

JUDICIAL DISQUALIFICATION IN ALASKA COURTS

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This Article discusses the various statutory provisions, judicial rules, and ethics provisions that affect judicial disqualification in Alaska courts. The Article explains that Alaska judicial disqualification law is derived from two conflicting doctrines: one recognizing that judges have a duty to sit unless there is a concrete showing of bias, and the other granting parties a broad “right of disqualification.” As a result, there are three ways in which judicial disqualification operates in Alaska. Disqualification for cause requires disqualification in cases where tangible evidence of bias is shown. Peremptory disqualification allows each party to disqualify the judge once during the proceeding, provided that the party acts in good faith. Finally, various provisions of the Alaska Code of Judicial Conduct instruct judges to disqualify when circumstances make them unable to decide the case impartially.

I. INTRODUCTION

The ability to have every dispute heard by an impartial judge is essential to our system of jurisprudence. While judges are people with all the attendant human imperfections and limitations, they are also selected and trained to put aside many of their inherent predispositions to ensure an impartial decision. Of course, the perception by others of a given judge’s impartiality in a matter is also of concern. To address the many complex issues involved in assessing and ensuring a trial by a judge free of bias, the law has historically allowed parties to move to disqualify judges. In Alaska, judicial disqualification law takes essentially three different forms: disqualification for cause under Alaska Statutes section 22.20.020; peremptory disqualification under Alaska Statutes section 22.20.022 and corresponding Criminal Rule 25(d) and Civil Rule 42(c); and the judicial ethics requirements set out in the

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Alaska Code of Judicial Conduct. This Article looks at the development of each of these approaches to judicial disqualification in Alaska and their inter-relationship.

II. HISTORY

Modern doctrines of judicial disqualification can be traced back to ancient civil law and early British common law. Civil law countries incorporated broad concepts of judicial bias into their codes.¹ By contrast, the British common law required judicial disqualification where the judge was shown to have a financial interest in a proceeding but not where there was a mere suspicion of bias. Historically, then, there has always been a tension between those court doctrines allowing broad rights of disqualification based on amorphous assertions of bias and those requiring some tangible and substantial showing of interest.

The conflicting ancient doctrines of judicial disqualification “for cause” and a “peremptive right” to disqualify now coexist in many American jurisdictions, including Alaska. Peremptory disqualification has evolved to address those situations where a party believes, but cannot prove, that a judge is biased. The doctrine of peremptory disqualification, which allows disqualification without a showing of bias or incompetency, has been adopted mostly in the midwestern and western states.² In Alaska, both concepts existed from statehood and have their roots in a 1940 statute similar to concurrent federal law.³

In 1972, the American Bar Association (“ABA”) adopted a Code of Judicial Conduct that includes detailed criteria for judicial disqualification.⁴ The ABA Code, which was the first detailed code of ethics for judges, attempted to codify the existing case law regarding disqualification issues. Alaska adopted the ABA Code by supreme court order in 1973⁵ and subsequently revised its code in 1998.⁶ Paralleling, to a large extent, the “for cause” criteria set out in the statute, the 1973 Code added an affirmative duty on the part of the judge to disqualify in any proceeding where the judge’s

1. See RICHARD E. FLAMM, *JUDICIAL DISQUALIFICATION: RECUSAL AND DISQUALIFICATION OF JUDGES* § 1.2.2 (1996).

2. See *id.* § 3.1.

3. See Robert Arthur Levinson, *Peremptory Challenges of Judges in the Alaska Courts*, 6 *UCLA-ALASKA L. REV.* 269, 272-73 (1977) (not addressing “for cause” disqualification).

4. *CODE OF JUDICIAL CONDUCT* Canon 3C (1972).

5. See Alaska Sup. Ct. Order No. 170 (1973).

6. See Alaska Sup. Ct. Order No. 1322 (1998).

“impartiality might reasonably be questioned.”⁷ While used chiefly as a tool to guide judicial conduct and, as discussed below, a judicial conduct enforcement mechanism, the Code provisions have also been cited by Alaska courts to illustrate their application of the disqualification statutes and rules.⁸

III. DISQUALIFICATION OF JUDGES FOR CAUSE

A. The Statute

The most comprehensive codified law governing the disqualification of Alaska judges is also the least used by litigants. Section 22.20.020 of the Alaska Statutes outlines criteria that require a judge to disqualify him or herself in a matter.⁹ There is also a subjective catchall provision that requires a judge to recuse him or herself if the judge “feels that, for any reason, a fair and impartial decision cannot be given.”¹⁰

Section 22.20.020 provides a ready checklist for judges to determine whether they should remove themselves from any given case. If a judge recuses on his or her own motion, the statute provides that the case be immediately transferred by the district’s presiding judge.¹¹ Once a judge presents potential conflicts that qualify under the enumerated provisions of section 22.20.020(a), the parties may choose to waive their rights to judicial disqualification, provided the conflict arises under a waivable provision pursuant to section 22.20.020(b).¹² The judge is under a duty to disclose the reasons for disqualification and those grounds are deemed waived “unless a party raises an objection.”¹³ The statute is structured so that actual bias on the part of a judge and those circumstances that give rise to a strong inference of bias are generally not waivable.¹⁴

7. ALASKA CODE OF JUDICIAL CONDUCT Canon 3C(1) (1973).

8. *See, e.g.,* *Amidon v. State*, 604 P.2d 575 (Alaska 1979).

9. *See* ALASKA STAT. § 22.20.020 (LEXIS 1999). These criteria are listed in Part III.C, *infra*.

10. *Id.* § 22.20.020(a)(9).

11. *See id.* § 22.20.020(c).

12. *See infra* note 31 and accompanying text.

13. ALASKA STAT. § 22.20.020(b). *But see* ALASKA CODE OF JUDICIAL CONDUCT Canon 3F (LEXIS 1999) (restricting a judge’s participation in discussions concerning waiver and requiring the judge to notify the parties of the effect of a failure to act).

14. Examples of circumstances giving rise to a strong inference of bias are where the judge is a party, a material witness, or has a direct financial interest in the matter. *See* ALASKA STAT. § 22.20.020(b) (LEXIS 1999).

When a judge denies a motion to disqualify for cause, the statute requires another judge to determine anew the question of disqualification.¹⁵ This provision seeks to provide a check on judges who wrongly determine their own ability to hear cases objectively when their impartiality is questioned. However, the efficacy of the practice is questionable. No Alaska appellate cases cite to hearings where a judge has ordered the disqualification of another judge pursuant to a motion under the statute, but many cases have denied motions to disqualify.¹⁶ This disparity could merely be a function of the nature of appeals, in that granted motions of this kind would seldom, if ever, give rise to an appeal. It is equally likely, however, that judges are reluctant to overturn a colleague's assessment of impartiality.

When a district court judge denies disqualification, the presiding judge of the district assigns another judge to review the district court judge's determination.¹⁷ When a superior court judge denies disqualification, the supreme court makes the assignment.¹⁸ The court of appeals has held that when a party moves to disqualify all district court judges, it is not a violation of section 22.20.020(c) for the presiding judge to assign the matter to himself for decision.¹⁹ It is up to the party seeking disqualification to pursue any rights under section 22.20.020(c), at least where the party alleges general bias.²⁰ Motions for blanket disqualification of all judges of a certain court cannot be reviewed under the statute without allowing each individual judge to determine his or her own ability to sit on the matter.²¹

B. A Judge's Duty to Sit

Judges under early common law and federal law had a strong duty to sit on cases where there was not a sufficient showing under relevant rules for disqualification.²² As a result, judges had an affirmative obligation to hear cases unless a disqualifying factor could be proved.²³ As the law evolved to include general bias and

15. *See id.* § 22.20.020(c).

16. *See, e.g.,* Wasserman v. Bartholomew, 923 P.2d 806, 815-16 (Alaska 1996); Neal & Co. v. City of Dillingham, 923 P.2d 89, 92 (Alaska 1996).

17. *See* ALASKA STAT. § 22.20.020(c).

18. *See id.*

19. *See* Feichtinger v. State, 779 P.2d 344, 346-48 (Alaska Ct. App. 1989).

20. *See* Amidon v. State, 604 P.2d 575, 577 (Alaska 1979); Coffey v. State, 585 P.2d 514, 525 (Alaska 1978).

21. *See Feichtinger*, 779 P.2d at 348.

22. *See* FLAMM, *supra* note 1, §§ 20.10.1, 20.10.4.

23. *See id.* § 20.10.2.

appearance of bias as bases for disqualification, several jurisdictions recognized that the duty to sit no longer had a clear meaning and abolished the rule.²⁴ Those courts that have abolished the duty nonetheless recognize that “a judge should ordinarily not recuse himself merely in order to avoid embarrassment or uneasiness or because he would prefer to be trying some other type of case.”²⁵

Alaska case law has explicitly retained the common law “duty to sit” rule. In *Amidon v. State*,²⁶ the Alaska Supreme Court noted that “a judge has as great an obligation not to disqualify himself, when there is no occasion to do so, as he has to do so in the presence of valid reasons.”²⁷ This concept was reaffirmed in *Feichtinger v. State*,²⁸ where a blanket challenge to recuse all sitting district court judges led the court of appeals to state that “the public is entitled to have sitting district court judges decide cases assigned to them in the absence of good cause for recusal.”²⁹ The Alaska courts have implied that judicial responsibility to the public requires that judges hear even those cases that may cause them some discomfort. Consequently, where there is a mere assertion of an appearance of bias, judges must face a difficult balancing of their conflicting duties. While “judges must avoid the appearance of bias, it is equally important to avoid the appearance of shirking responsibility.”³⁰

C. Bias

Alaska Statutes section 22.20.020 identifies specific situations that require disqualification:

- (a) A judicial officer may not act in a matter in which
 - (1) the judicial officer is a party;
 - (2) the judicial officer is related to a party or a party’s attorney by consanguinity or affinity within the third degree;
 - (3) the judicial officer is a material witness;
 - (4) the judicial officer or the spouse of the judicial officer, individually or as a fiduciary, or a child of the judicial officer has a direct financial interest in the matter;
 - (5) a party, except the state or a municipality of the state, has retained or been professionally counseled by the judicial

24. *See id.* § 20.10.4.

25. *Id.* § 20.10.2.

26. 604 P.2d 575 (Alaska 1979).

27. *Id.* at 577.

28. 779 P.2d 344 (Alaska Ct. App. 1989).

29. *Id.* at 348.

30. *Id.*

officer as its attorney within two years preceding the assignment of the judicial officer to the matter;

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

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

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

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

(b) A judicial officer shall disclose, on the record, a reason for disqualification specified in (a) of this section at the commencement of a matter in which the judicial officer participates. The disqualifications specified in (a)(2), (a)(5), (a)(6), (a)(7), and (a)(8) of this section may be waived by the parties and are waived unless a party raises an objection.³¹

Each situation listed above gives rise to an inference of bias. While actual bias is difficult to prove, the statute, by enumerating certain circumstances, sets out guideposts for determining bias. Courts are generally reluctant to impose a finding of bias where the judge has neither disclosed a bias nor made a tangible showing that he or she cannot be impartial in the case. In *Nelson v. Fitzgerald*,³² the Alaska Supreme Court found that section 22.20.020 disqualified a judge who had previously disqualified himself from hearing any matter involving an attorney against whom he held a personal bias.³³ The trial judge admitted the bias by filing a certification of bias, but did not disqualify himself from the case in question even though it fell during the time covered by the certification of bias.³⁴

Generally, information or "biases" that judges acquire through hearing other cases are not legitimate bases for disqualification.³⁵ This rule is especially important in Alaska's small legal community, where there are many communities that have access to only one judge.

31. ALASKA STAT. § 22.20.020(a) (LEXIS 1999).

32. 403 P.2d 677 (Alaska 1965).

33. *See id.* at 679.

34. *See id.* at 678.

35. *See FLAMM, supra* note 1, §§ 12.3-12.6.

In *Alaska Trams Corp. v. Alaska Electric Light & Power*,³⁶ the Alaska Supreme Court held that it was not unreasonable to refuse disqualification of a judge who may have made sarcastic comments and participated in environmental movements.³⁷ A party unsuccessfully challenged the trial judge for perceived unfair treatment, the judge's past participation in environmental causes, unspecified allegations of sarcastic statements made in another proceeding, and a comment made in an opinion denying the party's motion for a preliminary injunction.³⁸ The court allowed the judge to hear the case because "[a] review of the record as a whole fail[ed] to reveal any unfairness in the conduct of the trial and the alleged instances of bias, considered either collectively or individually, fail[ed] to demonstrate any specific bias or generalized pattern of bias."³⁹

Other cases show that judges will normally not be disqualified unless the allegations of bias can be specifically connected to the current case. In *DeNardo v. Michalski*,⁴⁰ the supreme court held that disqualification was not required where a judge had previously headed the state office of prosecutions that had handled the current defendant's appeals in prior cases.⁴¹ The court found no indication that the judge, while an attorney, participated in any aspect of the current case.⁴² In *Long v. Long*,⁴³ the supreme court also rejected a challenge to the impartiality of a trial court judge in a child custody dispute where a witness in the case had briefly investigated the judge.⁴⁴ The court noted that the trial judge was not even aware at the time of the hearing that he had been the subject of an investigation, nor was there any showing of unfair treatment.⁴⁵ In *Capital Information Group v. State*,⁴⁶ the supreme court refused to disqualify a judge because he had written an advisory memo on a related matter fifteen years earlier.⁴⁷ The court noted that the judge had no personal knowledge of the disputed facts in the matter before him.⁴⁸

36. 743 P.2d 350 (Alaska 1987).

37. *See id.* at 353.

38. *See id.* at 352.

39. *Id.* at 353.

40. 811 P.2d 315 (Alaska 1991).

41. *See id.* at 316.

42. *See id.*

43. 816 P.2d 145 (Alaska 1991).

44. *See id.* at 155.

45. *See id.* at 155-56.

46. 923 P.2d 29 (Alaska 1996).

47. *See id.* at 40-41.

48. *See id.* at 41.

The Alaska Court of Appeals reached a different result in *Perotti v. State*,⁴⁹ where a trial judge heard evidence in a juvenile waiver proceeding that was later determined to violate the defendant's privilege against self-incrimination in an unrelated criminal appeal heard by the same judge. The juvenile waiver proceedings were assigned to the judge, who ordered Perotti over his objection to submit to a psychiatric evaluation.⁵⁰ The psychiatric reports were considered at the waiver hearing, and the judge ordered waiver out of juvenile jurisdiction, allowing Perotti to be tried as an adult.⁵¹ The waiver order included references to the professional evaluation as it related to rehabilitative prospects.⁵² Shortly after that, the court of appeals ruled that court-ordered evaluations in juvenile waiver cases violate the privilege against self-incrimination.⁵³ The same judge, in taking Perotti's no contest plea, offered a different judge for sentencing and scheduled a status hearing to allow the defendant to decide whether he wanted a different judge.⁵⁴ The defendant requested another judge at the status hearing, and the case was reassigned.⁵⁵ The State then moved to vacate the reassignment, characterizing it as an additional peremptory challenge, rather than one for cause.⁵⁶ Perotti filed a formal motion for disqualification based on the reliance on improper evidence and an appearance of partiality.⁵⁷ In denying the motion, the judge explicitly stated, "[t]his court finds [the judge] can be fair to the defendant with respect to this case."⁵⁸ The judge assigned to review the motion for disqualification ruled that the judge would be able to distinguish the inadmissible evidence at the sentencing.⁵⁹ The court of appeals ruled that the judge indeed should have been disqualified, noting that the judge's initial offer to recuse himself "certainly enhanced the appearance of partiality."⁶⁰

The holding in *Perotti* was strictly limited to the particulars of the case. The court made special note of the similarity of issues

49. 806 P.2d 325 (Alaska Ct. App. 1991).

50. *See id.* at 326.

51. *See id.*

52. *See id.*

53. *See R.H. v. State*, 777 P.2d 204 (Alaska Ct. App. 1989).

54. *See Perotti*, 806 P.2d at 326.

55. *See id.*

56. *See id.* at 326-27.

57. *See id.* at 327.

58. *Id.*

59. *See id.*

60. *Id.* at 329.

involved in juvenile waiver proceedings and subsequent criminal prosecutions. Citing relevant juvenile justice standards that relate to juvenile waivers, the court endorsed an approach that allowed a juvenile to disqualify the judge in the juvenile proceeding from presiding at subsequent adjudication.⁶¹ The juvenile justice standards note that, under these circumstances, “the likelihood that the juvenile will perceive impropriety is great.”⁶² The court reasoned that where a judge presided over both the criminal case and its prior juvenile waiver proceeding based on the same conduct, “fair-minded persons apprised of the objective facts would conclude that [the judge’s] participation in the sentencing hearing created an appearance of partiality.”⁶³

Can we then conclude that criminal due process creates a lower threshold for disqualification based on an appearance of partiality than that for civil cases? A look at the peremptory challenge cases in Alaska provides some guidance.

IV. PEREMPTORY DISQUALIFICATION

A. The Governing Provisions

Peremptory disqualification or disqualification as a matter of right was initially created by statute,⁶⁴ and has subsequently been given procedural structure and meaning by court rule in Criminal Rule 25(d)⁶⁵ and Civil Rule 42(c).⁶⁶ Alaska Statutes section 22.20.022(a) is based on a subjective belief on the part of a party or party’s attorney that “a fair and impartial trial cannot be obtained.”⁶⁷ The statute requires an affidavit alleging that belief and containing a statement that it is made “in good faith and not for the purpose of delay.”⁶⁸ It also gives a five-day window for the filing and allows only one filing per action. These procedures are largely superseded by the corresponding court rules.

61. *See id.*

62. *Id.* (quoting Standards Relating to Transfer Between Courts § 2.3J (Approved Draft 1980)).

63. *Id.* at 330.

64. *See* ALASKA STAT. § 22.20.022 (LEXIS 1999).

65. ALASKA R. CRIM. P. 25(d)(2).

66. ALASKA R. CIV. P. 42(c). For a more detailed examination of peremptory challenges in the first 20 years of the state, *see generally* Levinson, *supra* note 3, but note its limitations in not addressing the many approaches to addressing bias that exist under § 22.20.020 disqualification for cause.

67. ALASKA STAT. § 22.20.022(a).

68. *Id.*

Criminal Rule 25(d) replaces the affidavit requirement with a “Notice of Change of Judge” that must be signed by counsel.⁶⁹ The notice shall neither “specify grounds nor be accompanied by an affidavit.”⁷⁰ The rule reasserts the five-day definition of timeliness for the filing and addresses the issue of the number of peremptory challenges allowed when there are multiple defendants.⁷¹ Finally, the rule articulates that a waiver takes place when, after an opportunity to consult with an attorney, the party either participates in an omnibus hearing or any subsequent hearing.⁷²

Civil Rule 42(c) parallels the criminal rule in many respects. It too requires a “Notice of Change of Judge” and explicitly states that grounds should not be specified.⁷³ The same five-day timeliness standard applies, and waiver is accomplished by “knowingly participating before that judge in: (i) Any judicial proceeding which concerns the merits of the action and involves the consideration of evidence or of affidavits; or (ii) A pretrial conference; or (iii) The commencement of trial; or (iv) If the parties agree upon a judge. . . .”⁷⁴

The validity of the rules, to the extent that they alter some of the particular requirements of the statute, was addressed in *Gieffels v. State*.⁷⁵ In *Gieffels*, the court recognized the constitutional bases for judicial rulemaking and stated that it has “consistently affirmed [the court’s] power to regulate procedural and administrative matters in Alaska courts.”⁷⁶ The court noted that section 22.20.022 encompassed both substantive and procedural matters.⁷⁷ Substantive matters are properly determined by the legislature, but the courts properly determine the procedures that are followed to accomplish the substantive purposes of the statutes.⁷⁸ In this instance:

Although the legislature has the power to create the right to a fair trial before an unbiased judge, and the right to pre-empt a judge without requiring actual proof of bias or interest, it has very limited power to provide for the means by which that pre-emption right may be exercised. . . .Therefore, insofar as Rule 25(d) regulates only the procedural aspects of the peremptory

69. See ALASKA R. CRIM. P. 25(d)(2).

70. *Id.*

71. *See id.*

72. *See id.* at 25(d)(5).

73. See ALASKA R. CIV. P. 42(c)(1).

74. *Id.* at 42(c)(4).

75. 552 P.2d 661 (Alaska 1976).

76. *Id.* at 667.

77. *See id.*

78. *See id.*

right created by AS 22.20.022, and to the extent that the rule does not infringe upon the substantive right created by statute, the provisions of Rule 25(d) supersede the legislative enactment.⁷⁹

In the course of applying the criminal rule to the facts of the case, the court addressed the substantive purposes of the statute and examined whether the taking of a plea and setting bail was meaningfully affected by a biased judge.⁸⁰ The court distinguished “guilty” pleas from “not guilty” pleas, recognizing that acceptance of a guilty plea involves little, if any, discretion and there is “no possibility of bias that would interfere with the subsequent ability of a defendant to receive a fair disposition of his case.”⁸¹ There is, however, the obligation of the judge to inform the defendant of his right to a peremptory challenge if he has waived counsel.⁸² Similarly, setting bail generally does not affect the final disposition of a case and it is acceptable to allow a pre-empted judge to preside.⁸³ If the amount of bail or conditions are in dispute, the court states that the matter “should be immediately referred to another judicial officer.”⁸⁴ As with guilty pleas, the defendant should be advised of the right to have bail heard by another judge.⁸⁵

The substantive versus procedural distinction was later applied in *Main v. State*,⁸⁶ which involved a dispute over compliance with the five-day time period.⁸⁷ In determining whether a defendant had waived his right to perempt a re-assigned judge, the court of appeals stated as follows:

[T]he five-day time period established in AS 22.20.022(c) is a procedural component of the statutory right to peremptory challenge of a judge created by AS 22.20.022(a). The basic purpose of the legislation is to enable litigants to challenge a judge assigned to their case without making a showing of actual bias. . . . Nothing in the language of the statute or in its legislative history indicates that the legislature intended to elevate the five-day period for exercise of a peremptory challenge to the stature of a substantive right.⁸⁸

79. *Id.*

80. *See id.* at 668.

81. *Id.* at 669.

82. *See id.*

83. *See id.*

84. *Id.* at 670.

85. *See id.*

86. 668 P.2d 868 (Alaska Ct. App. 1983).

87. *See id.* at 869-70.

88. *Id.* at 872.

The criminal rule's waiver provision superseded any conflicting statutory time period.⁸⁹

A similar question was raised in the civil context in *Schmid v. Miller*,⁹⁰ where the supreme court did not find any conflict between the civil rule and the statute.⁹¹ Instead, citing both statute and civil rule, the court found that the notice of change of judge was timely filed and was not waived by a hearing on a temporary restraining order where no evidence was considered.⁹²

To summarize, while there may be differences between the court rules and the statute governing peremptory challenge of a judge, court decisions have applied the rules to clearly procedural disputes and have looked to the statute to interpret any substantive applications.⁹³ The general substantive purpose of the statute is to allow a challenge for bias without having to articulate any basis for that belief.⁹⁴ As will be seen, the lines may often blur between the substantive purpose of peremptory challenge of judge and disqualification for cause in section 22.20.020.

B. Peremptory Challenges in Criminal Cases

Perhaps the most striking element of the peremptory challenge in Alaska is its substantive component. Peremptory challenges, though largely a matter of procedure, convey a right to challenge a judge without articulating any basis for that challenge.⁹⁵ While it is often referred to as a "change of judge as a matter of right,"⁹⁶ it is the word "right" that conveys substantive meaning. In the area of criminal law, that right takes many forms and is also limited in many ways.

One interesting possibility is that peremptory challenges can be used to select particular judges where there are single judge locations. The supreme court addressed that possibility in *Padie v. State*,⁹⁷ where both parties stipulated to enter a guilty plea before the sole judge in Kodiak, claiming that the effect of publicity from the first trial in Anchorage entitled them to the change of judge.⁹⁸

89. See *Tunley v. Municipality of Anchorage Sch. Dist.*, 631 P.2d 67, 71 n.3 (Alaska 1981) (citing *Gieffels v. State*, 552 P.2d 661, 667-68 (Alaska 1976)).

90. 619 P.2d 1 (Alaska 1980).

91. See *id.* at 1.

92. See *id.* at 2.

93. See *Tunley*, 631 P.2d at 71 n.3.

94. See *id.* at 71 (citing *Gieffels*, 552 P.2d at 671).

95. See *id.* at 71 n.2.

96. *Main v. State*, 668 P.2d 868, 870 (Alaska Ct. App. 1983).

97. 566 P.2d 1024 (Alaska 1977).

98. See *id.* at 1025-26.

When the Anchorage trial judge did not honor the stipulation, the defense objected, arguing that they were entitled to the change as a matter of right.⁹⁹ Relying on the last line of the waiver provision in Criminal Rule 25(d)(5), which states that “[n]o 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,”¹⁰⁰ the parties asserted that they were permitted effectively to “pre-empt all the [j]udges within the Judicial District except the [j]udge before whom the plea shall be taken under Rule 11.”¹⁰¹ The court disagreed with this interpretation and, referring to the assignment discretion of the presiding judge, interpreted the provision as preventing even a perempted judge from participating in a limited way by entering a plea of guilty or nolo contendere on the basis of a stipulation.¹⁰² According to the court, the statute explicitly recognized the need to have a prompt acceptance of a plea “in order to avoid the delay and expense of going to another city or bringing another judge to the city wherein the defendant is located for entry of the plea.”¹⁰³ The court very firmly stated that the “right to disqualify a judge, and the right to thereafter partially waive such disqualification to allow him to accept a plea of guilty or nolo contendere, does not add up to a right to dictate where and before whom a defendant’s plea will be entered.”¹⁰⁴

What qualifies as a waiver is another frequent issue in criminal peremptory challenge cases. As noted above, bail hearings are neither clearly ministerial (and therefore not constituting waiver) nor an exercise of judicial discretion (in which case participation would constitute a waiver).¹⁰⁵ The court of appeals attempted to clarify this issue as applied to a contested bail hearing in *Gardner v. State*.¹⁰⁶ Reading the rule closely and noting the specific sequence of hearings enumerated in that rule, the court found that a bail hearing held shortly after arraignment and well before an omnibus hearing date was not “any subsequent pretrial hearing” constituting a waiver under the rule.¹⁰⁷

Because a failure to exercise the right to perempt the judge results in the party forfeiting rights under Criminal Rule 25(d), the

99. *See id.* at 1026.

100. *Id.* at 1027.

101. *Id.*

102. *See id.* at 1027-28.

103. *Id.* at 1028.

104. *Id.*

105. *See supra* notes 80-85 and accompanying text.

106. 702 P.2d 250 (Alaska Ct. App. 1985).

107. *Id.* at 251 (citing ALASKA R. CRIM. P. 25(d)(5)).

defendant must have “reasonable access to counsel before the commencement of trial if the failure to file a timely peremptory challenge is to work a forfeiture.”¹⁰⁸ Where there is defense counsel prior to trial, “it will be conclusively presumed that reasonable access existed and, questions of ineffective assistance of counsel aside, failure to exercise a peremptory challenge prior to selection of the jury forfeits any rights defendant and his counsel might otherwise have had under Criminal Rule 25(d).”¹⁰⁹ Similarly, it has been held that probation revocation proceedings are the same case as the original sentencing for purposes of peremptory challenge as “justice is best served if the same judge who originally sentenced the defendant makes the sentencing decision at any subsequent probation revocation proceedings.”¹¹⁰ In other words, participation in a sentencing hearing is a waiver under the rule that applies to all subsequent probation revocation proceedings.¹¹¹

Criminal Rule 25(d)(1) allows the trial judge to give uncooperative multiple defendants more than one change of judge.¹¹² In *Moore v. State*,¹¹³ one defendant exercised his peremptory challenge, and the co-defendants were not happy with the resulting appointment.¹¹⁴ The court held that it was within the judge’s discretion whether to grant additional challenges and that no co-defendant could veto a challenge made by another co-defendant.¹¹⁵ Noting that the primary purpose of the rule and statute is “to allow a party to disqualify a biased judge,”¹¹⁶ the court of appeals found that it “is not unfair to allow a single defendant in a multiple-party case to unilaterally exercise a peremptory challenge.”¹¹⁷ Citing *Padie v. State*, the court reaffirmed that litigants have no right to insist that a particular judge hear their case.¹¹⁸ To give guidance to judges in their exercise of discretion in these circumstances, the court noted that the competing interests must be evaluated:

A defendant may have articulable reasons to distrust the impartiality of the second assigned judge, even though these

108. *Trudeau v. State*, 714 P.2d 362, 366 (Alaska Ct. App. 1986).

109. *Id.*

110. *McRae v. State*, 909 P.2d 1079, 1083 (Alaska Ct. App. 1996).

111. *Cf. Wallace v. State*, 829 P.2d 1208 (Alaska Ct. App. 1992) (holding that probation revocation proceeding is governed by civil peremption rule).

112. *See* ALASKA R. CRIM. P. 25(d)(1).

113. 895 P.2d 507 (Alaska Ct. App. 1995).

114. *See id.* at 509.

115. *See id.* at 511-12.

116. *Id.* at 511.

117. *Id.*

118. *See id.* (citing *Padie v. State*, 566 P.2d 1024, 1027-28 (Alaska 1977)).

reasons may not be sufficient to support a challenge for cause. On the other hand, Criminal Rule 25(d), by restricting each side to one peremptory challenge in normal circumstances, implicitly recognizes that the number of peremptory challenges must be limited if the court system is to function effectively.¹¹⁹

The court has also expressly allowed trial judges to “reject a request for additional peremptory challenges when it appears that a party’s request is based on considerations of prospective strategic advantage rather than the party’s fear of the second judge’s potential bias or partiality.”¹²⁰ Once again, the court reaffirmed that the underlying purpose of peremptory challenges is to protect parties from anticipated judicial bias.

C. Peremptory Challenges in Civil Cases

Like its criminal counterpart, Civil Rule 42(c) has given rise to case law that recognizes the essential substantive right that the statute confers. The case law consistently refers to the “right” to perempt a judge and often focuses on when a knowing waiver of that right has taken place. Remands in civil cases, as in criminal cases, do not give an additional peremptory challenge where there is no reassignment. The courts have noted that “it would be fair to presume that the same judge would preside at the second trial in the absence of a reassignment of the case to another judge.”¹²¹ Retrials are not new proceedings.¹²² Where litigants knowingly participate in a proceeding concerning the merits of the controversy, they have waived any right to a peremptory challenge.¹²³ Allowing peremptory challenges on remand would allow litigants to challenge a judge “merely because his rulings in the original trial were not as favorable” as desired,¹²⁴ subverting the purpose of the waiver provision that “concerns the merits of the action and involves the consideration of evidence or of affidavits.”¹²⁵

However, when a litigant refiles a complaint that was previously dismissed, that litigant is not bound to any challenges he may have exercised in the prior action.¹²⁶ In *Staso v. State Department of Transportation*, the plaintiff sought to disqualify the

119. *Id.* at 512.

120. *Id.*

121. *Priest v. Lindig*, 591 P.2d 1299, 1301 (Alaska 1979).

122. *See Sebring v. Colver*, 649 P.2d 932, 935 (Alaska 1982).

123. *See id.*

124. *Id.*

125. ALASKA R. CIV. P. 42(c)(4)(i).

126. *See Staso v. State Dep’t of Transp.*, 895 P.2d 988, 994 (Alaska 1995).

judge assigned to his refiled case.¹²⁷ Citing the court of appeals holding that a second peremptory challenge is not allowed in a proceeding that is ancillary to or a continuation of the underlying matter, the Alaska Supreme Court held that a refiled suit is a new action that, in turn, creates a new right to a peremptory challenge.¹²⁸ The court distinguished refiled actions from collateral matters, which would be considered the same action for peremptory challenge purposes, “drawing a bright-line where a refiled case is given a new docket number, new filing fees are imposed, and new process is served.”¹²⁹

Waiver does not occur merely by participating in a hearing on a consolidation motion. The waiver, to be a knowing waiver, can occur only after the case has been assigned to a specific judge.¹³⁰ Additionally, participation in various pretrial matters before a judge is permanently assigned does not waive an otherwise timely peremptory challenge.¹³¹ For example, appearing on a motion for a temporary restraining order where there was no evidence presented does not constitute a waiver.¹³² However, filing a Rule 12(b)(6) motion to dismiss does constitute a waiver, at least in a single-judge court site.¹³³ In *Kodiak Island Borough v. Large*, the Alaska Supreme Court held that because a 12(b)(6) motion concerns the merits of a case, it triggers a case assignment.¹³⁴ Acknowledging that the waiver must also be knowing, the court noted that in a single-judge site, the parties knew that the local judge

would be the trial judge unless he was disqualified. To hold otherwise would create a situation which is susceptible to the practice of “judge shopping,” where a party could take advantage of the clerk’s tardiness in formally giving notification by sampling the judge’s rulings on motions presented before that time, and then availing itself of the right to peremptorily challenge the judge if the rulings are not to its liking.¹³⁵

Like the criminal rule, Civil Rule 42(c) addresses concerns that arise in multiple-party cases. Alaska Civil Rule 42(c) provides, in part, that

127. *See id.* at 989.

128. *See id.* at 991.

129. *Id.* at 992.

130. *See Tunley v. Municipality of Anchorage Sch. Dist.*, 631 P.2d 67, 73 (Alaska 1980).

131. *See Smith v. State*, 616 P.2d 863, 865 (Alaska 1980).

132. *See Schmid v. Miller*, 619 P.2d 1, 2 (Alaska 1980).

133. *See Kodiak Island Borough v. Large*, 622 P.2d 440, 443 (Alaska 1981).

134. *See id.*

135. *Id.* at 444.

[t]wo 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.¹³⁶

A beneficiary to a trust has been held to be entitled to a peremptory challenge even though technically the beneficiary was not a party.¹³⁷ The court found that the beneficiary was “a full participant in the proceedings, whose interest in the trust is the focus of the current litigation.”¹³⁸ An intervenor late in a proceeding also has a right to change a judge peremptorily.¹³⁹ In *Mundt v. Northwest Explorations, Inc.*,¹⁴⁰ the Alaska Supreme Court found that when the intervenor’s interests are not coextensive with those of a prior party to the matter, the intervening party has an independent right to challenge the judge.¹⁴¹ The intervenor’s right to change judges does not depend on the stage of litigation and may even occur in the post-judgment stage.¹⁴² The court hinted that any fears that the new judge will reopen already decided issues can be addressed if the concerned party simply points them out to the new judge.¹⁴³ Looking to the underlying purpose of peremptory disqualification, the court notes that the intervenor who meets the requirements of the rule has the right to peremptorily challenge the judge, and “the right is just that – a right, not an interest subject to balancing.”¹⁴⁴

D. Determining Whether a Peremptory Challenge is Civil or Criminal

Although it is usually clear whether a situation falls under the criminal peremption rule or the civil one, sometimes that is not the case. For example, the court of appeals has interpreted probation revocation proceedings to be civil proceedings for purposes of appeal,¹⁴⁵ but in another case held that such proceedings “are viewed as the ‘same case’ [as the criminal sentencing] for

136. ALASKA R. CIV. P. 42(c)(1).

137. *See* Barber v. Barber, 915 P.2d 1204, 1208 (Alaska 1996).

138. *Id.*

139. *See id.*

140. 963 P.2d 265 (Alaska 1998).

141. *See id.* at 268.

142. *See id.* at 269.

143. *See id.* at 270.

144. *Id.*

145. *See* Wallace v. State, 829 P.2d 1208, 1210 (Alaska Ct. App. 1992).

peremptory challenge purposes.”¹⁴⁶ Both contempt proceedings (criminal or civil) and civil sanctions that arise out of other underlying court proceedings are ancillary to those underlying proceedings, and thus do not give rise to independent peremptory challenge rights.¹⁴⁷ How post-conviction relief petitions should be treated remains unclear. In many ways, they are the civil counterpart to the criminal case in the same way that probation revocation proceedings are. However, while probation revocation proceedings are directly related to the continuing validity of the sentencing, post-conviction relief petitions often challenge the various bases of the underlying criminal proceedings. In other words, a judge in a probation revocation proceeding will enforce the sentencing decision while a judge in a post-conviction relief petition may be asked to assess the criminal trial court’s determination critically.¹⁴⁸

E. The Relationship of Peremptory Challenges to Challenges “For Cause”

While there are few cases that directly address the relationship of the peremptory disqualification right with disqualification for cause, there are some assumptions that can be derived from the cases available. For instance, a denial of a challenge for cause does not force the losing litigant to forfeit his or her otherwise available right to exercise a peremptory challenge for that same judge.¹⁴⁹ However, filing a motion to disqualify a judge for cause will not toll the general five-day timeliness standard for exercising that peremptory challenge.¹⁵⁰ Therefore, if a litigant truly believes that the judge has a bias or is in a situation that gives rise to a strong inference of bias on any of the grounds set out in section 22.20.020,¹⁵¹ that party should move to disqualify for cause immediately and assert their peremptory challenge within the time limits established by court rule as well. As the court of appeals has noted, the underlying purpose of peremptory challenge rights in allowing for a challenge when parties believe they will not obtain a fair trial in front of a particular judge “strongly suggests that if there are potential legal grounds for the judge’s disqualification,

146. *McRae v. State*, 909 P.2d 1079, 1083 (Alaska Ct. App. 1996).

147. *See Weidner v. Superior Court*, 715 P.2d 264, 269 (Alaska Ct. App. 1986); *Webber v. Webber*, 706 P.2d 329, 330 (Alaska Ct. App. 1985).

148. *See ALASKA R. CRIM. P.* 35.1(a).

149. *See DeNardo v. Municipality of Anchorage*, 938 P.2d 1099, 1100 (Alaska Ct. App. 1997).

150. *See Wamser v. State*, 587 P.2d 232, 234 (Alaska 1978).

151. *See supra* note 31 and accompanying text.

those grounds should be litigated before the party is called upon to exercise a peremptory challenge.”¹⁵²

V. DISQUALIFICATION IN THE ALASKA CODE OF JUDICIAL CONDUCT

A. The Role of the Code

Although the Alaska Code of Judicial Conduct is only directly enforceable through judicial disciplinary proceedings conducted by the Alaska Commission on Judicial Conduct,¹⁵³ it provides guidance to judges in interpreting their ethical obligation to disqualify and has been used by the courts to enhance interpretation of the disqualification statute’s full meaning and intent. The pre-1998 Code regarding judicial disqualification was broader and more vague than the statute.¹⁵⁴ The revised Code, effective in July 1998, attempts to parallel the language of section 22.20.020 more closely.¹⁵⁵ Perhaps the most useful addition to the 1998 Code is the expansion of the disclosure and waiver requirements that provide procedural guidance to judges.¹⁵⁶ The revised Code also includes commentary that relates the requirements of section 22.20.020 to the Code and illuminates many of the Code’s provisions.¹⁵⁷

Courts have looked to the Code of Judicial Conduct in interpreting “appearance of impropriety” or “appearance of bias” issues.¹⁵⁸ The earlier versions of the Code did not use mandatory language, but instead referred to what a judge “should” do.¹⁵⁹ Recognizing that less than mandatory language limits the enforceability of the provision,¹⁶⁰ the Alaska Supreme Court has looked to the more mandatory language of the statute.¹⁶¹ So too, where there is merely an appearance of partiality or bias (i.e., the standards of the Code of Judicial Conduct), appellate courts have required a greater showing than for actual bias (i.e., under the

152. *DeNardo*, 938 P.2d at 1100.

153. See ALASKA STAT. § 22.30.010 (LEXIS 1999).

154. ALASKA CODE OF JUDICIAL CONDUCT Canon 3C (1973).

155. ALASKA CODE OF JUDICIAL CONDUCT Canon 3E (LEXIS 1999).

156. See *id.* at Canon 3F.

157. See *id.* at Canons 3C-3F.

158. See, e.g., *Inquiry Concerning a Judge*, 822 P.2d 1333, 1343 (Alaska 1991); *Vaska v. State*, 955 P.2d 943, 945 (Alaska Ct. App. 1998).

159. See *Blake v. Gilbert*, 702 P.2d 631, 641 (Alaska 1985).

160. The 1998 Code has altered this issue by using mandatory language in place of the former “shoulds.”

161. See *Blake*, 702 P.2d at 641 (comparing the Alaska Code of Judicial Conduct to the more stringent federal provision, 28 U.S.C. § 455(b)).

statute) where the petitioner seeks to overturn a decision denying disqualification.¹⁶²

In *Perotti v. State*, the Alaska Court of Appeals explicitly related the disqualification provisions under the Code of Judicial Conduct to the language of section 22.30.020(a)(9), requiring disqualification when “the judicial officer feels that, for any reason, a fair and impartial decision cannot be given.”¹⁶³ The court noted that

the need to consider the appearance of impartiality seems implicit in the language of AS 22.20.020(a)(9), for whenever it is predictable that an unmistakable appearance of bias will arise from a judge’s participation in a case, there will be “reason” for concluding that “a fair and impartial decision cannot be given.”¹⁶⁴

Another distinguishing characteristic between the Code requirements and the statute is that the Code governs a judge’s duty to disqualify himself or herself, but the statute provides procedures through which another judge can review that disqualification decision.¹⁶⁵ Apart from the use of the canons to add meaning to the term “appearance of impartiality,” courts are reluctant to use the Code’s differing standards to overturn a judge’s determination of his or her ability to hear a case.¹⁶⁶ In *Vaska v. State*, the court of appeals looked to the Code of Judicial Conduct to help determine whether actions by a judge’s law clerk could affect the ability of the judge to continue to hear a matter.¹⁶⁷ In that case, an improper communication by the judge’s law clerk to the state prosecutor’s office was viewed as potentially affecting the entire judicial process.¹⁶⁸ Looking not only to the Code provisions governing disqualification, but also to a judge’s ethical obligation to require his or her staff to observe the same standards that judges must meet,¹⁶⁹ the court concluded that

[b]ecause of the close working relationship between judges and their law clerks, there comes a point where a law clerk’s bias for or against a particular party or attorney, or a law clerk’s potential interest in the outcome of particular litigation, rises to

162. See *Feichtinger v. State*, 779 P.2d 344 (Alaska Ct. App. 1989).

163. *Perotti v. State*, 806 P.2d 325, 327 (Alaska Ct. App. 1991) (quoting ALASKA STAT. § 22.20.020(a)(9) (LEXIS 1999)).

164. *Id.*

165. See *Wasserman v. Bartholomew*, 923 P.2d 806, 815-16 (Alaska 1996) (citing *Feichtinger*, 779 P.2d at 347 n.4).

166. See, e.g., *Vaska v. State*, 955 P.2d 943 (Alaska Ct. App. 1998).

167. See *id.* at 945.

168. See *id.* at 946.

169. See *id.*; see also ALASKA CODE OF JUDICIAL CONDUCT Canon 3B(2) (1973)

an intolerable level – a level where the judicial decisionmaking process comes under reasonable suspicion.¹⁷⁰

The court gave special attention to the role of the Code, noting that judicial conduct codes “have long recognized the principle that it is not enough for judicial officers to be untainted by bias; judicial officers must, in addition, conduct themselves so as to avoid engendering reasonable suspicions of bias.”¹⁷¹

B. Disclosure Requirements

While the statute governing judicial disqualification for cause merely requires a judge to disclose a reason for disqualification that relates to one of the itemized grounds, the Code of Judicial Conduct expands both the duty to disclose and the way that any waiver resulting from disclosure is to be handled.¹⁷² The commentary to the 1998 Code notes that “[a] judge should disclose on the record information that the judge believes the parties or their lawyers might consider relevant to the question of disqualification, even if the judge believes there is no real basis for disqualification.”¹⁷³ To ensure that any waiver of disqualification is voluntary, the 1998 Code mandates the following:

The judge shall not participate in the parties’ discussions and shall require the parties to hold their discussions outside the presence of the judge. The judge shall not comment in any manner on the merits or advisability of waiver, other than to explain the right of disqualification or to further elucidate the ground or grounds of disqualification if requested by the parties.¹⁷⁴

Waiver by inaction is also allowable if the judge gives the parties “a reasonable length of time to waive the disqualification, telling the parties either (a) that their failure to act will be construed as a decision to waive the potential disqualification or (b) that their failure to act will be construed as a decision not to waive the potential disqualification. . . .”¹⁷⁵

Various advisory opinions issued by the Alaska Commission on Judicial Conduct have also construed a judge’s obligation to disclose very broadly. Not limiting disclosure to those grounds explicitly listed by the statute or the Code, the Commission’s advisory opinions recommend disclosure in any instance that in an

170. *Vaska*, 955 P.2d at 945-46.

171. *Id.* at 945.

172. *See* ALASKA CODE OF JUDICIAL CONDUCT Canons 3E-F (1998).

173. *Id.* at Canon 3E(1) cmt.

174. *Id.* at Canon 3F(2).

175. *Id.* at Canon 3F(3).

expansive way might be relevant to an appearance of impropriety. These disclosures include contributions to charitable organizations that may appear before the court,¹⁷⁶ contributions to The Alaska Legal Services Corporation in any case involving a legal services attorney,¹⁷⁷ and employment discussions with an entity involved in litigation before the judge.¹⁷⁸ Whether any of these disclosures also should lead to recusal by the judge will depend on various factors that affect the appearance of impropriety, including the issue in dispute and the extent of the potential conflict created. In other words, a judge's nominal financial contribution to a large charitable organization that is in litigation before the judge on an employment issue, for example, is not likely to create a reasonable inference of bias. In all instances, disclosure is favored in order to avoid creating an appearance of impropriety, which is often created where certain facts have been hidden, whether intentionally or inadvertently, from the participants in the courtroom.

VI. CONCLUSION

In conclusion, the various statutes, court rules, and ethics provisions all have the same purpose: to ensure a fair and impartial decisionmaker. Each approach places responsibility on a different actor. The peremptory challenge statute and rules place the burden on the party to assert his or her "right" to disqualify the judge. The statute governing judicial disqualification for cause places the responsibility evenly on the parties and the judge by requiring the judge to act to disqualify himself or herself in certain specified situations, yet placing the burden of moving to disqualify the judge on the parties in all other cases. Finally, the Code of Judicial Conduct, as the ethics code for all state judicial officers, places additional responsibilities exclusively on the judge to both disclose and disqualify where required.

All of these doctrines also recognize that an overly lenient approach to disqualification could lead to abuse. It would be unfair to allow parties to disqualify judges after sampling their decisions in a matter or merely because a judge has seen the party in court before on an unrelated matter.¹⁷⁹ The public benefits not only from impartial judges but also by an efficient, courageous, and responsible judiciary. Therefore, Alaska judges should be required to hear cases that are difficult or uncomfortable. Judicial

176. See Alaska Comm. on Judicial Conduct, Advisory Op. 97-2 (1997) (on file with author).

177. See *id.* 98-4 (1998) (on file with author).

178. See *id.* 99-1 (1999) (on file with author).

179. See *Pride v. Harris*, 882 P.2d 381, 385 (Alaska 1994).

disqualification law provides the framework for parties and judges to exercise their rights and responsibilities to ensure fair proceedings. An understanding of the various statutes and rules can lead to an understanding of each participant's role in ensuring the impartiality of Alaska's courts.