the named judge shall be disqualified and shall promptly request assignment of another judge under s. 751.03.

(3) Except as provided in sub. (4), no party is entitled to file more than one such written request in any one action, and any single such request shall not name more than one judge. For purposes of this subsection, parties united in interest and pleading together shall be considered as a single party, but the consent of all such parties is not needed for the filing by one such party of a written request.

(4) If upon an appeal from a judgment or order or upon a writ of error the appellate court orders a new trial or reverses or modifies the judgment or order as to any or all of the parties in a manner such that further proceedings in the trial court are necessary, any party may file a request under sub. (1) within 20 days after the entry of the judgment or decision of the appellate court whether or not another request was filed prior to the time the appeal or writ of error was taken.

Wisc. Stat. Ann. sec. 345.315 (1984) (vehicle code)

345.315. Change of judge

(1) In traffic regulation and nonmoving traffic violation cases a person charged with a violation may file a written request for a substitution of different judge for the judge originally assigned to the trial of that case. The written request shall be filed not later than 7 days after the initial appearance in person or by an attorney. If a new judge is assigned to the trial of a case and the defendant has not exercised the right to substitute an assigned judge, a written request for the substitution of the new judge may be filed within 10 days of the giving of actual notice or sending of the notice of assignment to the defendant or the defendant's attorney. If the notification occurs within 10 days of the date set for trial, the request shall be filed within 48 hours of the giving of actual notice or sending of the notice of assignment to the defendant or the defendant's attorney. If the notification

occurs within 48 hours of the trial or if there has been no notification the defendant may make an oral or written request for substitution prior to the commencement of the proceedings. The judge against whom a request has been filed may set initial bail and accept a plea.

(2) Except as provided in sub. (5), no more than one judge can be disqualified in any action.

(3) In a court of record assignment of judges shall be made as provided in s.751.03.

(4) In municipal court a case shall be transferred as provided in ss.751.03 (2) and 800.05.

(5) If upon an appeal from a judgment or order or upon a writ of error the appellate court orders a new trial or reverses or modifies the judgment or order in a manner such that further proceedings in the trial court are necessary, the person charged with a violation may file a request under sub (1) within 20 days after the entry of the judgment or decision of the appellate court whether or not another request was filed prior to the time the appeal or writ of error was taken.

COURT RULES

(There are no court rules concerning judicial peremptory challenges in Wisconsin)

WYOMING

STATE STATUTES

(There are no controlling statutes concerning judicial peremptory challenges in Wyoming.)

COURT RULES

Wyo. R. Crim. P. 23 (1984)

Peremptory disqualification. A district judge may be peremptorily disqualified from acting in a case by the filing of a motion requesting that he be so disqualified. The motion shall be filed by the state at the time the information or indictment is filed designating the judge to be disqualified. The motion shall be filed by a defendant at the time of his arraignment and following the entry of his plea, designating the judge to be disqualified. In any matter, a party may exercise the peremptory disqualification only one (1) time and against only one (1) judge.

Wyo. R. Civ. P. 40. 12(b) (1) (1984)

Peremptory disqualification. A district judge may be peremptorily disqualified from acting in a case by the filing of a motion requesting that he be so disqualified. The motion shall be filed by a plaintiff at the time the complaint is filed, designating the judge to be disqualified. The motion shall be filed by a defendant at or before the time the first responsive pleading is filed by him or within thirty (30) days after service of the complaint on him, whichever first occurs. One made a party to an action subsequent to the filing of the first responsive pleading by a defendant cannot peremptorily disqualify a judge. In any matter, a party may exercise the peremptory disqualification only one (1) time and against only one (1) judge.

Appendix B:

Judicial Peremptory Challenge Frequency Data

The following information was supplied by trial court administrators in each state unless otherwise noted. Current statistical information is not available in California, Illinois, Indiana, Montana, and Wyoming. Information is apparently available in Missouri and Oregon but could not be obtained for this project.

ALASKA

Filings and Challenges Per District, 1983[1/]

District	Number of Judges[2/]	Number of Filings[3/]	Number of Challenges	Number of Filings/ Challenges	Percent of Filings
1	7	8,932	398	22.4	4.5
2	3	2,414	44	54.9	1.8
3	26	38,151	937	40.7	2.4
4	9	10,357	391	26.5	3.7
TOTAL		59,854	1,770	33.8	3.0

1/ The data is drawn from "Memorandum on Peremption of Judges," from Heide Borson-Paine, Legislative Analyst, Research Agency, Alaska State Legislature, to Representative Milo Fritz, January 24, 1984.

2/ Superior and District Court Judges.

3/ Nontraffic filings.

ALASKA

Civil Filings and Challenges Per Judge, Anchorage, 1983

Judge	Number of Filings	Number of Challenges	Number of Filings/Challenge	Percent of Filings
A	493	36	13.7	7.3
B	522	103	5.1	19.7
C	247	9	27.4	3.6
D	490	8	61.3	1.6
E	495	46	10.8	9.2
F	361	31	11.7	8.6
G	4,970[1]/	212	23.4	4.3
H	75[2]/	2	37.5	2.7
I	74[2]/	1	74.0	1.4
J	81[2]/	4	20.3	4.9
K	139[3]/	7	19.9	5.0
L	0[4]/	0	0.0	0.0
TOTAL	7,947	459	17.3	5.8

1/ This figure is disproportionately large due to the unique calendaring procedure of initially assigning all domestic cases to Judge G.

2/ This figure is disproportionately small because the judge primarily hears criminal cases.

3/ Judge K served only two months in 1983.

4/ Judge L did not begin to serve until March, 1984.

ALASKA

Civil Filings and Challenges Per Judge, Anchorage, 1984

Judge[1]	Number of Filings	Number of Challenges	Number of Filings/Challenge	Percent of Filings
A	501	37	13.4	7.4
B	533	83	6.4	15.6
C	255	6	42.5	2.4
D	495	10	49.5	2.0
E	497	34	14.6	6.8
F	0	0	0.0	0.0
G	4,228[2]	178	23.8	4.2
H	154[3]	2	77.0	1.3
I	155[3]	1	155.0	.7
J	161[3]	5	32.2	3.1
K	94[4]	23	4.1	24.5
L	433[5]	30	14.4	6.9
TOTAL	7,506	409	18.4	5.5

1/ Superior Court Judges only.

2/ This figure is disproportionately large due to the unique calendaring procedure of initially assigning all domestic cases to Judge G.

3/ This figure is disproportionately small because the judge primarily hears criminal cases.

4/ Judge K served only three months in 1984.

5/ Judge L served only 10 months during 1984.

ALASKA

Challenges Per Judge, District 4, January 1 - July 30, 1985

Judge	Number of Filings[1/]	Number of Challenges	Number of Filings/Challenge	Percent of Filings
A	663	18	36.8	2.7
B	663	6	110.5	.1
C	663	108	6.1	16.3
D	663	12	55.3	1.8
E	663	1	666.0	.2
F	663	3	221.0	.5
G	663	8	82.9	1.2
H	663	151	4.4	22.8
TOTAL	5,304	307	17.3	5.7

1/ There were 5,304 cases filed during the period. The court administrator reports that the number of cases handled by each judge is "roughly the same."

ALASKA

Challenges by Type of Case, District 4, January 1 - July 30, 1985

	Filings	Challenges
Civil	2,781	80
Criminal	2,223	221
Children	296	5
TOTAL	5,300	306

ARIZONA

Filings and Challenges by Type of Case,
March 1, 1971 to August 27, 1971 1/

County	Number of Judges	Number of Filings - Civil	Number of Challenges - Civil	Number of Filings - Criminal	Number of Challenges - Criminal
Maricopa	32	11,527	236	3,056	117
Pima	11	3,683	17	789	11
Pinal	2	548	0	102	1
Coconino	2	292	1	85	0
Gila	1	231	3	62	6
Yavapai	1	372	0	81	0
TOTAL	49	16,653	257	4,175	135

Statistics Based on 1971 Data

County	Number of Filings/ Challenge	Percent of Filings	Number of Filings/ Challenge - Civil	Number of Filings/ Challenge - Criminal
Maricopa	41.3	2.4	48.9	26.1
Pima	159.7	.6	216.6	71.7
Pinal	650.0	.1	548.0	102.0
Coconino	377.0	.3	292.0	85.0
Gila	97.6	.1	77.0	10.3
Yavapai	453.0	0	372.0	81.0
TOTAL	53.1	1.9	64.8	30.9

1/ The data is drawn from Kraig J. Marton, "Peremptory Challenges of Judges: The Arizona Experience," Law and the Social Order (1973), 95-108.

ARIZONA

Filings and Challenges by Type of Case,
March 1, 1972 to August 27, 1972 1/

County	Number of Judges	Number of Filings - Civil	Number of Challenges - Civil	Number of Filings - Criminal	Number of Challenges - Criminal
Maricopa	32	12,864	292	3,827	121
Pima	11	4,256	36	985	23
Pinal	2	545	0	90	1
Coconino	2	286	2	132	0
Gila	1	246	1	55	3
Yavapai	1	421	1	121	0
TOTAL	49	18,618	332	5,210	148

Statistics Based on 1971 Data

County	Number of Filings/ Challenges	Percent of Filings	Number of Filings/ Challenge - Civil	Number of Filings/ Challenge - Criminal
Maricopa	40.4	2.5	44.1	31.6
Pima	88.8	1.1	118.2	42.8
Pinal	645.0	.2	545.0	90.0
Coconino	209.0	.5	143.0	132.0
Gila	75.2	1.3	246.0	18.3
Yavapai	542.0	.2	421.0	121.0
TOTAL	49.7	2.0	56.1	35.2

1/ The data is drawn from Kraig J. Marton, "Peremptory Challenges of Judges: The Arizona Experience," Law and the Social Order (1973), 95-108.

ARIZONA

Civil Filings and Challenges, Maricopa County, 1984

Number of Judges	Number of Filings	Number of Challenges
19	28,547	625

Statistics Based on 1984 Maricopa County Data

Number of Cases/ Challenge	Percent of Filings
45.7	2.2

ARIZONA

Challenges Per Judge in Civil Filings, Maricopa County, 1984[1/]

Judge	Number of Challenges
A	116
B	67
C	51
D	44
E	43
F	40
G	39
H	28
I	26
J	25
K	23
L	22
M	22
N	19
O	18
P	13
Q	13
R	12
S	4

1/ The number of filings per judge is not available and thus the number of filings per peremptory challenge and the percent of filings challenged cannot be computed.

IDAHO

Filings and Challenges by District,
June 1, 1982 to November 30, 1982

District	Number of Judges[1]	Number of Filings[2]	Number of Challenges[3]	Number of Filings/ Challenge	Percent of Filings
1	14	14,680	67[4]	219.1	.5
2	17	13,171	25	526.8	.2
3	14	18,037	90[5]	200.4	.5
4	20	40,335	116[6]	347.7	.3
5	16	21,726	14	1151.9	.0
6	15	17,398	70	248.5	.4
7	16	22,997	28	821.3	.1
TOTAL		148,344	410	361.8	.3

1/ Includes magistrates.

2/ The filings are taken from the Idaho Courts 1982 Annual Report, Appendix and may be slightly high because a few cases were counted twice. The number of filings were obtained by dividing the yearly totals in the 1982 Report by one-half. The filings include all cases heard by judges and magistrates because many of the challenges are made to magistrates.

3/ The number of challenges was drawn from a memorandum to Carl Bianchi, Administrator of Courts, from Kit Furey, Judicial Education Officer, on Disqualification Sample Study, December 13, 1982.

4/ Fourteen of these were directed toward one magistrate who was disqualified nine times by one attorney.

5/ Seventy-six of these were directed toward one magistrate who was disqualified 26 times by one attorney (7 were DWI cases), 16 times by another attorney (13 were DWI cases) and 14 times by yet another attorney.

6/ Forty-three of these were directed toward one magistrate who was rarely disqualified more than once by the same attorney.

MINNESOTA

Filings and Challenges Per District, 1983

District[1]	Number of Filings[2]	Number of Challenges	Number of Filings/ Challenge	Percent of Filings
2	1,746[3]	21	83.1	1.2
4	35,615	57[4]	624.8	.2
5	6,568	131[5]	50.1	2.0
8	3,787	130[6]	29.1	3.4
9	8,672	199	43.6	2.3
TOTAL	56,388	538	104.8	1.0

1/ No information is available for Districts 1, 3, 6, 7 and 10. In District 3 the court administrator reports that challenges are "rare."

2/ The number of filings was supplied by the state court administrator's office. They include criminal, civil, probate and family cases. They exclude juvenile, conciliation, juvenile traffic, parking and traffic cases.

3/ St. Paul criminal jury cases only.

4/ Twenty-four were in criminal cases and 33 in civil cases.

5/ Fifty-two percent were in criminal cases, 20% in civil cases, 20% in family cases and 8% in probate cases.

6/ Estimate by District 8 court administrator.

MINNESOTA

Filings and Challenges Per District, 1984

District[1]	Number of Filings[2]	Number of Challenges	Number of Filings/ Challenge	Percent of Filings
2	2,113[3]	18	117.4	.9
4	39,718	99[4]	401.2	.3
5	6,786	213	31.9	3.1
6	6,681	117	57.1	1.8
8	3,992	130[5]	30.7	3.3
9	8,896	143	62.2	1.6
TOTAL	68,186	720	94.7	1.1

1/ Information is not available for Districts 1, 3, 7 and 10. In District 3 the court administrator reports that challenges are "rare."

2/ The number of filings was supplied by the state court administrator's office. They include criminal, civil, probate and family cases. They exclude juvenile, conciliation, juvenile traffic, parking and traffic cases.

3/ St. Paul criminal jury cases only.

4/ Twenty-six were in criminal cases and 73 in civil cases.

5/ Estimate by District 8 court administrator.

MINNESOTA

Challenges Per Judge, District 2, St. Paul Municipal Court
Criminal Jury Cases, 1983 - 1984

Judge	Number of Challenges[1]/	Judge	Number of Challenges[1]/
A	9	A	5
B	5	B	4
C	2	C	2
D	1	D	1
E	2	E	0
F	1	F	0
G	1	G	0
H	0	H	3
I	0	I	1
J	0	J	1
K	0	K	1
TOTAL	21	TOTAL	18

1/ The number of filings per judge is not available and thus the number of filings per peremptory challenge and the percent of filings challenged cannot be computed. The total number of cases filed among nine judges during 1983 was 1,746 and thus the average number of cases per judge was 194. The total number of cases filed among nine judges during 1984 was 2,113 and thus the average number of cases per judge was 235.

MINNESOTA

Source of Challenge, District 2, St. Paul Municipal Court Criminal Jury Cases, 1983 - 1984

Party	1983	1984	Totals
Defendant	2	0	2
Defendant's Attorney	17	18	35
Prosecutor	2	0	2
TOTALS	21	18	39

MINNESOTA

Challenges Per Judge, by Type of Case,
District 4, 1981 - 1984 1/

Judge	1981 Criminal	1981 Civil	1982 Criminal	1982 Civil	1983 Criminal	1983 Civil	1984 Criminal	1984 Civil
1	--	1	--	2	--	--	--	2
2	--	1	--	--	--	--	x 2/	x
3	--	1	--	--	1	1	--	--
4	x	x	x	x	x	x	1	1
5	--	1	--	--	3	2	--	3
6	--	--	--	--	3	--	--	2
7	x	x	--	--	--	--	--	--
8	2	--	4	1	10	1	6	19
9	--	1	--	--	--	--	x	x
10	--	1	1	1	1	3	--	6
11	--	1	--	--	--	2	--	3
12	--	--	1	--	--	3	--	--
13	x	x	x	x	--	--	--	3
14	x	x	x	x	--	2	1	--
15	1	--	3	--	1	2	1	1
16	x	x	x	x	--	--	2	--
17	--	--	--	--	--	--	1	--
18	x	x	--	--	--	--	--	--
19	--	--	--	--	x	x	x	x
20	x	x	x	x	--	2	1	9
21	x	x	--	1	4	4	2	6
22	--	--	1	2	--	2	1	5
23	--	--	--	--	--	4	--	6
24	x	x	--	--	--	--	1	1
25	x	x	x	x	x	x	9	1
26	--	--	--	3	1	--	x	x
27	--	1	--	--	x	x	x	x
28	2	1	--	--	--	2	--	2
29 3/	--	--	--	1	--	--	--	--
30 3/	--	--	--	2	--	2	--	--
31 3/	--	--	--	--	--	1	--	--
32 3/	--	--	--	--	--	--	--	1
33 3/	--	--	--	--	--	--	--	2
TOTALS	6	9	10	13	24	33	26	73

1/ The number of filings per judge is not available and thus the number of filings per peremptory challenge and the percent of filings challenged cannot be computed.

2/ X denotes that the judge did not serve during this period.

3/ Retired judge not used on a daily basis.

MINNESOTA

Filings and Challenges by Type of Case,
District 4, 1981 - 1984

Year	Number of Judges	Number of Filings - Civil[1/]	Number of Challenges - Civil	Number of Filings - Criminal	Number of Challenges - Criminal
1981	23	16,555	9	2,934	6
1982	27	16,318	13	2,715	10
1983	29	15,898	33	2,659	24
1984	28	15,968	73	2,978	26
TOTAL		65,046	128	11,286	66

1/ Does not include family court.

Statistics Based on District 4, 1981 - 1984 Data

Year	Number of Filings/ Challenge	Percent of Filings	Number of Filings/ Challenge - Civil	Number of Filings/ Challenge - Criminal
1981	1299.3	.1	1839.4	489.0
1982	827.5	.1	1255.2	271.0
1983	325.6	.3	481.8	110.8
1984	191.4	.5	218.7	114.5

MINNESOTA

Filings and Challenges Per Judge, District 5, 1983

Judge	Number of Filings[1/]	Number of Challenges	Number of Filings/Challenge	Percent of Filings
A	234	4	58.5	1.7
B	378	3	126.0	.8
C	293	11	26.6	3.8
D	272	5	54.4	1.8
E	490	5	98.0	1.0
F	692	0	--	.0
G	692	3	230.7	.4
H	692	1	692.0	1.5
I	780	23	33.9	3.0
J	454	1	454.0	.2
K	709	2	351.0	.3
L	563	19	26.6	3.4
M	597	1	597.0	.2
N	597	1	597.0	.2
O	948	0	--	.0
P	305	6	50.8	2.0
Q	894	6	149.0	.7
R	827	4	206.8	.5
S	606	12	50.5	2.0
T	767	0	--	.0
U	665	4	166.5	.6
TOTAL	12,455	131	95.1	1.1

1/ Excludes traffic, juvenile traffic, parking and conciliation court filings.

MINNESOTA

Filings and Challenges Per Judge, District 5, 1984

Judge	Number of Filings[1/]	Number of Challenges	Number of Filings/Challenge	Percent of Filings
A	262	90	2.9	34.4
B	446	3	148.7	.7
C	221	7	31.6	3.2
D	288	8	36.0	2.8
E	437	4	109.3	.9
F	653	2	326.5	.3
G	653	5	130.6	.8
H	653	1	653.0	.2
I	922	27	34.2	2.9
J	451	4	112.8	.9
K	680	3	226.7	.4
L	532	25	21.3	4.7
M	660	2	330.0	.3
N	660	4	165.0	.6
O	972	1	972.0	.1
P	278	3	92.7	1.1
Q	959	12	79.9	1.3
R	775	0	--	--
S	703	4	175.6	.6
T	901	3	300.0	.3
U	672	3	224.0	.5
TOTAL	12,778	213	60.0	1.7

1/ Excludes traffic, juvenile traffic, parking and conciliation court filings.

MINNESOTA

Challenges by Type of Case, District 5, 1983 - 1984

Type of Case	Percent 1983	Percent 1984[1/]
Criminal	52	70
Civil	20	11
Family	20	15
Probate	8	3
Juvenile	--	1

1/ The 1984 figures are somewhat misleading because 83 challenges were filed against one judge by the local prosecutor. If these challenges are excluded from the calculation, the adjusted distribution is as follows: criminal 50%; civil 19%; family 25%; probate 5%; and juvenile 1%.

MINNESOTA

Challenge Per Judge, District 6, 1984[1/]

Judge	Number of Challenges
A	59[2/]
B	17[2/]
C	11
D	5
E	4
F	3
G	3
H	3
I	3
J	2
K	2
L	1
M	1
N	1
O	1
P	1
Q	0
R	0
S	0
	TOTAL 117

1/ The number of filings per judge is not available and thus the number of filings per peremptory challenge and the percent of filings challenged cannot be computed. The total number of cases filed among the 19 judges was 721 and thus the average number of cases per judge was 721.

2/ A great majority of these challenges are in divorce court.

MINNESOTA

Filings and Challenges Per County, District 9, 1983

County	Number of Filings[1/]	Number of Challenges	Number of Filings/Challenge	Percent of Filings
A	1,113	12	92.8	1.1
B	2,637	21	125.6	.8
C	1,817	52	34.9	2.9
D	598	0	--	--
E	3,140	21	149.5	.7
F	1,087	11	98.8	1.0
G	3,363	12	280.3	.4
H	341	0	--	--
I	1,072	25	42.9	2.3
J	422	19	22.2	4.5
K	417	0	--	--
L	576	2	288.0	.3
M	507	0	--	--
N	1,310	7	187.1	.5
O	2,350	1	2,350.0	.1
P	299	0	--	--
Q	776	16	48.5	2.1
TOTAL	22,095	199	111.0	.9

1/ Excludes conciliation, juvenile traffic, parking and other traffic filings.

MINNESOTA

Filings and Challenges Per County, District 9, 1984

County	Number of Filings[1/]	Number of Challenges	Number of Filings/Challenge	Percent of Filings
A	1,063	9	118.1	.9
B	2,600	17	152.9	.7
C	2,013	12	167.8	.6
D	719	2	359.5	.3
E	3,224	16	201.5	.5
F	1,190	4	297.5	.3
G	3,306	9	367.0	.3
H	461	3	153.7	.7
I	1,079	15	71.9	.1
J	500	25	20.0	5.0
K	527	0	--	--
L	557	0	--	--
M	583	5	116.6	.9
N	1,309	11	119.0	.8
O	2,530	4	632.5	.2
P	299	1	299.0	.3
Q	923	10	92.3	1.1
TOTAL	22,901	143	160.2	.6

1/ Excludes conciliation, juvenile traffic, parking and other traffic filings.

Filings and Challenges in Criminal Cases, Flathead County, 1974-1978[1/]

Year	Number of Filings	Number of Challenges	Number of Filings/Challenge	Percent of Filings
1974	118	2	59.0	1.7
1975	120	2	60.0	1.7
1976	236	21	11.2	8.8
1977	191	11	17.4	5.8
1978	157	16	9.8	10.2
TOTAL	822	52	15.8	6.3

Source of Challenges in Criminal Cases, Flathead County, 1974-1978

Source	Number
County Attorney	1
Defense Attorneys	43
Sua Sponte Disqualifications	13

1/ Drawn from Attorney General's Report Concerning Mass Peremptory Disqualifications of Montana District Judges, 1974-1978, submitted to the Montana Supreme Court, June 11, 1979.

NEVADA

Filings and Challenges in Civil Cases, 1981 - 1984

Year	Cases Filed	Number of Challenges	Number of Filings/ Challenge	Percent of Filings
1981	13,347	139	96.0	1.0
1982	13,972	145	96.4	1.0
1983	14,514	200	72.6	1.4
1984	15,170	247	61.4	1.6
TOTAL	57,003	731	78.0	1.3

NORTH DAKOTA

Filings and Challenges in North Dakota 1983 - 1984

Year	Number of Filings[1/]	Number of Challenges[2/]	Number of Filings/ Challenge	Percent of Filings
1983	16,062	423	38.0	2.6
1984	16,396	509	32.2	3.1

1/ The number of filings excludes county court civil, criminal and traffic cases.

2/ The number of challenges was determined by subtracting 10% of the 470 challenges in 1983 and the 566 challenges in 1984 which is the percentage estimated to be made in county court cases by the state court administrator's office.

NORTH DAKOTA

Filings and Challenges Per District, 1983

District	Number of Judges	Number of Filings	Number of Challenges	Number of Filings/ Challenge	Percent of Filings
East Central[1/]	4	2,013[1/]	32	62.9	1.6
South Central[1/]	5	3,260	95	34.3	2.9

1/ District court only.

Filings and Challenges Per District, 1984

District	Number of Judges	Number of Filings	Number of Challenges	Number of Filings/ Challenge	Percent of Filings
East Central[1/]	4	2,190	24	91.3	1.1
South Central[1/]	5	3,274	96	34.1	2.9

1/ District court only.

NORTH DAKOTA

Challenges by Type of Case, East Central District, 1983 - 1984

Type of Case	1983	1984	Totals
Civil	25	16	41
Criminal	7	8	15
TOTAL	32	24	56

Source of Challenge, East Central District, 1983 - 1984

Party	1983	1984	Totals
Civil defendant	13	8	21
Civil plaintiff	12	8	20
Prosecutor	0	3	3
Criminal defendant	7	5	12
TOTAL	32	24	56

NORTH DAKOTA

Challenges Per Judge, South Central District, 1983 - 1984

Judge	1983 Number of Challenges	1984 Number of Challenges
A	1	5
B	4	0
C	7	7
D	83	83
E	0	1
TOTAL	95	96

SOUTH DAKOTA

Filings and Challenges Per District, 1983

District	Number of Judges	Number of Filings[1/]	Number of Challenges	Number of Filings/ Challenge	Percent of Filings
2	5	3,737	25	149.5	.7
7	5	1,817	22	82.6	1.2
TOTAL		5,554	47	118.2	.8

1/ Does not include probate, mental illness, guardianship, juvenile, termination of parental rights and adoption filings in which there were no challenges during 1984.

Filings and Challenges Per District, 1984

District	Number of Judges	Number of Filings	Number of Challenges	Number of Filings/ Challenge	Percent of Filings
2	5	3,951	14	282.2	.4
7	5	1,790[1/]	8	223.8	.5
TOTAL		5,741	22	261.0	.4

1/ Does not include probate, mental illness, guardianship, juvenile, termination of parental rights and adoption filings in which there were no challenges during 1984.

SOUTH DAKOTA

Filings and Challenges Per Judge, District 2, 1977 - 1984

Judge	Number of Challenges[1/]							
	1977	1978	1979	1980	1981	1982	1983	1984
A	1	0	0	0	0	8	4	5
B	3	2	3	5	0	2	3	2
C	3	2	3	2	3	2	3	1
D	2	0	2	6	7	2	3	3
E	4	13	8	54	43	14	12	3
TOTAL	13	17	16	67	53	28	25	14

1/ The number of filings per judge is not available and thus the number of filings per peremptory challenge and the percent of filings challenged cannot be computed.

SOUTH DAKOTA

Filings and Challenges, District 2, 1977 - 1984

Year	Number of Judges	Number of Filings	Number of Challenges	Number of Filings/ Challenge	Percent of Filings
1977	5	2,723	13	209.5	.5
1978	5	2,939	17	172.9	.6
1979	5	3,445	16	215.3	.5
1980	5	3,196	67	47.7	2.0
1981	5	3,540	53	66.8	1.5
1982	5	4,000	28	142.9	.7
1983	5	3,737	25	149.5	.7
1984	5	3,951	14	282.2	.4
TOTAL		27,531	233	118.2	.8

SOUTH DAKOTA

Filings and Challenges By Type of Case, District 7, 1983-1984

Year	Number of Judges	Number of Filings-Civil 1/	Number of Challenges-Civil	Number of Filings Criminal	Number of Challenges-Criminal
1983	5	1,578	11	239	11
1984	5	1,561	4	229	4

1/ Does not include probate, mental illness, guardianship, juvenile, termination of parental rights and adoption filings.

Statistics Based on District 7 Data, 1983-1984

Year	Number of Filings/ Challenge	Percent of Filings	Number of Filings/ Challenge-Civil	Number of Filings/ Challenge Criminal
1982	82.6	1.2	143.5	13.4
1983	223.8	.5	390.3	57.3

SOUTH DAKOTA

Filings and Challenges Per Judge, District 7, 1983

Judge	Number of Filings[1/]	Number of Challenges	Number of Filings/Challenge	Percent of Filing
A	391	4	97.8	1.0
B	452	11	41.1	2.4
C	369	3	123.0	.8
D	450	4	112.5	.9
E	155	0	--	--
TOTAL	1,817	22	82.6	1.2

1/ Does not include probate, mental illness, guardianship, juvenile, termination of parental rights and adoption filings in which there were no challenges during 1983.

Filings and Challenges Per Judge, District 7, 1984

Judge	Number of Filings[1/]	Number of Challenges	Number of Filings/Challenge	Percent of Filing
A	182	2	91.0	1.1
B	522	2	261.0	.4
C	449	1	149.0	.7
D	378	1	378.0	.3
E	259	2	129.5	.8
TOTAL	1,790	8	223.8	.5

1/ Does not include probate, mental illness, guardianship, juvenile, termination of parental rights and adoption filings in which there were no challenges during 1984.

WASHINGTON

Filings and Challenges Per District, 1983

District[1/]	Number of Judges	Number of Filings[2]	Number of Challenges	Number of Filings/ Challenge	Percent of Filings
6	6[3/]	5,690	25	227.6	.4
9	2	1,922	131	14.7	6.8
10	2	762[4/]	17[4/]	44.8	2.2
12	39	108,959	22	4,952.7	.1
13	5	5,000[5/]	4	1,250.0	.8
15	1	697	15	46.5	2.2
21	2	2,551	7	321.6	.3
23	10	13,839[5/]	25[5/]	553.6	.2
25	5	5,651	36	157.0	.6
TOTAL		145,071	282	514.4	.2

1/ Information is not available for Districts 1-5, 7, 8, 11, 14, 16-20, 22, 24, and 26-29.

2/ Filings exclude case heard in district and municipal courts such as those involving misdemeanors, traffic and domestic relations.

3/ Includes a court commissioner.

4/ Filings and challenges are for the period July 1982 to July 1984.

5/ Estimate by court administrator.

WASHINGTON

Filings and Challenges Per District,
1984

District[1/]	Number of Judges	Number of Filings[2]	Number of Challenges	Number of Filings/ Challenge	Percent of Filings
4	2	1,611	9	179.0	.6
6	6[3/]	5,817	10	581.7	.2
9	2	1,880	73	25.8	3.9
10	2	762[4/]	17[4/]	44.8	2.2
12	39	110,401	25	4,416.0	.1
13	5	5,000[5/]	4	1,250.0	.1
15	1	629	18	34.9	2.9
21	2	1,123	20	56.2	1.8
23	10	13,500[5/]	25[5/]	540.0	.2
25	5	6,119	52	117.7	.9
TOTAL		146,842	253	580.4	.2

1/ Information is not available for Districts 1-3, 5, 7, 8, 11, 14, 16-20, 22, 24, and 26-29.

2/ Filings exclude cases heard in district and municipal courts such as misdemeanors, traffic and domestic relations.

3/ Includes a court commissioner.

4/ Filings and challenges are for the period July 1982 to July 1984.

5/ Estimate by court administrator.

WASHINGTON

Filings and Challenges By Type of Case, District 4, 1984

Type of Case	Filings	Challenges	Number of Filings/ Challenge	Percent of Filings
Criminal	272	3	90.7	1.1
Civil	1,339	6	223.2	.5

WASHINGTON

Filings and Challenges By Type of Case,
District 6, 1982-1984

Year	Number of Judges[1]	Number of Filings-Civil	Number of Challenges-Civil	Number of Filings-Criminal	Number of Challenges-Criminal
1982	6	4,850	10	680	6
1983	6	4,936	22[2]	754	3
1984	6	4,979	8	838	2

1/ Includes a court commissioner.

2/ At least one-half of these were filed against the court commissioner.

Statistics Based on District 6 Data,
1982-1984

Year	Number of Filings/ Challenge	Percent of Filings	Number of Filings/ Challenge-Civil	Number of Filings/ Challenge-Criminal
1982	345.6	.3	485.0	113.3
1983	227.6	.4	224.4	251.3
1984	581.7	.2	622.4	419.0

WASHINGTON

Filings and Challenges, District 9,
1981-1984

Year	Number of Judges	Number of Filings	Number of Challenges	Number of Filings/ Challenge	Percent of Filings
1981	2	2,062	123	16.8	6.0
1982	2	1,962	92	21.3	4.7
1983	2	1,922	131	14.7	6.8
1984	2	1,880	73	25.8	3.9
TOTAL		7,826	419	18.7	5.4

WASHINGTON

Filings and Challenges By Type of Case, District 9, 1981-1984

Year	Number of Judges	Number of Filings-Civil	Number of Challenges-Civil	Number of Filings-Criminal	Number of Challenges-Criminal
1981	2	1,823	83	239	40
1982	2	1,737	68	225	24
1983	2	1,695	100	227	31
1984	2	1,654	47	226	26
TOTAL		6,909	298	917	121

Statistics Based on District 9 Data, 1981-1984

Year	Number of Filings/ Challenge	Percent of Filings	Number of Filings/ Challenge-Civil	Number of Filings/ Challenge-Criminal
1981	18.3	5.5	22.0	6.0
1982	43.8	2.3	25.5	9.4
1983	45.4	2.2	169.5	7.3
1984	107.2	.9	35.2	8.7

WASHINGTON

Filings and Challenges Per Judge, District 9, 1981-1983

	Number of Challenges[1/]			
Judge	1981	1982	1983	1984
A	93	66	71	27
B	40	26	60	46

1/ The number of filings per judge is not available and thus the number of filings per peremptory challenge and the percent of filings challenged cannot be computed.

WASHINGTON

Source of Challenge, District 10,
July 1982 to July 1984

Party	Number of Challenges
Defendant	10
Plaintiff	3

Challenges Per Judge, District 10,
July 1982 to July 1984

Judge	Number of Challenges
A	10
B	7

WASHINGTON

Filings and Challenges, District 12, 1980-1984

Year	Number of Judges	Number of Filings	Number of Challenges	Number of Filings/ Challenge	Percent of Filings
1980	39	88,048	302	291.6	.3
1981	39	100,828	76	1,326.7	.1
1982	39	119,918	52	2,306.1	.1
1983	39	108,959	22	4,952.7	.1
1984	39	110,401	25	4,416.0	.1
TOTAL		528,154	477	1,107.2	.1

Challenges By Type of Case, District 12, 1980-1984

Year	Number of Judges	Number of Challenges-Civil	Number of Challenges-Criminal
1980	39	26	276[1/]
1981	39	18	58
1982	39	22	30
1983	39	3	19
1984	39	7	18

1/ Many of these occurred concurrent with the start dates of seven newly seated judges. Most affidavits in 1980 challenged these new judges.

WASHINGTON

Challenges By Type of Case, District 13, 1983-1984

Year	Number of Judges	Number of Challenges-Civil	Number of Challenges-Criminal
1983	5	4	0
1984	5	4	0

WISCONSIN

Filings and Challenges Per District, 1984[1/]

District[2/]	Number of Judges	Number of Filings[3/]	Number of Challenges	Number of Filings/ Challenge[1/]	Percent of Filings
2	16	41,948	326	128.7	.8
5	20	63,092	515	122.5	.8
6	17	44,167	339	130.3	.8
7	14	34,906	448	77.9	1.3
8	18	37,887	429	88.3	1.1
9	14	26,726	537	49.8	2.0
10	18	38,138	521	73.2	1.4
TOTAL		286,864	3,115	92.1	1.1

1/ The number of challenges in this table was supplied by trial court administrators and thus the computations differ from those in the next table.

2/ Information was not available from trial court administrators in Districts 1, 3 and 4.

3/ Drawn from Director of State Court, Office of Court Operations, "Analysis of Substitution in Wisconsin Circuit Courts Prepared for the Wisconsin Judicial Conference," September 16, 1985.

WISCONSIN

Filings and Challenges Per District, 1984[1/]

District	Number of Judges	Number of Filings	Number of Challenges	Number of Filings/ Challenge	Percent of Filings
1	--	Not available	--	--	--
2	16	41,948	255	164.5	.6
3	--	44,447	348	127.7	.8
4	--	41,405	180	230.0	.4
5	20	63,092	453	139.3	.7
6	17	44,167	287	153.9	.6
7	14	34,906	399	87.5	1.1
8	18	37,887	293	129.3	.8
9	14	26,726	424	63.0	1.6
10	18	38,138	448	85.1	1.2
TOTAL		372,716	3,087	120.7	.8

1/ Table drawn from data in Director of State Court, Office of Court Operations, "Analysis of Substitution in Wisconsin Circuit Courts Prepared for the Wisconsin Judicial Conference," September 16, 1985.

WISCONSIN

Challenges Per Judge, By Type of Case,
District 5, 1984

Judge	Criminal	Civil	Total
1	-	40	40
2	-	5	5
3	-	1	1
4	10	7	17
5	-	5	5
6	5	2	7
7	-	7	7
8	52	81	133
9	-	3	3
10	-	8	8
11	5	3	8
12	10	9	19
13	1	54	55
14	11	68	79
15	-	-	-
16	-	2	2
17	-	7	7
18	-	-	-
19	54	50	104
20	-	15	15
TOTAL	148	367	515

WISCONSIN

Challenges Per County, District 5, 1984

County	Number of Judges	Number of Filings	Number of Challenges	Number of Filings/ Challenge	Percent of Filings
A	12	84,701	253	334.8	.3
B	1	10,356	55	188.3	.5
C	1	4,197	79	53.1	1.9
D	6	30,057	128	23.9	.4
TOTAL		129,311	515	251.1	.4

WISCONSIN

Filings and Challenges Per County, District 6, 1984

County	Number of Judges	Number of Filings	Number of Challenges	Number of Filings/ Challenge	Percent of Filings
A	1	1,308	59	22.2	4.5
B	2	2,678	46	58.2	1.7
C	2	6,751	33	204.6	.5
D	3	5,459	80	68.2	1.5
E	1	2,100	22	95.5	1.1
F	1	1,732	18	96.2	1.0
G	1	1,187	5	237.4	.4
H	2	3,343	28	119.4	.8
I	2	5,608	6	934.7	.1
J	1	1,255	28	44.8	2.2
K	2	7,338	23	319.0	.3
TOTAL		38,759	348	111.4	.9

WISCONSIN

Filings and Challenges By Type of Case,
District 6, 1984

County	Number of Judges	Number of Filings-Civil	Number of Challenges-Civil	Number of Filings-Criminal	Number of Challenges-Criminal
A	1	881	57	427	2
B	2	1,964	5	714	41
C	2	4,870	5	1,881	28
D	3	3,008	10	2,451	70
E	1	1,516	12	584	10
F	1	912	10	820	8
G	1	796	5	391	0
H	2	2,329	11	1,014	17
I	2	3,934	4	1,674	2
J	1	924	8	331	20
K	2	4,822	14	2,516	9
TOTAL		25,956	141	12,803	207

Statistics Based on District 6,
1984

County	Number of Filings/ Challenge-Civil	Percent of Filings-Civil	Number of Filings/ Challenge-Criminal	Percent of Filings-Criminal
A	15.5	6.5	213.5	.5
B	392.8	.3	17.4	5.7
C	974.0	.1	67.2	3.2
D	300.8	.3	35.0	2.9
E	126.3	.8	58.4	1.7
F	91.2	1.1	102.5	1.0
G	159.2	.6	0.0	0.0
H	211.7	.5	59.7	1.7
I	983.5	.1	837.0	.1
J	115.5	.9	16.6	6.0
K	344.4	.3	279.6	.4

WISCONSIN

Filings and Challenges Per Judge,
District 7, 1982

Judge	Number of Filings[1/]	Number of Challenges	Number of Filings/Challenge	Percent of Filing
1	1,205	37	32.6	3.0
2	1,709	39	43.8	2.3
3	1,081	14	72.7	1.3
4	863	16	53.9	1.9
5	841	46	18.3	5.5
6	1,420	50[2/]	28.4	3.5
7	1,576[3/]	12	131.3	.8
8	1,576[3/]	79	20.0	5.0
9	956[3/]	15	63.7	1.6
10	1,942	59	32.9	3.0
11	978	6	163.0	.6
12	1,576[3/]	11	143.3	.7
13	1,603	6	267.2	.4
14	956[3/]	12	79.7	1.3
TOTAL		402	45.5	2.2

1/ Represents contested filings only.

2/ Represents challenges to two judges who served one-half year each.

3/ Approximations by court administrator.

WISCONSIN

Filings and Challenges Per Judge,
District 7, 1984

Judge	Number of Filings	Number of Challenges	Number of Filings/Challenge	Percent of Filing
1	7,115	36	197.6	.5
2	6,449	42	153.6	.7
3	4,471	8	558.9	.2
4	4,679	22	212.7	.2
5	3,735	9	415.0	.2
6	3,804	67	56.8	1.8
7	5,977	14	426.9	.2
8	2,014	7	287.7	.3
9	2,256	95	23.7	4.2
10	1,879	56	33.6	2.9
11	1,962	15	130.8	.8
12	12,430	51	243.7	.4
13	4,038	9	448.7	.5
14	1,979	17	116.4	.8

WISCONSIN

Filings and Self-Disqualifications Per Judge, District 8, 1984

Judge[1]	Challenges	Self-Disqualifications
1	22	14
2	11	19
3	11	22
4	9	19
5	6	89[2]
6	9	8
7	45	5
8	9	10
9	26	7
10	55	52
11	9	9
12	2	8
13	22	2
14	5	20

1/ Data was not available on four judges in this district.

2/ This judge was ill.

WISCONSIN

Filings and Challenges,
District 9, 1983

Member of Judges	Number of Filings	Number of Challenges	Number of Filings/ Challenge	Percent of Filings
14	25,378	457	55.5	1.8

WISCONSIN

Filings and Challenges By County in District 9, 1983

County	Number of Judges	Number of Filings	Number of Challenges	Number of Filings/ Challenge	Percent of Filings
1	1	1,085	10	108.1	.9
2	1	811	34	23.9	4.2
3	1	1,588	13	122.2	.8
4	1	2,267	32	70.8	1.4
5	4	8,224	68	120.9	.8
6	1	3,466	89	38.9	2.6
7	1	1,289	46	28.0	3.6
8	2	3,844	39	98.6	1.0
9	1	942	79	11.9	8.4
10	1	2,262	47	48.1	2.1

Filings and Challenges By County in District 9, 1984

County	Number of Judges	Number of Filings	Number of Challenges	Number of Filings/ Challenge	Percent of Filings
1	1	1,531	9	170.1	.6
2	1	734	65	11.3	8.8
3	1	1,655	17	97.4	1.0
4	1	2,251	26	86.6	1.2
5	4	8,268	92	89.9	1.1
6	1	3,999	120	33.3	3.0
7	1	1,215	28	43.4	2.3
8	2	3,738	52	71.9	1.4
9	1	1,198	61	19.6	5.1
10	1	2,474	67	36.9	2.7

WISCONSIN

Filings and Challenges By type of Case,
District 10, 1984

Number of Filings-Civil	Number of Challenges-Civil	Number of Filings-Criminal	Number of Challenges-Criminal
95,127	294	4,361	227

Statistics Based on District 10,
1984 Data

Number of Filings/ Challenge-Civil	Percent of Filings-Civil	Number of Filings/ Challenge-Criminal	Percent of Filings-Criminal
323.6	.3	19.2	5.2

WISCONSIN

Challenges Per Judge By Type of Case,
District 10, 1984

Judge	Criminal	Civil	Total
1	32	4	36
2	3	11	14
3	1	7	8
4	7	13	20
5	-	3	3
6	68	121	189
7	-	5	5
8	2	10	12
9	4	18	22
10	0	4	4
11	0	2	2
12	1	9	10
13	3	6	9
14	1	0	1
15	1	3	4
16	34	40	74
17	33	59	92
18	2	14	16
TOTAL	99	144	521

Appendix C:
Bibliography

Articles

Abels, Jon B. and Charles A. Thompson, "Change of Judge in Indiana: A Continuing Dilemma," Indiana Legal Forum, 2(Fall, 1968), 164-86.

Ainsworth, Robert A., "Judicial Ethics - A Crisis Abates," Tulane Law Review, 45 (February, 1971), 245-58.

Aronson, Robert H., "Disqualification of Judges for Bias or Prejudice--A New Approach," Utah Law Review, 1972 (Fall, 1972), 448-464.

"Article III Constraints and the Expanding Civil Jurisdiction of Federal Magistrates: A Dissenting View," Yale Law Journal, 88 (April, 1979), 1023-61.

Bartels, John R., "Peremptory Challenges to Federal Judges: A Judge's View," American Bar Association Journal, 68(April, 1982), 449-51.

Barton, Susan E., "Judicial Disqualification in the Federal Courts: Maintaining an Appearance of Justice Under 28 U.S.C. sec. 455," University of Illinois Law Forum, 4(1978), 863-85.

Burbank, Stephen B., "Procedural Rulemaking Under the Judicial Council's Reform and Judicial Conduct and Disability Act of 1980," University of Pennsylvania Law Review, 131(December, 1982), 283-352.

Burbank, Stephen B., "The Federal Judicial Discipline Act: Is Decentralized Self-regulation Working?" Judicature, 67 (October, 1983), 183-99.

Burg, Edward G., "Meeting the Challenge: Rethinking Judicial Disqualification," California Law Review, 69(Spring, 1981), 1445-85.

"Change of Venue and Change of Judge in a Civil Action in Indiana: Proposed Reforms," Indiana Law Journal, 38(1963), 289-304.

"Civil Procedure--Judicial Disqualification--Extra-Judicial Associations and the Appearance-of-Prejudice Test of 28 U.S.C. sec. 455(a)--Idaho v. Freeman," University of Kansas Law Review, 31(Fall, 1982), 200-18.

Coberly, Mark T., Caesar's Wife Revisited - Judicial Disqualification After the 1974 Amendments," Washington and Lee Law Review, 34(1977), 1201-22.

Coleman, Richard M., "An Idea Whose Time Has Come," Los Angeles Lawyer, 4(September, 1981), 6-7.

Dasinger, Douglas D., "Statute Providing for Disqualifaction of A Judge By Affidavit Without Proof of Bias or Prejudice Is Not A Legislative Infringement on Judicial Power," Montana Law Review, 27(Fall, 1965), 79-84.

De La Mora, Linda, "Statute Allowing Substitution of Judge Upon Peremptory Challenge Does Not Violate Separation of Powers Doctrine, State v. Holmes, 106 Wis.2d 31, 315 N.W. 2d (1982)," Marquette Law Review, 66(1983), 414-31.

Devitt, Edward J. "Federal Civil Jury Trials Should Be Abolished," American Bar Association Journal, 60(May, 1974), 570-74.

"Disqualification for Interest of Lower Federal Court Judges: 28 U.S.C. sec. 455," Michigan Law Review, 71(1973), 538-70.

"Disqualification of a Judge on the Ground of Bias," Harvard Law Review, 41 (November, 1927), 78-83.

"Disqualification of Judges and Justices in The Federal Courts," Harvard Law Review, 86(Fall, 1973), 736-64.

"Disqualification of Judges for Bias In the Federal Courts," Harvard Law Review, 79(May, 1966), 1435-52.

"Disqualification of Judges for Prejudice or Bias-- Common Law Evolution, Current Status and the Oregon Experience," Oregon Law Review, 48(1969), 311-410.

Evans, John Scott, "Civil and Criminal Procedure-- Disqualification of District Judges for Prejudice in Wyoming," Land and Water Law Review, 6(1971), 743-52.

Frank, John P., "Disqualification of Judges," Yale Law Journal, 56(April, 1947), 605-39.

Frank, John P. "Disqualification of Judges: In Support of the Bayh Bill," Law and Contemporary Problems, 35(Winter, 1970), 43-68.

Galbraith, Peter A., "Disqualifying Federal District Judges Without Cause," Washington Law Review, 50(1974), 109-42.

Garn, Jake and Lincoln C. Oliphant, "Disqualification of Federal Judges Under 28 U.S.C. sec. 455(a)," Harvard Journal of Law and Public Policy, 4(Summer, 1981), 1-66.

Getto, Ernest J., "Peremptory Disqualification of the Trial Judge," Litigation, 1(Winter, 1975), 22-25.

Hjelmfelt, David C., "Statutory Disqualification of Federal Judges," University of Kansas Law Review, 30(Winter, 1982), 255-63.

Hutley, F.C., "Bias and Suspicion of Bias," Criminal Law Journal, 4(February, 1980), 200-09.

Iungerich, Russell, "The Time Has Come," Los Angeles Lawyer (September, 1980), 16-19.

Jackson, Neal A., "Allow Peremptory Challenge of Federal District Judges," Litigation News, 6(July, 1981), 3-4.

Jacobs, Andrew, Sr., "Some Observations Regarding Crime Control," Indiana Law Review, 11(February, 1978), 403-29.

Jacobson, Sharon T., "The Elusive Appearance of Propriety: Judicial Disqualification Under Section 455," De Paul Law Review, 25(Fall, 1975), 104-31.

Johnson, Stephen, "Criminal Law and Procedure," Indiana Law Review, 16(February, 1983), 119-169.

Karl, Gary L., "Disqualification of Federal District Court Judges for Bias or Prejudice: Problems, Problematic Proposals and a Proposed Procedure," Albany Law Review, 46(Fall, 1981), 229-49.

Kobrin, Helena Kempner, "Disqualification of Federal District Judges--Problems and Proposals," Seton Hall Law Review, 7(Spring, 1976), 612-41.

Lacy, Terri J., "Disqualification of Federal Judges, Statutory Right to Recusal and the 1974 Amendments to Title 28," Southwestern Law Journal, 31(Fall, 1977), 887-904.

Leitch, Brian P., "Judicial Disqualification in the Federal Courts: A Proposal to Conform Statutory Provisions to Underlying Policies," Iowa Law Review, 67(March, 1982), 525-49.

Levinson, Robert Arthur, "Peremptory Challenges of Judges in the Alaska Courts," UCLA-Alaska Law Review, 6(Spring, 1977), 269-300.

Litteneker, Randall J., "Disqualification of Federal Judges for Bias or Prejudice," University of Chicago Law Review, 46(Fall, 1978), 236-68.

M., D.B.H., Jr., Mitchell v. Sirica: The Appearance of Justice, Recusal, and the Highly Publicized Trial," Virginia Law Review, 61(1975), 236-53.

Martin, Ellen M., "Disqualification of Federal Judges for Bias Under 28 U.S.C. Section 144 and Revised Section 455," Fordham Law Review, 45(1976), 139-63.

Marton, Kraig J. "Peremptory Challenges of Judges: The Arizona Experience," Law and the Social Order (1973), 95-108.

Neisser, Eric, "The New Federal Judicial Discipline Act: Some Questions Congress Didn't Answer," Judicature, 65(September, 1981), 142-60.

"Note: Disqualification of a Federal District Judge for Bias--the Standard Under Section 144," Minnesota Law Review, 57(1973), 749-70.

Orfield, Lester B., "Recusation of Federal Judges," Buffalo Law Review, 17(Spring, 1968), 799-828.

Platt, Thomas J., "The Expanding Influence of the Federal Magistrate," The John Marshall Law Review, 14 (Spring, 1981), 465-89.

Puro, Steven, et al., "The Evolving Role of U.S. Magistrates in the District Courts," Judicature, 64 (May, 1981), 436-49.

Ratner, David L., "Disqualification of Judges for Prior Judicial Actions," Howard Law Journal, 3(June, 1957), 228-52.

Rusnak, Michael J., "Judges--Fifth Circuit Adopts Standard for Disqualification of Judges for Bias," Cumberland Law Review, 7(Spring, 1976), 185-92.

Ryan, Patrick J., "Judicial Disqualification Based on a Conflict of Interest," Loyola of Los Angeles Law Review, 12(December, 1978), 1057-79.

Schwartz, Bernard, "Disqualification for Bias in the Federal District Courts," University of Pittsburgh Law Review, 11(June, 1950), 415-429.

Sensabaugh, Don R., "Judicial Ethics--Recusal of Judges--The Need for Reform," West Virginia Law Review, 77(June, 1965), 763-79.

Slonim, Scott, "Bench-Bar Clash Looms Over Challenges to Judges," American Bar Association Journal, 66(December, 1980), 1503.

Smith, Cody W., Jr., "Judges-Disqualification to Act Because of Stock Interest," South Carolina Law Review, 22(1970), 261-72.

"State Procedures for Disqualification of Judges for Bias and Prejudice," New York Law Review, 42(May, 1967), 482-512.

Tone, Jeffrey R., "Substitution of Judges in Illinois Criminal Cases," University of Illinois Law Forum, (1978), 519-39.

Walton, H. Steven, "Extra-Judicial Associations and the Appearance of Prejudice Test of 28 U.S.C. sec. 455(a)," University of Kansas Law Review, 31(Fall, 1982), 200-18.

Willis, John W., "Civil Procedure - Judges - Peremptory Challenge of Judge - Cal. Code Civ. Proc. (1937), Sec. 170.S, Southern California Law Review, 11 (1938), 517-20.

Workman, Thomas and Vicky Arends, "A Tool For Abuse," Los Angeles Lawyer (September, 1980), 10-16.

Cases

American Buyers Life Insurance Co. v. Superior Court, 84 Ariz. 377, 329 P.2d 1100 (1958).

Austin v. Lambert, 11 Cal.2d 73, 77 P.2d 849 (1938).

Bachman v. City of Milwaukee, 47 Wis. 435, 2 N.W. 543 (1849).

Barber v. State, 197 Ind. 88, 149 N.E. 896 (1925).

Bell v. Chandler, 569 F.2d 556 (10th Cir. 1978).

Berger v. United States, 255 U.S. 22 (1921).

Castleberry v. Jones, 68 Okl. Crim. 44, 99 P.2d 174 (1940).

Channel Flying, Inc. v. Bernhardt, 451 P.2d 570 (Alas. 1969).

City of Cleveland v. Krupansky, 619 F.2d 572 (6th Cir. 1980), cert. denied, 449 U.S. 834 (1980).

Clover Valley Lumber Co. v. Sixth Judicial District, 58 Nev. 456, 83 P.2d 1031, 1034 (1938).

Conkling v. Crosby, 29 Ariz. 60, 239 P. 506 (1925).

Daigh v. Schaffer, 23 Cal. App.2d 449, 73 P.2d 927 (1937).

Davis v. Board of School Commissioners, 517 F.2d 1044 (5th Cir. 1975), cert. denied, 425 U.S. 944 (1976).

Davis v. Irwin, 65 Idaho 77, 139 P.2d 474 (1943).

Diehl v. Crump, 72 Okl. 108, 179 P. 4 (1919).

Duplan Corp. v. Deering Milliken, Inc., 400 F.Supp 497 (D.S.C. 1975).

Ex parte N.K. Fairbank Co., 194 F. 978 (M.D. Ala. 1912).

Geiffels v. State, 552 P.2d 661 (Alas., 1976).

Hornaday v. Rowland, 674 P.2d 1333 (Alaska 1983).

Huhn v. Quinn, 21 Wyo. 51, 128 P.2d 514 (1912).

Hulme v. Woleslagel, 208 Kan. 385, 493 P.2d 541 (1972).

In re Rodgers, 537 F.2d 1196 (4th Cir. 1976).

In re Virginia Electric and Power Company, 539 F.2d 357 (4th Cir. 1976).

Johnson v. Goldman, 94 Nev. 6, 575 P.2d 929 (1978).

Johnson v. Superior Court, 50 Cal.2d 693, 329 P.2d 5 (1958).

Jones v. Jones, 242 Minn. 251, 64 N.W.2d 508 (1954).

Knox v. Shelby County Superior Court, 290 N.E.2d 57 (Ind., 1972).

Lovell v. Weiss, 250 Ore. 252, 430 P.2d 357, 442 P.2d 241 (1968).

Marsin v. Udall, 78 Ariz. 309, 279 P.2d 721 (1955).

Moruzzi v. Federal Life and Casualty Co., 42 N.M. 35, 75 P.2d 320 (1938).

Murdica v. State, 22 Wyo. 196, 137 P. 574 (1914).

Natural Bridge Development v. St. Louis County Water, 563 S.W.2d 522, (Mo. App. 1978).

Parrish v. Board of Commissioners, 524 F.2d 98 (5th Cir. 1975), cert. denied, 425 U.S. 924 (1976).

People v. Arnold, 76 Ill. App.2d 269, 22 N.E.2d 160 (1966).

People v. Etheridge, 78 Ill. App.2d 45, 223 N.E.2d 437 (1966).

People v. Morrow, 100 Ill. App.2d 1, 241 N.E.2d 680 (1968).

Potashnick v. Port City Construction Co., 609 F.2d 1101 (Fifth Cir., 1980).

Price v. Featherstone, 130 P.2d 853 (Ida., 1942).

Rex v. Stanfield, 194 Ore. 698, 244 P.2d 173 (1952).

SCA Services, Inc. v. Morgan, 557 F.2d 110 (7th Cir. 1977).

Solberg v. Superior Court, 19 Cal.3d 182, 561 P.2d 1148, 137 Cal. Rptr. 460 (1977).

State v. Brown, 8 Okla. Cr. 40, 126 P.2d 245 (1912).

State ex rel. Anaconda Copper Mining Co. v. Clancy, 30 Mont. 529, 77 P. 312 (1904).

State ex rel. Beach v. Fifth Judicial District, 53 Nev. 444, 5 P.2d 535 (1931).

State ex rel. Benjamin v. Criminal Court of Marion County, 264 Ind. 191, 341 N.E.2d 495 (1976).

State ex rel. Bushman v. Vandenberg, 203 Ore. 326, 276 P.2d 432, 280 P.2d 334, (1955).

State ex rel. Durand v. District Court of Second Judicial District et al, 30 Mont. 547, 77 P. 318 (1904).

State ex rel. Gaston v. The Gibson County Court, 462 N.E. 2d 1049 (Ind. 1984).

State ex rel. Greeley v. Dist. Ct. of 4th Jud. Dist., 590 P.2d 1104 (Mont. 1979).

State ex rel. Hannah v. Armijo, 38 N.M. 73, 28 P.2d 511 (1933).

State ex rel. Jeffries v. The Lawrence Circuit Court, 467 N.E. 2d 741 (Ind. 1984).

State ex rel. Johnson v. Thomson, 34 N.W.2d 80 (1948).

State ex rel. McAllister v. Slate, 278 Mo. 570, 214 S.W. 85 (1919)

State ex rel. Peery v. District Court of Fourth Judicial Dist., 145 Mont. 287, 400 P.2d 648 (1965).

State v. Garrison, 276 N.W. 693 (N.D., 1937).

State v. Henning, 3 S.D. 492, 54 N.W. 536 (1893).

State v. Hilborn, 71 Ore. App. 534 (1984).

State v. Hoist, 126 N.W. 1090 (Minn., 1910).

State v. Holmes, 106 Wis.2d 31, 315 N.W.2d 703 (1982).

State v. Palmer, 4 S.D. 543, 57 N.W. 490 (1894).

State v. Thompson, 180 N.W. 73 (S.D., 1920).

Stephens v. Stephens, 17 Ariz. 306, 152 Pac. 164 (1915)

United States v. Bell, 351 F2d 868 (1965)

United States v. Grinnell Corp., 384 U.S. 563 (1966)

United States, v. Olander, 584 F.2d 876 (9th Cir. 1978).

United States v. Ritter, 540 F.2d 459 (10th Cir. 1976).

U'ren v. Bagley, 118 Ore. 77, 245 P. 1074 (1926).

Miscellaneous

American Bar Association, Section on Criminal Justice, Report to the House of Delegates, approved by the House of Delegates, August, 1979.

American Bar Association, Young Lawyers Division Report to the House of Delegates, No. 125, February, 1980.

American Law Reports, Annotated (1920) Vol. 5, pp. 1275-77.

Attorney General's Report Concerning Mass Peremptory Disqualifications of Montana District Judges, 1974-1978, submitted to the Montana Supreme Court, June 11, 1979.

Change in Peremptory Challenge Rules 40.1 (b)(i), W.R.C.P. and 23(d), W.R.C.P., Memorandum from Rooney, Chief Justice, to Members of the Wyoming State Bar Association, March 14, 1983.

Chaset, Alan J., Disqualification of Federal Judges By Peremptory Challenge (Washington: Federal Judicial Center, 1981).

Chicago Bar Association, Federal Civil Procedure Committee, Report of the Subcommittee to Consider the Proposed "Peremptory Challenge Act of 1981" Providing for Peremptory Challenges of Federal Judges, 1985.

Chicago Bar Association, Judiciary Committee, Preliminary Report of the Subcommittee on the Peremptory Challenge Act of 1980 Relating to Federal Judges, approved by the Board of Managers, October 1, 1981.

Congressional Record - Senate, 91st Cong., 2nd Session, August 7, 1970, vol. 116, pp. 27796-27800.

Congressional Record - Senate, 92nd Cong., 1st Session, May 17, 1971, vol. 117, pp. 15267-15271.

Director of State Court, Office of Court Operations, Analysis of Substitution in Wisconsin Circuit Courts Prepared For the Wisconsin Judicial Conference, September 16, 1985.

Disqualification of Judges, Memorandum From Michael B. Johnson, Judicial Planning Committee, to Sue Dosal, State Court Administrator, Minnesota, October 24, 1983.

Disqualification Sample Study, Memorandum From Kit Furey, Judicial Education Officer, to Carl Bianchi, Administrative Director of Courts, Idaho, December 13, 1982.

Elliott, Jim. "Substitution adds costs, delays to state justice," Daily Herald (Wausau-Merrill, Wis.), September 18, 1981.

Elliott, Jim, "Substitutions blamed for Judicial delays," Daily Herald (Wausau-Merrill, Wis.), n.d. 1981.

Elliott, Jim, "Substitutions 'essential', ex-judge says," Daily Herald (Wausau-Merrill, Wis.), n.d. 1981.

Hearings on H.R. 7473 and H.R. 7817 Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary, 96th Cong., 2d sess. (June 6 and 9, 1980).

Hearings on S. 1064 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary, 93d Cong., 1st sess. (1971-73).

History of Judicial Peremptory Challenge Proposals in the Ninth Circuit, Memorandum from Mary Heim, Law Clerk, to James R. Browning, Chief Judge, United States Court of Appeals, Ninth Circuit, August 2, 1985.

H.R. Rep. No. 93-1453, 93d. Cong., 2d Sess., reprinted in [1974] 3 U.S. Code Cong. and Ad. News, 6351-63.

Joint Subcommittee on Judiciary, The District Courts, Indigent Defense, and Prosecutorial Services in Montana (Helena: Montana Legislative Council, 1982), 13-16.

Judicial Council of California, "Disqualification of Judges," 1962 Annual Report of the Administrative Office of the California Courts (January, 1963), 34-39.

Misner, Robert L., Speedy Trial: Federal and State Practice Charlottesville: The Michie Co., 1983).

Neff, Alan, The United States District Judge Nominating Commissions: Their Members, Procedures and Candidates (Chicag : American Judicature Society, 1981).

New York City Bar Association, Committee on Federal Courts, "A Proposal for Peremptory Challenges of Federal Judges in Civil and Criminal Cases," Record of the New York City Bar Association, 36(April, 1981), 231-48.

Peremption of Judges, Memorandum from Heidi Borson-Paine, Legislative Analyst, Research Agency, Alaska State Legislature, to Representative Milo Fritz, January 24, 1984.

Solomon, M., Caseflow Management in the Trail Court (Chicago: American Bar Association, 1973).

The State Bar of California, Federal Courts Committee, Report and and Recommendations on Permissive Substitution of Federal District Judges, approved by the Board of Directors, May 1, 1984.

Thode, E. Wayne, Reporters Notes to Code of Judicial Conduct, (Chicago: American Bar Association, 1973)

United States Code Congressional and Administrative News, 93rd Cong., 2nd Session, 1974, vol. 3, pp. 6351-63.

Appendix D:
Letters Sent to Target Audiences

Letter of Inquiry*

Dear _____:

We have been asked by the United States Department of Justice to conduct a study on judicial peremptory challenges. This procedure allows for the automatic substitution of a judge, without a determination of cause, upon motion by an attorney or litigant.

Our primary tasks are to evaluate how these procedures are working in the states and to recommend whether they should be extended to the federal judiciary. Because the subject is of considerable importance, we are asking a few select individuals such as yourself for a candid assessment of the procedure.

Of particular concern is how these procedures impact on practicing attorneys. For example, it has been suggested that they force lawyers to invoke challenges for the slightest of reasons, fearing that if they do not, they will be open to malpractice suits. It has also been suggested that the procedure strains relationships between attorneys and judges to a greater extent than procedures which require cause to be established before a substitution is allowed. Others claim that both of these allegations are unfounded.

A second concern is ascertaining how peremptory challenge procedures impact on the administration of justice. Some have suggested that they compromise judicial independence while others refute this assertion, claiming that instead, public confidence in the judiciary is enhanced.

A third concern is about possible abuses of the system and how often they occur. Some jurists, for example, have suggested that they are invoked for illegitimate reasons while others claim that they are generally invoked for legitimate ones. Among the reasons listed in the literature are a judge's interest in the case, bias or prejudice, philosophy, demeanor, mediocrity, sentencing practices, race, sex, and religion.

Finally, we are interested in an overall assessment of how peremptory challenges are working in your jurisdiction and whether they should be continued.

---

*Letter was sent to district attorneys, public defenders, attorneys general, local bar association presidents and state bar association presidents.

Our task is a difficult one because the subject is highly controversial and has significant ramifications. Any thoughts that you can share with us will be tremendously helpful and most greatly appreciated.

Thank you in advance for your time and consideration.

Sincerely,

Larry Berkson
Principal Investigator
Judicial Peremptory Challenge Project

Letter of Inquiry*

Dear _____:

We have been asked by the United States Department of Justice to conduct a study on judicial peremptory challenges. This procedure allows for the automatic substitution of a judge, without a determination of cause, upon motion by an attorney or litigant.

Our primary tasks are to evaluate how these procedures are working in the states and to recommend whether they should be extended to the federal judiciary. Because the subject is of considerable importance, we are asking a few select individuals such as yourself for a candid assessment of the procedure.

Of particular concern is ascertaining how these procedures impact on judges personally. For example, it has been suggested that they subject judges to hardships associated with frequent and lengthy travel, cause extensive frustrations among judges and are more likely to strain relationships between judges and attorneys than those procedures which require cause to be established before a substitution is allowed. Others claim that these assertions are unfounded.

A second concern is ascertaining how peremptory challenge procedures impact on the administration of the judiciary. Some have suggested that they cause delay, disrupt calendar management (in both individual and master calendar systems), increase judicial budgets, result in the need to place additional judges on the bench, and compromise judicial independence. Others claim that this is not true and that the procedures provide helpful feedback to judges, enhance public confidence in the judiciary, and reduce the number of appeals in criminal and civil cases.

Third, we are concerned about possible abuses of the system and how often they occur. Some jurists, for example, have suggested that they are invoked for illegitimate reasons while others claim that they are generally invoked for legitimate ones. Among the reasons listed in the literature are a judge's interest in the case, bias or prejudice, philosophy, demeanor, mediocrity, sentencing practices, race, sex and religion.

Finally, we are interested in an overall assessment of how peremptory challenges are working in your district and whether they should be continued.

---

* Letter was sent to chief judges who have trial court administrators in their district.

Our task is a difficult one because the subject is highly controversial and has significant ramifications. Any thoughts that you can share with us will be tremendously helpful and most greatly appreciated.

Thank you in advance for your time and consideration.

Sincerely,

Larry Berkson
Principal Investigator
Judicial Peremptory Challenge Project

Letter of Inquiry*

Dear _____:

We have been asked by the United States Department of Justice to conduct a study on judicial peremptory challenges. This procedure allows for the automatic substitution of a judge, without a determination of cause, upon motion by an attorney or litigant.

Our primary tasks are to evaluate how these procedures are working in the states and to recommend whether they should be extended to the federal judiciary. Because the subject is of considerable importance, we are asking a few select individuals such as yourself for a candid assessment of the procedure.

Of particular concern is determining how often these procedures are used and whether they are ever exercised so frequently that they effectively remove a judge from hearing certain cases.

Another concern is ascertaining how these procedures impact on judges personally. For example, it has been suggested that they subject judges to hardships associated with frequent and lengthy travel, cause extensive frustrations among judges and are more likely to strain relationships between judges and attorneys than those procedures which require cause to be established before a substitution is allowed. Others claim that these assertions are unfounded.

A third concern is ascertaining how peremptory challenge procedures impact on the administration of the judiciary. Some have suggested that they cause delay, disrupt calendar management (in both individual and master calendar systems), increase judicial budgets, result in the need to place additional judges on the bench, and compromise judicial independence. Others claim that this is not true and that the procedures provide helpful feedback to judges, enhance public confidence in the judiciary, and reduce the number of appeals in criminal and civil cases.

Fourth, we are concerned about possible abuses of the system and how often they occur. Some jurists, for example, have suggested that they are invoked for illegitimate reasons while others claim that they are generally invoked for legitimate ones. Among the reasons listed in the literature are a judge's interest in the case, bias or prejudice, philosophy, demeanor, mediocrity, sentencing practices, race, sex and religion.

---

* Letter was sent to chief judges who do not have trial court administrators in their district.

Finally, we are interested in an overall assessment of how peremptory challenges are working in your district and whether they should be continued.

Our task is a difficult one because the subject is highly controversial and has significant ramifications. Any thoughts that you can share with us will be tremendously helpful and most greatly appreciated.

Thank you in advance for your time and consideration.

Sincerely,

Larry Berkson
Principal Investigator
Judicial Peremptory Challenge Project

Letter of Inquiry*

Dear _____:

As you know, we have been asked by the United States Department of Justice to conduct a study on judicial peremptory challenges. This procedure allows for the automatic substitution of a judge, without a determination of cause, upon motion by an attorney or litigant.

Our primary tasks are to evaluate how these procedures are working in the states and to recommend whether they should be extended to the federal judiciary. In addition to the information about the number of these challenges that you have already provided we would like to offer you the opportunity to express your personal opinion about these procedures.

Of particular concern is ascertaining how peremptory challenges impact on the administration of the judiciary. Some have suggested that they cause delay, disrupt calendar management (in both individual and master calendar systems), increase judicial budgets, and create a need for additional judges on the bench. Others claim that these allegations are totally unfounded.

We are also interested in an overall assessment of how peremptory challenges are working in your jurisdiction and whether they should be continued.

Our task is a difficult one because the subject is highly controversial and has significant ramifications. Any thoughts that you can share with us will be tremendously helpful and most greatly appreciated.

Thank you in advance for your time and consideration.

Sincerely,

Larry Berkson
Principal Investigator
Judicial Peremptory Challenge
Project

---

* Letter was sent to state court administrators and trial court administrators.

Letter of Inquiry*

Dear _____:

We have been asked by the United States Department of Justice to conduct a study on judicial peremptory challenges. This procedure allows for the automatic substitution of a judge, without a determination of cause, upon motion by an attorney or litigant.

Our primary tasks are to evaluate how these procedures are working in the states and to recommend whether they should be extended to the federal judiciary. Because the subject is of considerable importance, we are asking a few select individuals such as yourself for a candid assessment of the procedure.

Of particular concern is ascertaining how these procedures impact on judges personally. Another concern is about possible abuses of the system and how frequently they occur. Some jurists, for example, have suggested that peremptory challenges are invoked for illegitimate reasons while others claim that they are generally invoked for appropriate ones. Among the reasons listed in the literature are a judge's interest in the case, bias or prejudice, philosophy, demeanor, mediocrity, sentencing practices, race, sex and religion.

We are also interested in an overall assessment of how peremptory challenges are working in your jurisdiction and whether they should be continued.

Our task is a difficult one because the subject is highly controversial and has significant ramifications. Any thoughts that you can share with us will be tremendously helpful and most greatly appreciated.

Thank you in advance for your time and consideration.

Sincerely,

Larry Berkson
Principal Investigator
Judicial Peremptory Challenge Project

---

* Letter was sent to black judges and women judges.

Letter of Inquiry*

Dear _____:

We have been asked by the United States Department of Justice to conduct a study on judicial peremptory challenges. This procedure allows for the automatic substitution of a judge, without a determination of cause, upon motion by an attorney or litigant.

Our primary tasks are to evaluate how these procedures are working in the states and to recommend whether they should be extended to the federal judiciary. Because the subject is of considerable importance, we are asking the Chief Justices in 16 states for a candid assessment of the procedure.

Would you be so kind as to take a few moments to assess how well these provisions are working in (state). We would also appreciate your assessment of how most judges in (state) feel about the procedure.

Finally, we are interested in any thoughts you may have about the impact of these provisions on judicial independence and public confidence in the judiciary.

As I am sure you realize, the subject is a highly controversial one with far reaching ramifications. Any insight that you can provide will be most greatly appreciated.

We thank you in advance for your consideration.

Sincerely,

Larry Berkson
Principal Investigator

---

* Letter was sent to chief justices.

Letter of Inquiry*

Dear _____:

We have been asked by the United States Department of Justice to conduct a study on judicial peremptory challenges. This procedure allows for the automatic substitution of a judge, without a determination of cause, upon motion by an attorney or litigant. Currently, the procedure is used in 16 states. One of our tasks is to recommend whether the concept should be extended to the federal judiciary.

In 1980, Congress held hearings on a bill sponsored by Representative Drinan which would have provided for the peremptory challenge of federal district judges. Judge Walter E. Hoffman testified against the bill as Chairman of the Advisory Committee on Criminal Rules of the Judicial Conference of the United States. Subsequently, it is our understanding that the subject was discussed in the various Circuit Councils and that resolutions were adopted supporting or opposing the concept by most of them.

To assess the views of the federal judiciary on judicial peremptory challenges we would very much appreciate receiving any materials or resolutions on the subject developed by your Circuit Council. We would also very much appreciate receiving your personal views on the probable consequences of such a procedure, both negative and positive, if one were applied to the federal judiciary.

Our tasks is a difficult one because the subject is highly controversial and has significant ramifications. By soliciting your views we hope to gain an understanding of how federal judges feel about such a proposal.

I thank you in advance for your consideration.

Sincerely,

Larry Berkson
Principal Investigator
Judicial Peremptory Challenge Project

---

* Letter was sent to chief judges, U.S. Courts of Appeals.

Follow-up Letter*

Dear _____:

In the month of April we mailed you a letter inquiring about the operation of judicial peremptory challenges in your state. To date, we have not received a response and thought the correspondence might have been misplaced while enroute. For your convenience I have enclosed another copy.

The Justice Department is most eager to learn how these procedures are working so that it can determine whether the concept should be extended to the federal judiciary. Your observations will be most greatly appreciated.

Sincerely,

Larry Berkson
Principal Investigator
Judicial Peremptory Challenge Project

---

* Letter was mailed to all individuals from which we did not receive a response (within a 4-6 week period after initial letters were mailed).

Letter of Inquiry to California Judges*

Dear _____:

Koba Associates, Inc. is a management consulting firm in Washington, D.C. We are currently under contract to the Office of Legal Policy (OLP), United States Department of Justice to conduct a study on how judicial peremptory challenge procedures are working at the state level. This study, which involves a survey of judges, prosecutors, defense attorneys, bar association presidents, and court administrators in the 16 states in which the challenge is utilized, will culminate in a final report making recommendations regarding the extension of the peremptory challenge procedure to the federal judiciary.

The OLP is particularly interested in the operation of the challenge in California, given the size and make-up of the state. In 1969 a study was conducted by the California Judicial Council for the purpose of assessing the use and/or abuse of the challenge in the state. As 16 years have passed since this survey was conducted, OLP and Koba feel that a re-examination of the procedure in California is appropriate. We are therefore asking individuals such as yourself for a candid assessment of the procedure.

Would you be so kind as to take a few moments to answer the four questions enclosed? Any insight that you provide will be greatly appreciated.

You may notice a number which appears in the upper left-hand corner of the enclosed questionnaire. This number is used for coding purposes only. In order to ensure the confidentiality of your response, we will use a number-identification coding system. We thank you in advance for your consideration.

Sincerely,

Larry Berkson
Principal Investigator
Judicial Peremptory Challenge Project

---

* Letter was sent to all presiding and sole judges in the municipal and superior courts in California.

Questionnaire to California Judges*

OMB No. 1105 - 0032
Expires 6/30/86

1. Generally speaking, in your experience, is the peremptory challenge to judges under Code of Civil Procedure Section 170.6 used properly by counsel?

2. In what ways, if any, and with what frequency is the peremptory challenge being abused?

---

* Questionnaire was sent to all presiding and sole judges in the municipal and superior courts in California.

3. In your opinion is there a need to amend Code of Civil Procedure Section 170.6, and if so, would it be appropriate to merely add a provision to Section 170.6 that would permit a judge, in cases of repeated use of peremptory challenges against him, to raise the issue of abuse of process for determination by the presiding judge? What other changes might prevent such abuse?

4. Additional Comments

_____
Signature of Judge

(Use reverse side or attach additional sheets if needed.)

Please return this questionnaire to:

Koba Associates, Inc.
2000 Florida Avenue, N.W.
Washington, DC 20009
Attn: Dr. Larry Berkson

Follow-up Letter to California Judges*

Dear_____:

In mid-August we mailed you a letter and questionnaire inquiring about the operation of judicial peremptory challenges under section 170.6 of the Code of Civil Procedure in the state of California. To date, we have not received a response and thought the correspondence might have been misplaced while enroute. We have enclosed another copy for your convenience.

The Justice Department is most eager to learn how these procedures are working in California. Your observations will be most greatly appreciated. We look forward to hearing from you soon.

Sincerely,

Larry Berkson
Principal Investigator
Judicial Peremptory Challenge Project

---

* Letter was mailed to all individuals from which we did not receive a response (within a 4-6 week period after initial letters were mailed).

Appendix E:

Selected List of Individuals Providing Information For The Study

Alaska

Francis L. Bremson, Executive Director, Alaska Judicial Council, Anchorage

Teresa W. Carns, Senior Staff Associate, Alaska Judicial Council, Anchorage

Harry Davis, District Attorney, Fairbanks

Richard Dolaplain, Manager of Technical Operations, Alaska Court System, Anchorage

Dana Fabe, Public Defender, Anchorage

Leanne Flickinger, Research Analyst, Office of Administrative Director, Anchorage

Charles M. Gibson, Area Court Administrator, 4th Judicial District, Fairbanks

Mike Hall, Trial Court Administrator, 2nd Judicial District, Anchorage

Victor Krumm, District Attorney, Anchorage

Dwayne McConnell, District Attorney, Palmer

Albert H. Szal, Area Court Administrator, 3rd Judicial District, Anchorage

Arizona

Peter Anderson, Judicial Administrator for Criminal Division, Maricopa County, Phoenix

Honorable Matthew Boroweic, Chief Judge, Bisbee

Honorable Robert C. Broomfield, Chief Judge, Maricopa County, Phoenix

Honorable James Cameron, Associate Justice, Arizona Supreme Court, Phoenix

Michael Planet, Judicial Administrator for Civil and Probate Divisions, Maricopa County, Phoenix

California

Honorable James R. Browning, United States Court of Appeals, 9th Circuit, San Francisco

Stanley Collis, Executive Officer, Alameda County Superior Court, Oakland

Gudny Davis, Assignment Specialist, Court Administrator's Office, San Francisco

Donald Day, Supervising Attorney, Judicial Council, San Francisco

Noel K. Dessaint, Administrative Director of Courts, Supreme Court, Phoenix

Joseph Doyle, Statistics Department, Office of Administrative Director of Courts, San Francisco

Ralph J. Gampell, Administrative Director of Courts and Secretary of the Judicial Council, San Francisco

Kevin Holsclaw, Legislative Assistant, Office of Congressman Daniel Lungren, Washington, D.C.

B. Daniel Lynch, Esq., Pasadena

William Pierce, Court Administrator, San Diego Superior Court, San Diego

Val Saldano, Esq., Fullerton, Lang, Richert and Patch, Fresno

Alan Slater, Executive Officer/Jury Commissioner, Orange County, Santa Ana

Steve White, Chief Assistant Attorney General, Sacramento

Idaho

Carl Bianchi, Director, Administrative Office of Courts, Boise

Kit Furey, Assistant Director, Administrative Office of Courts, Boise

Illinois

Frank J. Bailey, Chief Deputy, Cook County Criminal Courts, Chicago

Bertha P. Erickson, Administrative Secretary, 1st Judicial Circuit, Marion

Honorable Roy Gulley, Director, Administrative Office of Courts, Springfield

Edward Ludwig, Chief Administrator, State Attorney's Office, Wheaton

William Madden, Assistant State Court Administrator, Chicago

Terrence M. Murphy, Executive Director, The Chicago Bar Association, Chicago

Thomas Powell, Administrative Secretary, 9th Judicial Circuit, Hamilton

Indiana

Honorable Gary DaNikolas, Chief Judge, Lake County, Crown Point

Honorable Michael Eldred, Vigo Superior Court, Terre Haute

Honorable James Kimbrough, Senior Judge, Superior Court, Lake County, Crown Point

Bruce Kotzan, Executive Director, Supreme Court of Indiana, Indianapolis

Minnesota

Stuart A. Beck, District Administrator, 6th Judicial District, Duluth

Donald Cullen, District Administrator, 3rd Judicial District, Austin

Deborah Dailey, Director, Statistical Analysis Unit, Supreme Court, St. Paul

Becky Dolen, Administrative Assistant, 8th Judicial District, Montevideo

Gordon Griller, District Administrator, 2nd Judicial District, St. Paul

D. J. Hanson, District Administrator, 9th Judicial District, Bemidji

A. Milton Johnson, Judicial District Administrator, 8th Judicial District, Montevideo

Michael B. Johnson, Staff Attorney, Judicial Planning Commission of the Minnesota Supreme Court, St. Paul

William Kennedy, Public Defender, Hennepin County

Jack Nordby, Esq., Minneapolis

Jack M. Provo, Court Administrator, 4th Judicial District, Minneapolis

James P. Slette, Court Administrator, 7th Judicial District, Moorhead

W. Paul Westphal, Jr., Court Administrator, 10th Judicial District, Anoka

D. Gerald Wilhelm, Martin County Attorney, Fairmont

Gerald J. Winter, Judicial District Administrator, 5th Judicial District, St. James

Missouri

Michael Ward, Trial Court Administrator, 26th Judicial Circuit, Camdenton

Montana

Michael Abley, State Court Administrator, Supreme Court of Montana, Helena

Honorable Jack L. Green, Chief Judge, 4th Judicial District, Missoula

Jane Haydn, Data Processing Control Supervisor, Supreme Court of Montana, Helena

Nancy Johnson, Secretary, Court Administrator's Office, Helena

Honorable Charles Luedke, 13th Judicial District, Billings

Honorable Ronald D. McPhillips, 9th Judicial District, Shelby

Chris Tweeten, Assistant Attorney General, Helena

Nevada

Honorable William Beko, 5th Judicial District, Tonopah

Ann Bersi, Executive Director, State Bar of Nevada, Reno

Michael Brown, Director, Administrative Office of the Courts, Carson City

Judith Fountain, Clerk, Supreme Court, Carson City

Herbert Keppen, Comptroller's Office, Carson City

Mary Sanada, Assistant Comptroller, Carson City

New Mexico

Honorable William R. Federici, Chief Justice, Supreme Court of New Mexico, Santa Fe

Edward J. Baca, Director, Administrative Office of Courts, Santa Fe

North Dakota

Kathy DeLang, Data Coordinator, Office of Court Administrator, State Supreme Court, Bismarck

Luella Dunn, Clerk, Supreme Court (Joann Eckroth, Deputy Clerk), Bismarck

Theodore Gladden, District Court Administrator, Bismarck

Dan Greenwood, Esq., Greenwood, Greenwood and Greenwood, Dickinson

Gail Hagerty, District Attorney, Bismarck

Ardean Ovelette, District Court Administrator, Dickinson

Richard Sletten, District Court Administrator, East Central Judicial District, Fargo

Oregon

Honorable Charles S. Crookham, Chief Judge, 4th Judicial District, Portland

William Linden, State Court Administrator, Supreme Court of Oregon, Salem

Norman H. Myer, Jr., Court Administrator, 2nd Judicial District, Eugene

Honorable Darrell J. Williams, 12th Judicial District, Dallas

South Dakota

Corinne M. Ausmann, Trial Court Administrator, 7th Judicial Circuit, Rapid City

William M. Daugherty, Trial Court Administrator, 2nd Judicial Circuit, Sioux Falls

Mark G. Geddes, State Court Administrator, Pierre

Honorable Irvin N. Hoyt, Chief Judge, 3rd Circuit, Huron

Washington

Louise Anderson, Coordinator of Superior Court Services, State Court Administrator's Office, Olympia

Margaret J. Bingham, Grays Harbor County Clerk, Montesano

James R. Boldt, Court Administrator, 2nd Judicial District, Tri-Cities

Douglas Boole, Prosecuting Attorney, Okanogan County

Gary Burleson, Prosecuting Attorney, Mason County

Robert Cannon, Court Administrator, 12th Judicial District, Seattle

Robert Carlberg, Court Administrator, 23rd Judicial District, Spokane

Sharon Estee, Manager, Research and Statistics, State Court Administrator's Office, Olympia

Carolyn Failing, Court Administrator, 25th Judicial District, Olympia

Thomas Fallquist, County Clerk, Spokane

Judy Foster, Calendar Administrator, Olympia

Carol Glover, Court Administrator, 10th Judicial District, Coupeville

George Holmes, Court Administrator, 13th Judicial District, Port Orchard

Peggy L. Melvin, Court Administrator, 18th Judicial District, Okanogan

M. Janice Michels, Superior Court Clerk, Department of Judicial Administration, Seattle

Kathryn Moco, Court Administrator, 15th Judicial District, Goldendale

Mark Oldenburg, Court Administrator, 6th Judicial District, Clark County (Maggie Lingerfeld - Secretary), Vancouver

Carol Perusek, Court Administrator, 21st Judicial District, Mount Vernon

Charlotte Phillips, Court Administrator, 29th Judicial District, Yakima

Ed Poyfair, President, Clark County Bar Association, Clark County, Vancouver

James S. Scott, Esq., Yakima

Scott Stuart, Public Defender, Okanogan

Pam Tryon, Secretary, State Court Administrator's Office, Olympia

Honorable Robert F. Utter, Associate Justice, Supreme Court of Washington, Olympia

Wisconsin

Mary K. Baum, District Court Administrator, 5th Judicial District, Madison

John P. Brown, Public Defender, Green Bay

Jack Carter, Public Defender, Racine

Patrick Crooks, Esq., Crooks, Low and Connell, Wausau

Honorable William J. Duffy, Chief Judge, 8th Judicial District, Green Bay

John D. Ferry, Jr., Deputy Director for Court Operations, Supreme Court, Madison

Martin Hanson, Esq., Racine

Penny Hayes-Brook, Esq., Door County, Sturgeon Bay

Bradley Keith, Public Defender, Hudson

Dan Kessler, District Court Administrator, Waukesha County, Waukesha

Jerry Lang, District Court Administrator, 4th Judicial District, Oshkosh

Gregg T. Moore, District Court Administrator, 10th Judicial District, Eau Claire

J. Denis Moran, Director of State Courts, Madison

Lynae K.E. Olson, District Court Administrator, 2nd Judicial District, Racine

Jeffrey Schurman, Reporter, Leader-Telegram, Eau Claire

James E. Seidel, District Court Administrator, 9th Judicial District, Wausau

Sam Shelton, District Court Administrator, 6th Judicial District, Stevens Point

Steven R. Steadman, District Court Administrator, 7th Judicial District, LaCrosse

William Sucha, District Court Administrator, Brown County, Green Bay

Thomas Terwilliger, Esq., Wausau

Rick Volte, Esq., Wausau

Ronald Witkowiak, District Court Administrator, Milwaukee

Dean Ziemke, Policy & Planning Analyst, Office of Director of State Courts, Madison

Wyoming

Brenda Baker, Judicial Assistant, 1st Judicial District, Cheyenne

Pamela Davis, Setting Clerk, 7th Judicial District, Casper

Robert Duncan, Court Coordinator, Superior Court, Cheyenne

Honorable Kenneth G. Hamm, District 3B, Green River

Honorable Alan B. Johnson, 1st Judicial District, Cheyenne

Stanley Lowe, Esq., Casper

Honorable Leonard McEwan, 4th Judicial District, Sheridan

Honorable Terry O'Brien, District Court, Gilette

Sue Pate, Clerk, 7th Judicial District, Casper

Appendix F:

List of Organizations Providing Information For The Study

LIST OF ORGANIZATIONS PROVIDING INFORMATION FOR THE STUDY

Administrative Office of U.S. Courts, Washington, D.C.

American Bar Association, Washington, D.C.

American Judicature Society, Chicago, Illinois

California State Library, Sacramento, California

Chicago Bar Association, Chicago, Illinois

Judicial Council of Alaska

Judicial Council of California

Los Angeles Bar Association

National Association of Trial Court Administrators

National Center for State Courts, Williamsburg, Virginia

National District Attorneys Association, Alexandria, Virginia

National Legal Aid and Defender Association, Washington, D.C.

New York City Bar Association

*U.S. GOVERNMENT PRINTING OFFICE: 1986-491-510:40150