

University of Nevada, Reno

**An Examination of the Judicial Peremptory Challenge:
Variations between States and Considerations of
Constitutionality**

A thesis submitted in partial fulfillment of the requirements for the
degree of Master of Judicial Studies

by

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ABSTRACT OF THESIS

An Examination of the Judicial Peremptory Challenge: Variations between States and Considerations of Constitutionality.

Seventeen states allow for a judicial peremptory challenge of a trial judge. Seven of these states require that a new judge be assigned to the case without any showing of bias, prejudice or impartiality. The remaining ten states require some showing, primarily through an affidavit or certification, which meets requirements set forth by the statute or rule. Distinctions between the various challenge procedures were examined. State jurisprudence addressing the competing constitutional principles of maintaining a litigant's right to a fair and impartial tribunal and the presumption of a trial judge's impartiality was examined within the context of the doctrine of separation of powers, improper delegation of judicial power, and analogies to the peremptory strike of a juror. Having found no constitutional infirmities, except perhaps under circumstances unique to the evolution of a state's particular rule or statute, the decision of whether to remove by a peremptory challenge a presumptively impartial judge should be left to the policy branch of government – the legislature.

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AN EXAMINATION OF THE JUDICIAL PEREMPTORY CHALLENGE:
VARIATIONS BETWEEN STATES AND CONSIDERATIONS OF
CONSTITUTIONALITY.

Courts, in our system, elaborate principles of law in the course of resolving disputes. The power and the prerogative of a court to perform this function rest, in the end, upon the respect accorded its judgments. The citizen's respect for judgments depends in turn upon the issuing court's absolute probity. Judicial integrity is, in consequence, a state interest of the highest order.

Republican Party of Minn. v. White, 536 U.S. 765, 793, 122 S. Ct. 2528, 2544 (2002) (Kennedy, J., concurring).

INTRODUCTION.

The term “probity” refers to the quality of having strong moral principles; honesty and decency; and “adherence to the highest principles and ideals.”¹ This paper examines state statutes that allow for the removal of a judge without the litigant demonstrating cause; that is, without demonstrating bias, prejudice, or partiality of the judge against the litigant. Such statutes embody procedures for effectuating what I refer to as a judicial peremptory challenge, which should be distinguished from disqualification for cause statutes that allow a litigant to disqualify a judge for reasons of bias, prejudice, or partiality. Federal decisional law regarding disqualification for cause is discussed only to place in proper context the objectives and purpose of the judicial peremptory challenge. States which currently provide for a judicial peremptory challenge will be examined,

¹ Merriam-Webster Collegiate Dictionary 929 (10th Ed. 1997).

particularly where the state court has considered constitutional implications of the peremptory challenge, such as a violation of the separation of powers doctrine, improper delegation of judicial power, and analogies to the peremptory strike of a juror. Within this evaluation of state peremptory challenge statutes, rules, and decisional law, the advantages and abuses of the judicial peremptory challenge are noted to assist the reader in answering whether the judicial peremptory challenge advances the perception of judicial probity.

JUDICIAL DISQUALIFICATION FOR CAUSE VS. JUDICIAL PEREMPTORY CHALLENGE.

One of the principle functions of judicial disqualification is to ensure that litigants have their grievances heard before an impartial and unbiased tribunal. John Locke believed that the “primary function of political society is to serve as an impartial judge over all disputes of rights that arise between its members.”² Courts have considered the right to a fair and impartial judge as embodied in the Fifth and Fourteenth Amendment to the United States Constitution, as well as various state constitutions and statutes. Nonetheless, “[t]he law will not suppose the possibility of bias or favour in a judge, who is already sworn to administer impartial justice, and whose authority greatly depends upon that presumption and idea.”³ Addressing these competing principles, disqualification for cause statutes

² Kiyoshi Shimokawa, *Locke's Concept of Justice*, in *THE PHILOSOPHY OF JOHN LOCKE* 67 (Peter R. Anstey ed., 2003).

³ *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813, 820, 106 S. Ct. 1580, 1584-85 (1986) (citing 3 W. Blackstone, *Commentaries* 361).

recognize that a litigant ought to be heard on a claim that a fair and unbiased tribunal is unobtainable before the particular presiding judge. Accordingly, every jurisdiction in the United States has a statutory basis upon which a litigant may seek removal of a judge who is demonstrably biased and partial; that is, removed for cause.

The process for removing a judge for actual bias or prejudice varies among jurisdictions, but all require that the movant demonstrate, to some degree, that the judge cannot be relied upon to preside in an impartial or unbiased manner. A disqualification challenge is rooted in principles of due process intended to ensure that no person is deprived of life, liberty, or property without a fair opportunity to contest the validity of the deprivation.⁴ Basic elements of due process require the litigant be heard by a judge and jury that are unbiased and impartial, in addition to being legally constituted and having jurisdiction over the cause. These protections are designed to ensure that a judgment is accurate and to eliminate the possibility of erroneous fact finding. A biased judge or jury presents the greatest threat to these principles. Disqualification or cause challenges therefore allow a litigant to substantively raise the issue of a judge's impartiality in order to ensure accurate decisions and compliance with basic principles of due process.⁵

⁴ See *Carey v. Piphus*, 435 U.S. 247, 259-260 (1978); *Boddie v. Connecticut*, 401 U.S. 371, 378 (1971); *Sill v. Pa. State Univ.*, 462 F. 2d 463, 469 (3d Cir. 1972); *Addington v. Texas*, 441 U.S. 418, 425 (1979); *Greenholtz v. Inmate of the Neb. Penal & Corr. Complex*, 442 U.S. 1, 13 (1979).

⁵ See also Raymond J. McKoski, *Disqualifying Judges When Their Impartiality Might Be Questioned: Moving Beyond a Failed Standard*, 56 Ariz. L. Rev. 411, 468 (2014).

In contrast, the judicial peremptory challenge grants a litigant one change of judge, without having to specify a reason. Litigants must typically exercise the challenge within a statutory timeframe after assignment of a judge. Normally, once a peremptory challenge is exercised, a litigant may seek removal of the new judge only if the successor judge is disqualified based upon statute, court rule, or because the judge's participation would violate principles of due process; that is, the party demonstrates actual bias or prejudice of the judge.

The distinction between a motion to disqualify for cause and a judicial peremptory challenge is important for purposes of identifying principles and objectives underlying each and assessing whether the particular procedure invoked is successful in advancing legitimate objectives. Following examination of states with judicial peremptory challenge statutes, the evolution of disqualification for cause jurisprudence will be examined, as the judicial peremptory challenge shares the same objective as disqualification for cause statutes - establishing a procedure for ensuring a litigant receives a fair and impartial trial. To this extent, federal jurisprudence, as a representative body of decisional law, will be examined.

Lastly, I refer to "change of judge" and "removal of judge" interchangeably; each characterizes the process of reassigning a different judge to the proceeding. Similarly, "substitution" of a judge is a judicial peremptory challenge because statutes providing for "substitution" of a judge do not require any showing of cause. However, "disqualification" should be distinguished from

a “peremptory challenge” because “disqualification” refers to a judge who is no longer cloaked with the presumption that he is impartial and thus qualified to preside. The distinction is noteworthy because the presumption of impartiality and qualification applies in every proceeding following administration of a judge’s oath of office.

STATES ALLOWING JUDICIAL PEREMPTORY CHALLENGES.

Although this paper discusses state peremptory challenges, I would be remiss if I did not note that federal law does not provide the litigant an ability to peremptorily challenge a federal judge. Pursuant to 28 U.S.C. § 455 the disqualification of any justice, judge, or magistrate is required in any proceeding in which the judge’s impartiality might reasonably be questioned. Under subsection (b) (1) of that statute, the judge’s disqualification is required when the judge has a personal bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceeding. Additionally, 28 U.S.C. § 144 allows a party to file a timely and sufficient affidavit that the judge has personal bias or prejudice and request that the assigned judge be removed from the case. The assigned judge is prohibited by the statute from proceeding further and the matter of disqualification is referred to another judge to “hear such proceeding.” Thus, while there is a procedure in federal courts for disqualification of judge, the procedure requires a showing of cause and cannot be characterized as

peremptory inasmuch as the allegation of prejudice is considered a disputed matter for resolution by another judge.

As indicated, all states have statutes providing for disqualification of a judge for cause and, in the large majority of jurisdictions, cause is still required for removal of a judge. However, seventeen states, primarily in the west and mid-west, have adopted statutes or rules which allow for removal of a judge either without any showing of prejudice or bias (seven states) or automatic removal upon presentation of a “sufficient” affidavit alleging prejudice (ten states). What is “sufficient”, in most instances, is set forth by the authorizing statute or rule and varies widely among the states providing such a remedy. What makes the statute or rule “peremptory”, however, is that upon filing the affidavit or notice the remedy of a change of judge is self-executing.

Nearly every state examined restricts the judicial peremptory challenge by requiring strict compliance with the statute or rule; such as, time limitations, that the motion be filed prior to certain occurrences in the proceeding, the manner in which parties may or may not be aligned on “sides” thus restricting the number of challenges, and limitation of the right to one such motion. These variations I have often noted. My inquiry, however, focuses more on the rationale of the state court in considering the constitutionality of the rule and the state court’s balancing of two legitimate interests: that of ensuring a party *perceives* they have received a

fair trial before an impartial and unbiased judge and the state court's interest in effectively administering and managing the courts.

STATES ALLOWING FOR "PURE" PEREMPTORY CHALLENGES.

Currently, only seven states allow for a "pure" peremptory challenge: Alaska, Idaho, Minnesota, Missouri, Montana, New Mexico, and Wisconsin. A "pure" peremptory challenge allows for a change of judge without any avowals at all; that is, the change of judge is effectuated by filing a notice such as "Plaintiff, [name], requests substitution of Judge [name]." While the statute or rule authorizing the change of judge may limit the right through, for example, establishing time and waiver requirements, a "pure" peremptory challenge means there is absolutely no averment of good faith or prejudice required, or any other inquiry into the reason of the party for making the request. As will become clear, the distinction between "pure" peremptory challenge statutes or rules and those requiring an affidavit is important when state courts have considered the constitutionality of the authorizing statutes or rules.

ALASKA.

Alaska did not allow judicial peremptory challenges until 1974 when the Alaska Supreme Court promulgated rules removing an affidavit requirement previously imposed by the legislature. The Court initially considered the constitutionality of a judicial peremptory challenge statute, enacted by the legislature in 1967, which required an affidavit be filed alleging the "belief" that a

party cannot obtain a fair and impartial trial before a particular judge. Section 22.20.22 (a) provided:

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 must contain a statement that is made in good faith and not for the purpose of delay.⁶

In *Channel Flying, Inc. v. Bernhardt*⁷ the court expressly rejected a separation of powers challenge regarding § 22.20.022 concluding that Alaska's statute required an affidavit of prejudice or bias, which distinguished it from those cases where peremptory challenge statutes had been invalidated.

The cases which have held disqualification statutes invalid have recognized that where in a statute an affidavit of prejudice or bias is required in order to disqualify a judge, the statute would successfully withstand an attack on its validity. The reason is that where no affidavit is necessary, a judge may be disqualified for good cause, bad cause -- or no cause at all. But where an affidavit is required, the assertion of bias or prejudice under oath is at least some showing or an imputation of the fact that the judge is disqualified and this is sufficient to save the statute from successful attack on constitutional grounds. 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 for showing bias or lack of impartiality does not offend the principle of separation of powers of government.⁸

⁶ Alaska Stat. § 22.20.022.

⁷ 451 P. 2d 570 (Alaska 1969).

⁸ *Channel Flying*, 451 P.2d at 575 (footnotes omitted).

The court thus rejected a challenge that the statute was unconstitutional on the basis that it did not permit disqualification for no cause at all. An allegation under oath constitutes a showing or is at least an imputation that the judge is disqualified. “That is all that is required.”⁹

After deciding *Channel Flying* in 1969, the Alaska Supreme Court promulgated Alaska R. Civ. P. 42(c) and Alaska R. Crim. P. 25(d) in 1974, both of which permit peremptory challenges of a judge without submission of an affidavit or specification of grounds. In civil proceedings, Alaska R. Civ. P. 42 (c)¹⁰ provides, in relevant part:

(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 the 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.*¹¹

⁹ *Channel Flying*, 451 P. 2d at 575.

¹⁰ Alaska R. Civ. P. 42.

¹¹ (Emphasis supplied.) The entire portion of Rule 42 pertaining to change of judge provides:

(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

In criminal proceedings, Alaska R. Crim. P. 25 (d)¹² provides, in relevant part:

(d) Change of Judge as a Matter of Right. -- In all courts of the state, a judge may be peremptorily challenged as follows:

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 the 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.

(2) Filing and Service. -- The notice of change of judge shall be filed and copies served on the parties 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 the commencement of trial and within five days after notice that the case has been assigned to a specific judge. Where a party has been served or 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 a party appears or files a pleading in the action. If a party has moved to disqualify a judge for cause within the time permitted for filing a notice of change of judge, such time is tolled for all parties and, if the motion to disqualify for cause is denied, a new five-day period runs from notice of the denial of the motion.

(4) Waiver. -- A party waives the right to change as a matter of right a judge who has been permanently assigned to the case 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 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 the administrative director 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.

¹² Alaska R. Crim. P. 25.

(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. -- A party may exercise the party's right to a change of judge by filing a "Notice of Change of Judge" signed by counsel, if any, stating the name of the judge to be changed. *The notice shall neither specify grounds nor be accompanied by an affidavit*. The notice of change of judge is timely if filed within five days after notice that the case has been assigned to a specific judge. If a party has moved to disqualify a judge for cause within the time permitted for filing a notice of change of judge, such time is tolled for all parties and, if the motion to disqualify for cause is denied, a new five-day period runs from notice of the denial of the motion.

(4) Timeliness. -- Failure to file a timely request precludes a change of judge under this rule as a matter of right.¹³

¹³ (Emphasis supplied.) The entire portion of Rule 25(d) pertaining to change of judge provides:

(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. -- A party may exercise the party's right to a change of judge by filing a "Notice of Change of Judge" signed by counsel, if any, stating the name of the judge to be changed. The notice shall neither specify grounds nor be accompanied by an affidavit. The notice of change of judge is timely if filed within five days after notice that the case has been assigned to a specific judge. If a party has moved to disqualify a judge for cause within the time permitted for filing a notice of change of judge, such time is tolled for all parties and, if the motion to disqualify for cause is denied, a new five-day period runs from notice of the denial of the motion.

(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, the judge 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 the right under this rule to change a judge when the party, after reasonable opportunity to consult with counsel, agrees to the assignment of the case to a judge or knowing that the

The promulgation by the court of Civ. R. 42 (c) and Crim. R. 25 (d) expanded the right to peremptorily remove a judge provided for in §22.20.022. Thereafter, the court determined that since the court itself had broadened the peremptory rights embodied in § 22.20.022, “it is difficult to conceive of how the statute could be deemed to violate the separation of powers doctrine by intruding upon judicial policy and rule-making prerogatives.”¹⁴

In *Tunely v. Municipality of Anchorage School District*,¹⁵ the court reaffirmed that the peremptory challenge rights granted litigants by § 22.20.022 creates peremptory challenge rights in both criminal and civil proceedings. Moreover, section 22.20.022 creates the "substantive right" to a peremptory challenge, while the rule is the “sole provision which may be consulted in determining whether the peremptory right was properly exercised and in determining the effect of the preemption on the procedural and administrative functions of the court system.”¹⁶ The principle applies with equal force to peremptory challenges in both civil and criminal proceedings and, therefore, the rule controls the procedure and scope of such challenges.¹⁷ Accordingly, “insofar as Rule 25 (d) regulates only the procedural aspects of the peremptory right

judge has been permanently assigned to the case, participates before the judge 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.

¹⁴ *Hornaday v. Rowland*, 674 P. 2d 1333, 1342 (Alaska 1983).

¹⁵ 631 P. 2d 67 (Alaska 1980).

¹⁶ *Gieffels v. State*, 552 P.2d 661, 667 (Alaska 1976), *overruled on other grounds by Miller v. State*, 617 P. 2d 516 (Alaska 1980).

¹⁷ *See also Halligan v. State*, 624 P. 2d 281 (Alaska 1981).

created by § 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.”¹⁸

In Alaska, the court has broadened peremptory challenges by removing any requirement that prejudice be alleged. The right, while derived from legislative enactment, is implemented through court rules which have expanded the right, likely in recognition of “the fundamental tenet of [the Alaska] system of justice that every litigant shall have his rights adjudicated by a judge who is disinterested, impartial, and unbiased.”¹⁹

IDAHO.

Prior to the Supreme Court of Idaho’s promulgation of a rule pertaining to peremptory challenge of judge, a party could disqualify a judge without cause pursuant to statute.²⁰ The right had existed for nearly forty years before the court first promulgated I.C.R. 25 (a), with nearly the same provisions as the statute. The right was recognized in criminal proceedings through the adoption of I.C.R. 25 (a), providing, in relevant part:

(a) Disqualification of judge *without cause*. In all criminal actions, the parties shall each have the right to one disqualification *without cause* of the judge or magistrate, except as herein provided, under the following conditions and procedures:

(1) Motion to disqualify. In any criminal action in the district court or the magistrate's division thereof, any party may disqualify one (1)

¹⁸ *Gieffels*, 552 P. 2d at 667-68.

¹⁹ *In re G. K.*, 497 P. 2d 914, 915 (Alaska 1972).

²⁰ Idaho Code Ann. § 1-1801.

judge or magistrate by filing a motion for disqualification without cause, *which shall not require the stating of any grounds therefor, and the granting of such motion for disqualification without cause, if timely, shall be granted.* Each party in a felony prosecution shall have one (1) disqualification without cause under this Rule as to the magistrate appointed to hear the preliminary hearing and another disqualification without cause as to the district judge appointed to hear the trial of the action. *A motion for disqualification without cause shall not be made under this Rule to hinder, delay or obstruct the administration of justice.*

(2) Time for filing. A motion for disqualification without cause must be filed not later than seven (7) days after service of a written notice setting the action for status conference, pre-trial conference, trial or for hearing on the first contested motion, or not later than fourteen (14) days after service of a written notice specifying who the presiding judge or magistrate to the action will be, whichever occurs first; and such motion must be filed before the commencement of a status conference, a pre-trial conference, a contested proceeding or trial in the action.²¹

As is clear from the language of the rule, no showing of prejudice is required for a defendant to invoke his automatic right of substitution. However, the provision that the motion not be filed to “hinder, delay or obstruct the administration of justice,” set forth in (a)(1) of the rule, has proved to be a contentious issue in the Idaho courts. Prior to its amendment in 1982, the rule did not contain the language that prohibits filing a motion to “hinder, delay or obstruct the administration of justice.” That language was adopted from its corollary civil rule, I.C.R.P. 40 (d)(1).²² In 1994, the court in *Bower v. Morden*²³ concluded that a trial court could not exercise discretion in considering whether the motion to

²¹ Idaho Crim. R. 25 (emphasis supplied).

²² Idaho R. Civ. P. 40 (d).

²³ *Bower v. Morden*, 880 P. 2d 245, 248-49 (Idaho 1994).

disqualify was filed to hinder, obstruct or delay the administration of justice and that the provision did “not supply the basis for an exercise of discretion by the judge against whom the motion is made.”²⁴ As pointed out by the dissent in *Bower v. Morden*, such an interpretation rendered the language as cautionary only and divested the court of its power to manage, administer, and supervise the judiciary and the courts.²⁵

The Idaho Supreme Court suspended the rule for five months in 1995, following its decision in *Bower v. Morden*, because abuse of the rule - as predicted by the dissent - rendered court administration unmanageable. The court appointed a committee to study possible modification or even elimination of the rule.²⁶ Following the committee’s report recommending reinstatement of the rule with the addition of a provision allowing for the monitoring of abuses, the court reinstated the rule in November of 1995. However, on January 24, 1997, the Idaho Supreme Court repealed the rule finding that “judicial administration requires repeal of [the] Rule.”²⁷ The rule remained repealed until 2004.

In 2004, the rule was reinstated following the recommendation of state bar groups and the Idaho Criminal Rules Advisory Committee.²⁸ Although the final enactment of 25 (a) lacks the monitoring provisions contained in the 1995 rule, the

²⁴ *Bower*, 880 P. 2d at 248-49.

²⁵ *Bower*, 880 P. 2d at 250 (Silak, J., dissenting).

²⁶ Order, Idaho Supreme Court, *In Re Amendment of Idaho Criminal Rules (I.C.R.) Repealing Rule 25 (a)* (Apr. 19, 1995 (suspending I.C.R. 25 (a))).

²⁷ Order, Idaho Supreme Court, *In Re Amendment of Idaho Criminal Rules (I.C.R.) Repealing Rule 25 (a)* (Jan. 24, 1997).

²⁸ See Idaho Criminal Rules Advisory Committee, Excerpt of Minutes (Nov. 21, 2003).

Idaho Supreme Court has monitored use of the rule by keeping statistics on the number of motions filed under both rule 25 (a) and its civil counterpart, 40(d)(1).

Other than *Bower v. Morden*, very few opinions have been issued from the Idaho Supreme Court regarding judicial peremptory challenges and thus only scarce legal precedent exists to guide litigants. However, disqualification without cause in Idaho remains a peremptory challenge that is automatic and which does not require any allegation of prejudice - actual or perceived.

MINNESOTA.

Minnesota has allowed for the judicial peremptory strike without a showing of cause since 1978.²⁹ Currently, Minn. Stat. § 542.16 provides that “[a]ny party, or the party’s attorney,³⁰ to a cause pending in a district court, except for a proceeding under section 484.702 [pertaining to referees in a partition action], may make and file with the court administrator in which the action is pending and serve on the opposite party a notice to remove.”³¹ The notice to remove must be served and filed within ten days after the party receives notice of which judge has been assigned.³² “Thereupon, without any further act or proof”, the chief judge of the judicial district “shall” assign any other judge of the district to preside over the

²⁹ Minn. Stat. § 542.16 (1978 c 647 s 2).

³⁰ Minn. Stat. § 542.16 was amended in 1927 to add that, in addition to any party, the party’s “attorney” could file for removal. Prior to 1978, however, the party or the party’s attorney were required to file an affidavit of prejudice.

³¹ Minn. Stat. § 542.16.

³² Minn. Stat. § 542.16

cause.³³ Section 542.16 was enacted by the legislature in 1927 and served as the state's disqualification for cause statute until amendments in 1978 allowed for peremptory removal of a trial judge without filing an affidavit or verification.

In addition to the legislature's enactment of § 542.16, the Minnesota Supreme Court promulgated, pursuant to the court's inherent power to oversee court procedure, Minn. R. Crim. P. 26.03 and Minn. R. Civ. P. 63.03, setting forth procedures for filing a peremptory notice of removal in criminal and civil cases, respectively. To the extent there may be any conflict between the rules and the statute, the Minnesota Supreme Court has held that the peremptory right of removal is a procedural issue governed by the court's inherent authority "to regulate[] procedural matters in all state criminal actions . . . [and] that statutes relating to procedure in such actions may be superseded by court rules."³⁴ As notice of removal constitutes "merely a step in the pretrial process and a method by which a judge may be replaced," it is, consequently, "a procedural matter governed by Minn. R. Crim. P. 26.03, subd. 13(4) rather than Minn. Stat. § 542.16."³⁵ Thus, to the extent there is any conflict between the rules and statutes, the rules will prevail as they relate to administration of the courts and the court's inherent authority to regulate matters of procedure.

³³ Minn. Stat. § 542.16.

³⁴ *State v. Azure*, 621 N.W.2d 721, 723-724 (Minn. 2001) *citing* Minn. Stat. § 480.059 (1) and (7) (2000); *see also State v. Cermak*, 350 N.W.2d 461, 484 (Minn. 1999) and *State v. Johnson*, 514 N.W.2d 551, 554 (Minn. 1994) (noting that the courts govern procedural subjects and the legislature governs substantive rights).

³⁵ *Azure*, 621 N.W. 2d at 724.

A limitation on the right to peremptory challenge a judge existing in both rules is the requirement that notice of removal be filed before a party has invoked the discretion of the court.³⁶ Whether the discretion of the court has been invoked under the particular circumstances of a case remains an issue frequently litigated in the Minnesota courts.

In *Holmes*, the court reasoned that while parties always maintain the right to remove a judge for cause, “the limited ability to remove a judge without cause is important because it operates 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 the confidence in the judiciary.’”³⁷ Nevertheless, although the “right to peremptorily challenge a judge shall be liberally construed to safeguard in both fact and appearance the constitutional right to a fair and impartial trial,”³⁸ it is equally true that “the right of removal may be waived by failure to seasonably assert it.”³⁹

³⁶ Minn. R. Crim. P. 26.03, subd. 14(4)(c) provides: “The notice is not effective against a judge who already presided at the trial, Omnibus Hearing, or evidentiary hearing if the removing party had notice the judge would preside at the hearing.” Minn. R. Civ. P. 63.03 provides: “No such notice may be filed by a party or party’s attorney against a judge or judicial officer who has presided at a motion or any other proceeding of which the party had notice, or who is assigned by the Chief Justice of the Minnesota Supreme Court. A judge or judicial officer who has presided at a motion or other proceeding or who is assigned by the Chief Justice of the Minnesota Supreme Court may not be removed except upon an affirmative showing of prejudice on the part of the judge or judicial officer.”

³⁷ *State v. Cheng*, 623 N.W.2d 252, 257 (Minn. 2001), quoting *State v. Holmes*, 315 N.W. 2d 703, 717 (Wis. 1982).

³⁸ *McClelland v. Pierce*, 376 N.W. 2d 217, 220 (Minn. 1985) (citations omitted).

³⁹ *Jones v. Jones*, 64 N.W. 2d 508, 515 (Minn. 1954).

Finally, the judicial peremptory challenge in Minnesota does not apply to appellate judges. In *State ex rel. Wild v. Otis*,⁴⁰ the court adopted the rationale of the ABA Standards of Judicial Administration, Standards Relating to Appellate Courts § 3.42 and its commentary:

In the collegial decision-making of an appellate court an individual judge's purely personal views are of less significance than they would be in a trial court and he is subject to collegial restraint should he be inclined to act on them; an appellate judge has few occasions for exercising the broad discretion reposing in a trial judge; and in appellate litigation there is no occasion for the intense personal interaction between the judge and the lawyers and litigants that may occur in a trial court.⁴¹

Applying this rationale, the court concluded that there was no peremptory right to removal of any of the justices on the Minnesota Supreme Court.

MISSOURI.

In both criminal cases and civil actions, a party enjoys the right in Missouri to disqualify a judge without the “need to allege or prove any reason for such change” and without the application being verified. The change of judge procedure in a criminal case is set forth in Mo. Sup. Ct. R. 32.07; in a civil action, the procedure is set forth in Mo. Sup. Ct. R. 51.05. Procedures for a change of judge in criminal and civil cases are “parallel,”⁴² and contain virtually identical language.⁴³ The rules were adopted by the Supreme Court of Missouri on April

⁴⁰ 257 N.W. 2d 361 (Minn. 1977).

⁴¹ *Otis*, 257 N.W. 2d at 263-64.

⁴² *State ex rel. McNary v. Jones*, 472 S.W. 3d 637, 640 (Mo. App. 1971).

⁴³ Minn. R. Crim. P. 32.07 provides:

32.07. Misdemeanors or Felonies--Change of Judge--Procedure

(a) Except as provided in *Rule 32.06*, a change of judge shall be ordered in any criminal proceeding upon the timely filing of a written application therefor by any party. The applicant 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) In felony and misdemeanor cases the application must be filed not later than ten days after the initial plea is entered. If the designation of the trial judge occurs more than ten days after the initial plea is entered, the application shall be filed within ten days of the designation of the trial judge or prior to commencement of any proceeding on the record, whichever is earlier.

(c) 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.

(d) Upon the presentation of a timely application for change of judge, the judge promptly shall sustain the application. The disqualified judge shall thereupon:

(1) If the case is being heard by an associate circuit judge, 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, 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, transfer the case to the other circuit judge or 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, 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.

(e) 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.

Minn. R. Civ. P. 51.05 provides:

51.05. Change of Judge--Procedure

(a) A change of judge shall be ordered in any civil action upon the timely filing of a written application therefor by a party. For purposes of this Rule 51, proceedings to revoke probation or judicial parole and motions to modify child custody, child support, or spousal maintenance filed pursuant to chapter 452, R. S. Mo., are not an independent civil action unless the judge designated to rule on the motion is not the same judge that ruled on the previous independent civil action. 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 within 60 days from service of process or 30 days from the designation of the trial judge, whichever time is longer. If the designation of the trial judge occurs less than thirty days before trial, the application must be filed prior to any appearance before the trial judge.

In the case of intervenors, the application must be filed within 30 days of intervention or designation of the trial judge, whichever is later, but in no event may any intervening party obtain a change of judge pursuant to this Rule 51 unless the application is filed within 180 days of the designation of the trial judge.

(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.

20, 1981, and became effective January 1, 1982. The rules were significantly changed from previous versions, inasmuch as no affidavit is required and the motion seeking a change of judge has been replaced by a “simple request.”⁴⁴ Prior to adoption of the rules, the court had recognized that the right to disqualify a judge “is one of the keystones of our legal administrative edifice.”⁴⁵ “No system of justice can function at its best or maintain broad public confidence if a litigant can be compelled to submit his case in a court where the litigant sincerely believes

(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; or (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. However, no party shall be precluded from later requesting any change of judge for cause. Further, in condemnation cases involving multiple defendants, as to which separate trials are to be held, each separate trial to determine damages shall be treated as a separate case for purposes of change of judge.

(e) The judge promptly shall sustain a timely application for change of judge upon its presentation. The disqualified judge shall transfer the case to a judge stipulated to by the parties if the new judge agrees to take the case. If the case is not so transferred, the disqualified judge shall notify the presiding judge:

(1) If the presiding judge is not disqualified in the case, the presiding judge shall assign a judge of the circuit who is not disqualified or request this Court to transfer a judge; or

(2) If the presiding judge is disqualified in the case, a judge of the circuit shall be assigned in accordance with local court rules, so long as the local court rules do not permit the disqualified judge to make the assignment, or the presiding judge 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.

⁴⁴ *Missouri v. Mountjoy*, 831 S.W. 2d 241, 244 (Mo. App. 1992).

⁴⁵ *Mountjoy*, 831 S.W. 3d at 244, quoting *State ex rel. Campbell v. Kohn*, 606 S.W. 2d 399, 401 (Mo. App. 1980).

the judge is incompetent or prejudiced”⁴⁶ Thus, “the right of the litigant to disqualify a judge has been described as ‘virtually unfettered.’”⁴⁷

In *Hornbuckle*,⁴⁸ the court reasoned as follows:

While society and courts desire that justice be done, disqualification of judges cannot be "too easy" or "too hard." If disqualification is "too easy, both the cost and the delay of justice go out of bounds. If disqualification is too hard, cases may be decided quickly, but unfairly." Under Missouri practice, a middle ground and a proper balance has been sought and, we believe, achieved, insofar as possible to do so.⁴⁹

Recognizing that allowing a litigant to disqualify a judge may at times "snarl the smooth flow of a court's docket," the court explained that achieving "that middle ground" was "the price to be paid for a judicial system that seeks to free a litigant from a feeling of oppression."⁵⁰ The rules thus addressed the tension between competing interests recognized in court precedent⁵¹ and in the court's judgment promoted the policies that underlie the "virtually unfettered" right of a litigant to one trial judge disqualification.

Montana

Mont. Code Ann. § 3-1-804, MCA, secures the constitutional right to an impartial trial judge in both criminal and civil proceedings by providing that a

⁴⁶ *Mountjoy*, 831 S.W. 2d at 244, quoting *McNary v. Jones*, 472 S.W. 2d 637, 640 (Mo. App. 1971).

⁴⁷ *Mountjoy*, 831 S.W. 2d at 244, quoting *Medawar v. Gaddis*, 779 S.W. 2d 323, 326 (Mo. App. 1989).

⁴⁸ *State v. Hornbuckle*, 746 S.W. 2d 580, 584 (Mo. App. 1988).

⁴⁹ *Hornbuckle*, 746 S.W.2d at 584-85 (citations omitted).

⁵⁰ *Mountjoy*, 831 S.W. 2d at 245, quoting *Reproductive Health Services, Inc. v. Lee*, 660 S.W.2d 330, 337 (Mo. App. 1983).

⁵¹ See *State v. Hornbuckle*, 746 S.W. 2d 580 (Mo. App. 1988); *Reproductive Health Services, Inc. v. Lee*, 660 S.W. 2d 330 (Mo. App. 1983); and *McNary v. Jones*, 472 S.W. 2d 637 (Mo. App. 1971).

party may substitute or change a judge upon filing a motion for substitution without any showing of cause. Each party is entitled to one substitution request which must comport with time restrictions contained in the statute.

Mont. Code Ann. § 3-1-804 had its origins in the 1903 Montana Legislature and was enacted after the Governor of Montana, upon public demand, petitioned and convened a special session of the legislature for the express purpose of considering general legislation by which bias and prejudice of a district judge should effectuate a disqualification. As a result, the “Fair Trial Law” was enacted allowing for a change of judge upon the filing of an affidavit alleging the party could not receive a fair and impartial trial before the particular judge. The law provided that “[u]pon the filing of such affidavit the judge as to whom such qualification is averred, shall be without authority to act further in the action . . .” and, thus, the procedure for removal was automatic and required no inquiry by the court. Accordingly, Montana’s current version of Mont. Code Ann. § 3-1-804 varies significantly from its initial codification inasmuch as a litigant no longer is required to file an affidavit of cause.

The Fair Trial Law was quickly challenged in *State ex rel. Anaconda Mining Co. v. Clancy*,⁵² on the basis that it allowed for removal of a judge with no provision for judicially determining whether, as a fact, the judge is actually biased or prejudiced. The Supreme Court of Montana upheld the law, finding that “it is

⁵² 77 P. 312 (Mont. 1904).

not the bias or prejudice of the judge which disqualifies him, but the mere imputation of such bias and prejudice, and that leaves nothing to be judicially determined.”⁵³ Moreover, the “authority to enact such statutes . . . is inherent in the legislature . . . [and] we know of no reason why the legislature might not provide for a change of venue merely upon demand of either party, without assessing any reason whatsoever.”⁵⁴

In *In re Woodside-Florence Irr. Dist.*,⁵⁵ the court considered whether the failure of the trial judge to remove himself from the proceeding following a properly submitted motion to substitute affected the substantial rights of the parties. The court explained:

. . . it is the policy of our system that every litigant, no matter in what form his application may be presented to the court, shall have his rights adjudicated by a judge who is not interested in the result. It cannot be doubted for an instant that it would be perversion of justice for a judge to sit in any proceeding in the event of which he has an interest, whether such interest arise from the fact that he is a party in interest, directly or indirectly, or that he is related to one or more of the parties, or that he has theretofore been an attorney or counselor for one of the parties to the action or proceeding. Nor should he be allowed to sit, when he is laboring under bias or prejudice toward one or more of the parties litigant. By the amendment of section 180, supra, the Legislature has sought to provide a means by which this latter condition may be avoided. In doing so, it recognized the inherent difficulty of attaining this end, if a judge, possibly already biased or prejudiced, or in any event more or less affected by a feeling of offense arising out of the charge made against him by the litigant, be permitted to sit and try the question whether or not he is in fact biased, and, in its effort to meet a

⁵³ *Clancy*, 77 P. at 316.

⁵⁴ *Clancy*, 77 P. at 316.

⁵⁵ 194 P. 2d 241 (Mont. 1948).

situation surrounded by so much difficulty, enacted the amendment to section 180, *supra*, which makes the imputation sufficient to require a change of judge, or, in default thereof, of the place of trial under section. Of the wisdom of its action there may be much doubt or question; but it must not be overlooked that *this ground of disqualification stands upon the same level of importance as do the others enumerated*, except as to the time when the imputation may be made, *and operates just as effectively, if invoked at the proper time.*"⁵⁶

In 1965, in *State ex rel. v Perry*,⁵⁷ the court was again called upon to consider the constitutionality of Montana's substitution statute. The court first observed that "[n]o judge has a vested right to sit in a particular case. Neither has a litigant nor an attorney a vested right to have his case heard by any particular judge."⁵⁸ Moreover, "[j]udicial power is never exercised for the purpose of giving effect to the will of the judge. It is always exercised for the purpose of giving effect to the will of the people as that will is expressed by *the law*."⁵⁹

. . . judicial power as contra-distinguished from the power of the law has no existence. Judicial power is exercised by means of courts which are the mere creations and instruments of the law, and independent of the law the courts have no existence. The law preceded the courts. The law governs the courts. Thus it is the function of the courts to expound and administer law in those causes properly brought before them in course of legal procedure.⁶⁰

The court examined opinions of sister states that had considered the constitutionality of similar disqualification statutes – notably *U'ren*, *Vandenberg*,

⁵⁶ *In re Woodside-Florence Irr. Dist.*, 194 P. 2d at 255, quoting *State ex rel. Carleton v. District Court*, 82 P. 789, 790 (Mont. 1905) (emphasis supplied).

⁵⁷ 400 P. 2d 648 (Mont. 1965).

⁵⁸ *Perry*, 400 P. 2d at 655.

⁵⁹ *Perry*, 400 P. 2d at 653, quoting *State ex rel. Bennett v. Bonner, Governor*, 214 P. 2d 747 (Mont. 1950).

⁶⁰ *Perry*, 400 P. 2d at 653.

and *Austin* – and concluded that “we do not believe we have been previously mistaken” in “the search [] for the truth on this all important legal principle.” The statute is “constitutional, being a proper subject of legislative power and does not impinge upon the existence or supremacy of the judicial system nor alter its jurisdiction or duties.”⁶¹

As to the suggestion that the court take over the matter of the substitution rule from the legislature, the court explained:

As to the suggestion that this court take over the matter of disqualification by rule, or at least control its use to prevent abuse thereof, in the present situation we do not feel it necessary. This is not to say that we do not have the power to do so, since it is entirely a procedural matter. But there are several factors that should be considered in view of the long history of this statute. It has always been called the Fair Trial Law, it was adopted at a time when it appeared to be most essential, in fact the Governor was petitioned by our citizens to call the legislature into extraordinary session for that purpose. It has served litigants well, though admittedly it has been and can continue to be abused. Our district judges and the justices of this court are elective officers, responsible to the electorate of our state. The citizens of Montana requested disqualification be enacted by the legislature because the courts themselves had not provided this means of securing a fair trial. For these reasons at this time we decline to adopt any rules with respect thereto.

Adoption of rules of procedure can be petitioned for by the bench and bar of Montana, and it may be that they may desire to do so in this field. We have an Advisory Committee to consider all proposals for changes in rules or adoption of new ones. To them in the first instance should go any such requests.

Following the court’s invitation that it promulgate rules regarding peremptory judicial disqualification, the “Fair Trial Law” was superseded by order

⁶¹ *Perry*, 400 P. 2d at 660.

of the Montana Supreme Court in 1976 and subsequently codified as § 3-1-804, MCA.⁶² Although the affidavit requirement had remained part of the statutory scheme for obtaining a peremptory disqualification of judge until 1976, and was the basis upon which much of the court's precedent was premised, the affidavit requirement was removed by the Montana Supreme Court when the court promulgated the rule and superseded the statute. A constitutional challenge to the rule has not been considered by the court since the court's promulgation of the rule, although the court has received numerous petitions for amendments and/or abolition of the rule. Presumably, a constitutional challenge that it violates the doctrine of separation of powers will be dismissed for the reason that the court itself promulgated the rule.⁶³

NEW MEXICO.

New Mexico has allowed for a peremptory challenge of a district judge without cause since 1985. N.M. Stat. Ann § 38-3-9, enacted by the New Mexico Legislature in 1978, provides that "a party to an action, civil or criminal, . . . shall have the right to exercise a peremptory challenge to the district judge before whom the action or proceeding is to be tried and heard"⁶⁴ The Supreme Court of New Mexico has placed time, notice, and other limitations on the statutory right of the peremptory challenge through the promulgation of Rule 1-

⁶² *In re Rules of the Supreme Court*, 34 State Rep. 26, 27 (Mont. 1976).

⁶³ See *Hornaday v. Rowland*, 674 P. 2d 1333 (Alaska 1983).

⁶⁴ N.M. Stat. Ann. § 38-3-9.

088.1, but the remedy remains one which may be invoked by a party without any demonstration of cause.⁶⁵ Rule 1-088.1 provides that a party may not excuse more than one judge without establishing cause nor may a party “excuse a judge after the party has attended a hearing or requested the judge to perform any act other than an order for free process or a determination of indigency.”⁶⁶

The peremptory challenge in New Mexico is rooted in the state’s long tradition of protecting a party’s right to a fair and impartial tribunal. The court has held that the “right to excuse a judge without cause, embodied in § 38-3-9 and Rule 1-088.1, is one of several procedural mechanisms available to ensure a litigant’s constitutional right to a fair and impartial tribunal.”⁶⁷ In addition to “the substantive right . . . to a fair and impartial tribunal as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution,”⁶⁸ New Mexico’s constitution provides:

No justice, judge or magistrate of any court shall, except by consent of all parties, sit in any cause in which either of the parties are related to him by affinity or consanguinity within the degree of first cousin, or in which he was counsel, or in the trial of which he presided in any inferior court, or in which he has an interest.⁶⁹

Accordingly, New Mexico’s Constitution presumes the existence of partiality under the circumstances specified.⁷⁰

⁶⁵ N. M. R. Ann. 1-008.1.

⁶⁶ N. M. R. Ann. 1-088.1.

⁶⁷ *Quality Auto Ctr., LLC v. Arrieta*, 309 P. 3d 80 (N.M. 2013).

⁶⁸ *Gesswein v. Galvan*, 676 P. 2d 1334 (N.M. 1984).

⁶⁹ N.M. Const. article VI, § 18.

⁷⁰ *Gesswein*, 676 P. 2d at 1335.

The tradition and evolution of the peremptory challenge in New Mexico, however, has not been without its struggles. The statutory provision allowing for disqualification of a judge was first enacted in 1933 and, through legislative amendments, has evolved into a statute authorizing peremptory challenges to a judge without cause.⁷¹ While court rules similarly provide for a peremptory challenge, the New Mexico Supreme Court has steadfastly maintained that a party's right to a peremptory challenge pursuant to § 38-3-9 is a "procedural right meant to effectuate the substantive right of a fair and impartial tribunal recognized by the New Mexico and United States constitutions."⁷² Following documented abuses and increased burdens on the court system, the court recognized as early as 1984 that § 38-3-9 provided "a method of disqualification, a method procedural in nature and a prerogative of this Court" and held that the "Court can adopt a rule of procedure when the operation of the court is involved and the existing process has created a problem." The abuses and burdens on the courts as a result of the judicial peremptory challenges continued for several decades. Finally, in 2013, the court concluded that the rule must be amended, observing:

We recognize the importance of preserving a litigant's right to remove a judge *for cause*, but given the many strains upon our district courts, we question whether the existing procedural mechanism which enables parties with similar interests to remove a judge from a case without stating a reason is necessary to preserve such litigants' constitutional right. This Court must uphold the constitutional right of litigants to a fair and impartial tribunal in such

⁷¹ 1933 N.M. Laws, ch. 184.

⁷² *Quality Auto.*, 309 P. 3d at 87.

a way that ensures not only that justice is administered fairly but also effectively, for one without the other is a denial of both. To do so requires us to strike a meaningful balance between those two critical concepts. Rule 1-088.1 in its current form fails to harmonize these two important concepts.⁷³

The court determined that amendment of the rule was necessary because “to excuse a judge without a stated reason should not exist without limitation.”⁷⁴ “Our goal. . . is to develop a rule that is meaningful – one that maintains the right of everyone to a fair and impartial tribunal and one that eliminates the unnecessary delays caused by our current rule”⁷⁵

WISCONSIN.

Wisconsin allows for a judicial peremptory challenge in civil proceedings, § 801.58, and in criminal proceedings, only by a defendant, § 971.20.⁷⁶ Wisconsin legislative enactments on the subject of disqualification can be traced back to pre-statehood years.⁷⁷ Wisconsin’s initial disqualification statutes set forth an “affidavit of practice” procedure which provided that “. . . if either party in a civil case . . . shall fear that he will not receive a fair trial . . . on the account that the judge is interested or prejudiced . . . such party shall apply to the court . . . setting forth the cause . . . and praying a change of venue, accompanied by an affidavit

⁷³ *Quality Auto. Ctr.*, 309 P. 3d at 87.

⁷⁴ *Quality Auto. Ctr.*, 309 P. 3d at 87.

⁷⁵ *Quality Auto. Ctr.*, 309 P. 3d at 87.

⁷⁶ Wis. Stat. §§ 801.58 and 971.20.

⁷⁷ See Statutes of the Territory of Wisconsin (1839), sec. 10-12, p. 197. See also 1848 Laws of Wisconsin, sec. 11, p. 22.

verifying the facts of the petition stated”⁷⁸ In 1853, the statute was interpreted by the Supreme Court of Wisconsin in *Hungerford v. Cushing*⁷⁹ to require proof of actual prejudice, the truth or falsity of which was to be determined by the judge or court. Within that same year, the legislature promptly and effectively overturned *Hungerford* by amending the 1849 statute to eliminate proof of actual prejudice. The 1853 law provided that once the affidavit was made, it was the duty of the judge or court to change venue, thus making the procedure automatic. The simple allegation of prejudice alone, without proof that prejudice in fact exists, required substitution of the judge - because the allegation imputed prejudice.⁸⁰ The legislature also extended the affidavit of prejudice to criminal cases.⁸¹

The 1853 statutory procedure for automatic substitution of a judge upon merely an allegation of a party’s subjective belief remained the law for over 100 years. However, the requirement for filing an affidavit was removed in 1969 and a prefatory note by the Judicial Council to ch. 255, Laws of 1969, accompanied the new law making it clear that the revision was a change in terminology and procedure, and not a change in substance or statutory objective. The note to the legislation explained:

While not changing the practical effect of the present affidavit practice law, the bill provides for the ‘substitution of a judge’ upon the written request of the defendant. It is felt that most affidavits of prejudice are not truly that in present practice and it is more realistic

⁷⁸ Wis. Rev. Stat. § 1, ch. 95 (1849).

⁷⁹ *Hungerford v. Cushing*, 2 Wis. 292, 297-99 (1853).

⁸⁰ *Bachmann v. City of Milwaukee*, 2 N.W. 543, 544 (Wis. 1879).

⁸¹ 1853 Wis. Laws, § 1, ch. 51; 1853 Wis. Laws § 1, ch. 75.

to call them by what they are, a request for another judge to hear the case.”⁸²

The Supreme Court of Wisconsin found it was “clear” the legislative purpose and intent in removing the affidavit requirement was to “give the defendant an opportunity to object to a judge in whose fairness the defendant lacks confidence.”⁸³ The objective of “the peremptory substitution statute and of the 1969 affidavit of prejudice law is the same: to preserve the defendant’s right to a fair trial and to ensure the orderly administration of justice.”⁸⁴ The court concluded that the legislature’s elimination of the requirement of an affidavit of prejudice in 1969 was “merely a change in the method of accomplishing the legitimate legislative objective of assuring a fair trial, not a change of objective.”⁸⁵

Accordingly, Wisconsin’s peremptory challenge statute provides that in a criminal action, a defendant has one right of substitution which must be requested at least 5 days before the preliminary examination.⁸⁶ A request for substitution of a judge is simple and may be made in the following form: “Pursuant to s. 971.20 the defendant requests a substitution for the Hon . . . as judge in the above entitled action.”⁸⁷ Other limitations contained within the statute limit the right of substitution of a judge following appeal and in multiple defendant actions.

⁸² 1969 Wis. Sess. Laws, ch. 255.

⁸³ *State v. Holmes*, 315 N.W. 2d 703 (Wis. 1982).

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ Wis. Stat. § 971.20.

⁸⁷ Wis. Stat. § 971.20.

The civil “substitution of judge” statute similarly provides that “[a]ny party . . . 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.”⁸⁸ The written request must be filed not later than 60 days after the summons and complaint are filed.⁸⁹ Thereafter, if a new judge is assigned the request must be filed within 10 days of receiving the notice of reassignment.⁹⁰ No party may file more than one request for substitution nor may any single request name more than one judge.⁹¹

Wisconsin has a constitutional provision which the court has interpreted as providing the legislature a means for enacting statutes that ensures a litigant’s constitutional right to have his case heard by an unbiased judge is protected. Wis. Const. article I, sec. 9, provides that every person “ought to obtain justice freely, and without being obligated to purchase it, completely and without denial, promptly and without delay, conformably to the laws.”⁹² Thus, the legislature may, “to effectuate the public policy of maintaining a fair judicial system and public confidence in that system, grant litigants broader rights to challenge a judge than are granted under the constitution so that litigants are assured both the actuality and appearance of a fair trial.”⁹³ In furtherance of this provision, the

⁸⁸ Wis. Stat. § 801.58 (1).

⁸⁹ Wis. Stat. § 801.58 (1).

⁹⁰ Wis. Stat. § 801.58 (2).

⁹¹ Wis. Stat. § 801.58 (3).

⁹² Wis. Const. article I, sec. 9.

⁹³ *Holmes*, 315 N.W. 2d at 710-711.

Wisconsin Supreme Court found that the no cause peremptory challenge statutes enacted by the legislature were a “commendable procedure” to protect a party’s right to a fair trial. The court observed:

The legislative purpose in adopting sec. 971.20 was to remedy the ills caused by the affidavit of prejudice statute. Because the Wisconsin affidavit of prejudice statutes required no substantiation of or determination of the allegation of prejudice, many thought the procedure unjustly impugned the integrity of the judges to whom the affidavits were addressed and that the unchallenged and undetermined charges of judicial prejudice spread on the court records gave the public a distorted picture of judicial impartiality. Some would have preferred, instead of sec. 971.20, that the legislature require the litigant to make a prima facie showing of prejudice and the trial judge (whether the judge to whom the affidavit is addressed or another judge) to rule on the sufficiency of the showing. Such a provision can be viewed as too cumbersome, too time consuming and too expensive. In weighing the merits of the alternative approaches to substitution, the legislature obviously concluded that sec. 971.20, which limits the number of substitutions and limits the time for requesting substitution, on balance 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.⁹⁴

Finally, in addressing a constitutional challenge that § 971.20 was a legislative interference with the judicial branch, the court concluded that “it had not been proven beyond a reasonable doubt” that the peremptory challenge statutes materially impair the efficacy of the courts.⁹⁵

⁹⁴ *Holmes*, 315 N.W. 2d at 716-717.

⁹⁵ *Holmes*, 315 N.W. 2d at 707.

STATES REQUIRING THE PEREMPTORY CHALLENGE CONTAIN AN AFFIDAVIT OR VERIFICATION OF CAUSE.

Ten states allow for a peremptory judicial challenge, but only upon oath or verification that a particular avowal specified in the authorizing statute or court rule has been satisfied. Normally the avowal relates to a belief that the litigant cannot receive a fair and impartial trial before the particular judge, that the motion for change of judge is made in good faith, and/or that the motion has not been filed for an improper purpose, such as delay.⁹⁶ While these states still offer litigants a judicial peremptory challenge because no substantiation or determination of the allegation of prejudice is required and the prima facie showing of prejudice or sufficiency of the showing is not a disputed matter to be resolved by the court, the affidavit or verification is nevertheless a distinguishing feature. States that have

⁹⁶ What constitutes a sufficient and conclusive avowal or affidavit varies widely among the states. The disparity has existed for a long time, as it was noted as early as 1937 by the Supreme Court of California:

All the cases having to do with the disqualification of judges require an affidavit, and the affidavit must state that the affiant has reason to believe that he cannot have a fair and impartial trial. The conflict between the courts rests not upon the necessity of such an affidavit, but upon the sufficiency and conclusiveness of an affidavit alleging bias or prejudice. This conflict is clearly described in 33 C. J., page 1015, to wit: "There is a conflict of authority as to the sufficiency and conclusiveness of an affidavit alleging bias or prejudice, due largely to lack of uniformity in the various constitutional and statutory provisions. In some jurisdictions an affidavit alleging bias or prejudice is sufficient if made in the language of the statute, and the facts showing actual bias or prejudice are not required, and, in some cases, not permitted, to be alleged; hence, the affidavit is considered conclusive, the truth of the affidavit filed being not what disqualifies the judge, but the affidavit itself; and there is no discretion to refuse it. In other jurisdictions while differing as to the conclusiveness of the affidavit, it is required that it shall set forth the facts showing bias or prejudice, not mere conclusions; and it is insufficient even in the language of the statute. The facts as stated must be of a character that will show, not only that the bias or prejudice exists, but that it is of a character calculated to impair the judge's impartiality and to sway his judgment. In these latter jurisdictions there is a conflict as to the conclusiveness of the affidavit if it sufficiently sets forth the facts constituting the bias or prejudice. In some of them it is held that such an affidavit is conclusive; but in others, it is held that it is not conclusive and that counter-affidavits may be filed and the truth of the facts made an issue."

Daigh v. Shaffer, 73 P. 2d 927, 933 (Cal. 1937).

considered the constitutionality of judicial peremptory challenges have frequently found that an affidavit or verification of prejudice saves the statute or rule from an attack on its validity. Where an affidavit is required, a prima facie showing or imputation of fact that the judge is biased or prejudiced has been made and is considered sufficient to remove a judge who is perceived by the litigant as biased. The statute thus provides a reasonable procedure for assuring that all litigants receive a fair trial.

As I have indicated, variations are substantial between states regarding what is required in effectuating a change of judge. However, all of the following states require something more in the pleading than merely requesting a change of judge.

ARIZONA.

Arizona has struggled in its attempt to balance the interest against administration of the courts and protecting a party's perception that he has received a trial before a fair and impartial judge. As a result, Arizona allows for a "pure" peremptory challenge in civil proceedings,⁹⁷ but requires an avowal be made "in the attorney's capacity as an officer of the court" in criminal proceedings.⁹⁸

⁹⁷ Ariz. R. Civ. P. 42 (f).

⁹⁸ Ariz. R. Crim. P. 10.2.

In civil proceedings, each “side” is entitled as “a matter of right to a change of one judge” once the party has filed a notice of change of judge which “may be signed by an attorney” but “shall state the name of the judge to be changed”⁹⁹ The notice “shall neither specify the grounds nor be accompanied by an affidavit, such as is required [for disqualification for cause], but it shall contain a certification . . . that (i) the notice is timely, (ii) the party has not waived the right . . . , and (iii) the party has not previously been granted a change of judge as a matter of right in the case.”¹⁰⁰ Once the Notice of Change of Judge had been filed, the procedure is summary and automatic. If the request was filed timely, the “case shall be transferred immediately to the presiding judge who shall reassign the case to a new judge.”¹⁰¹

Prior to 2001, a party had the right to a judicial peremptory challenge in criminal cases also. Arizona had provided for removal of a judge without an actual showing of bias in criminal proceedings since the 1913 Penal Code. Paragraph 999, Penal Code of 1913, provided as follows:

999. A criminal action may be removed from the court in which it is pending, on the application of the defendant, on the ground that a fair and impartial trial cannot be had in the county where the action is pending, and if the defendant shall make affidavit, supported by the affidavits of three resident electors of the county that he cannot have a fair and impartial trial because of the bias and prejudice of the superior judge of the county wherein such cause is pending, the

⁹⁹ Ariz. R. Civ. P. 42 (f).

¹⁰⁰ Ariz. R. Civ. P. 42.

¹⁰¹ Ariz. R. Crim. P. 10 (1993).

judge shall call in some other superior judge of the state to preside at such trial.¹⁰²

Arizona had long recognized that the purpose of the peremptory challenge was to “allow a party to ask for a new judge when a party may perceive a bias that does not rise to disqualification under the rules allowing for actual bias or prejudice.”¹⁰³ Moreover, the Arizona Supreme Court held in 1915 that such affidavits *when filed before trial* are in effect a peremptory challenge to the trial judge, and that he has no discretion to deny a request.¹⁰⁴ Although the rule was automatic, the Court nevertheless required strict compliance with the rule’s provisions.¹⁰⁵

As early as 1928, however, the Court recognized inherent abuses in the procedure for removing a judge – whether as a matter of right or on the basis of cause. In *Sam v. State*,¹⁰⁶ the court observed:

It appeared affirmatively in this case that the purported affidavits, while signed, had never been sworn to by the signers, and that they were made in reality for the purpose of obtaining a continuance and not because there was any belief that the trial judge was biased or prejudiced. It is unfortunately a more or less common practice in this state to use the statutory affidavit of bias and prejudice, when as a matter of fact the party filing the same has not the slightest idea of any actual prejudice existing in the mind of the trial judge, for the sole purpose of obtaining a continuance which the affiant has no legal ground for. If the affidavits are properly made and presented *before the trial*, notwithstanding their use for the purpose referred to

¹⁰² Ariz. Penal Code (1913), § 999.

¹⁰³ Ariz. R. Crim. P. 10.2 cmt. to 2001 amendments.

¹⁰⁴ *Stephens v. Stephens*, 152 P. 164 (Ariz. 1915).

¹⁰⁵ *Sam v. State*, 265 P. 609 (Ariz. 1928).

¹⁰⁶ 265 P. 609 (Ariz. 1928).

seems hardly in accordance with the highest standards of legal ethics, under the plain and mandatory language of the statute they act, as we have indicated, as a peremptory challenge to the judge. We think, however, that while most trial judges, if they were convinced that such an affidavit represented a real belief on the part of the applicant that the judge was prejudiced, would promptly disqualify themselves, even though the affidavits were not technically sufficient, if it appears that they were made, not because of a real belief of prejudice, but to obtain a continuance which could not be obtained in any other manner, the trial judge is justified in holding the affiants to the strict letter of the law. It appears abundantly from the record that the affidavits were made for no other purpose than that of securing a continuance, and we hold that both because two of the supporting affidavits were not sworn to as required by statute, and because they were not filed in time, the trial court very properly refused to give them any effect.¹⁰⁷

Despite the recognition of widespread abuse of the peremptory challenge, Arizona continued to adhere for many years to the proposition that it is better to uphold the right to a peremptory challenge of a judge rather than become involved in a technical examination of the basis for the challenge. Thus, Arizona's rule permitting peremptory challenge of a judge was historically viewed by the court as "salutary" on the grounds that "it is not necessary to embarrass the judge by setting forth in detail the facts of bias, prejudice or interests which may disqualify him nor is it necessary for judge, litigant and attorney to involve themselves in an imbroglio which might result in everlasting bitterness on the part of the judge and lawyer."¹⁰⁸

¹⁰⁷ *Sam*, 265 P. at 616 (Ariz. 1928) (emphasis in original).

¹⁰⁸ *Anonymous v. Superior Court*, 484 P. 2d 655, 656 (Ariz. App. 1971).

In 2001, the Supreme Court of Arizona adopted amendments to Rule 10.2 to address the abuses in criminal proceedings of the peremptory challenge. Following vigorous debate regarding whether the rule should be abolished, the court installed an avowal procedure as a specific mechanism for attorneys to demonstrate that they have not abused the rule. The court also articulated a remedy of potential punishment through the state bar disciplinary process for attorneys who violate the rule notwithstanding facial compliance with the rule's procedure.¹⁰⁹ Two justices dissented from the order amending the rule and were in favor of abolishing it. Four trial judges filed formal comments to the rule stating that they favored severely limiting the rule because of the administrative difficulty in their courts that resulted from reassigning cases.¹¹⁰ The board of Governors of the State Bar of Arizona and the Yuma County Attorney noted the need for a process to reassign cases that avoided embarrassment to judges and attorneys and argued the proposed amendments adopting an avowal procedure would inhibit effective reassignment.¹¹¹ The court "experimentally" adopted the 2011 amendments noting that "[i]f such abuse is not substantially reduced as a result of the amendments at the conclusion of the one-year experiment on June 30, 2002,

¹⁰⁹ Ariz. R. Crim. P. 10.2, cmt. to 2001 amendments, Ethical Rule 8.4 (g), Ariz. R. Prof'l Conduct.

¹¹⁰ *In re Rule 10.2*, R. No. 00-0025 cmt. by Maricopa County Presiding Judge and Criminal Department Presiding Judge (filed March 8, 2001).

¹¹¹ *Id.*

the Court at that time will abolish the peremptory change of judge in most criminal cases as recommended in a proposal by the Arizona Judicial Council.”¹¹²

Ariz. R. Crim. P. 10.2, which excludes the right to peremptorily challenge a judge in postconviction proceedings, currently provides the following procedure for a change of judge in criminal proceedings:

10.2. (b) Procedure – A party may exercise his or 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. The notice shall also include an avowel that the request is made in good faith and not:

1. For the purpose of delay;
2. To obtain a severance;
3. To interfere with the reasonable case management practices of a judge;
4. To remove a judge for reasons of race, gender, or religious affiliation;
5. For the purpose of using the rule against a particular judge in a blanket fashion by a prosecuting agency, defender group or law firm.
6. To obtain a more convenient geographical location; or
7. To obtain advantage or avoid disadvantage in connection with a plea bargain or at sentencing, except as permitted under Rule 17.4 (g).

The avowel shall be made in the attorney’s capacity as an officer of the court.¹¹³

In *Bergeron ex rel. Perez v. O’Neil*,¹¹⁴ petitioners - several prosecutors and defenders who had filed notices of change of judge following the amendments of Ariz. R. Crim. P. 10.2 - sought relief from orders requiring them to appear before

¹¹² Ariz. R. Crim. P. 10.2 cmt. to 2001 amendments.

¹¹³ Ariz. R. Crim. P. 10.2.

¹¹⁴ 74 P. 3d 952 (Ariz. 2003).

various trial courts and explain their reasons for filing the notices. Petitioners argued that the orders compelling them to explain their reasons were contrary to the intent of Rule 10.2 and that once filed, the judge was required to reassign the cases. The trial judges, represented by the Arizona Attorney General, disagreed and maintained that the right to change a judge under Rule 10.2 was analogous to the right to peremptorily strike a juror, with the attendant requirement that the change not have improper motivations as set forth in *Batson v. Kentucky*,¹¹⁵ and its progeny. Thus, the trial judges reasoned, counsel was required to explain why they struck a judge in order for the court to assess the propriety of counsel's avowals made pursuant to Rule 10.2. The Court of Appeals for Arizona disagreed and found that "the clear language of Rule 10.2, its purpose, its history, and the case law addressing it all reflect a deliberate intent by the supreme court to retain a litigant's right to an automatic change of judge. In this light, [the court] cannot authorize a procedure that constructively amends the rule by conditioning the exercise of that right on a potential judicial inquiry into the litigant's reasons for seeking a change of judge."¹¹⁶

Thus, despite the avowel procedure which is directed substantively at curbing abuses of the rule, the court continues to maintain that the rule is automatic and permits no inquiry into the party's reasons for seeking a change of judge. Indeed, the court's addition of specific qualifiers to the long-established

¹¹⁵ 476 U.S. 79 (1986).

¹¹⁶ *Bergeron ex rel. Perez v. O'Neil*, 74 P. 3d at 958.

practice allowing for peremptory challenges demonstrates the court's struggle to achieve a balance between providing a remedy when a party perceives a judge is biased and preventing abuse.

CALIFORNIA.

Prior to 1937, the question of the existence of bias or prejudice on the part of a trial judge was one of fact to be alleged under oath and subject to judicial determination.¹¹⁷ In 1937, however, California enacted Cal. Civ. Proc. Code § 170.5 which provided, in part: “Any party or his attorney to any cause or proceeding of any nature . . . , except the people or district attorney in a criminal case, may make and file with the clerk of the court in which the action is pending . . . , a peremptory challenge in writing of the judge assigned to try or hear the cause Thereupon, without any further act or proof, the presiding judge . . . shall assign some other judge to try the cause or hear the pending matter”¹¹⁸ Within a year, the statute was challenged and the Supreme Court of California issued its landmark decision in *Austin v. Lambert*¹¹⁹ declaring the statute unconstitutional as an “unwarranted and unlawful interference with the constitutional and orderly processes of the courts.”¹²⁰

The court first observed that nothing was said in the new law about bias, prejudice, interest or any other “recognized ground” for disqualification. “No

¹¹⁷ *Austin v. Lambert*, 77 P. 2d 849, 851 (Cal. 1938).

¹¹⁸ Cal. Civ. Proc. Code § 170.5.

¹¹⁹ 77 P. 2d 849, 853 (Cal. 1938).

¹²⁰ *Austin*, 77 P. 2d at 853.

showing, *ex parte* or otherwise, is required and no reason need be given for thus stripping the judge of his judicial function.”¹²¹ The court distinguished California from other states with statutes providing for a “so-called ‘peremptory challenge’” finding that the other statutes provided “for some showing of disqualification by *affidavit*.”¹²² Such an *ex parte* showing of bias or prejudice, which is admittedly effective without a counter showing required or permitted, “is at least an imputation of such disqualification sufficient to save the statute from successful attack on constitutional grounds.”¹²³ The court explained:

But to put in the hands of a litigant uncontrolled power to dislodge without reason or for an undisclosed reason, an admittedly qualified judge from the trial of a case in which forsooth the only real objection to him might be that he would be fair and impartial in the trial of the case would be to characterize the statute not as a regulation but as a concealed weapon to be used to the manifest detriment of the proper conduct of the judicial department. The well-recognized limitations on legislative regulations of such matters in other jurisdictions, both state and federal, were available when section 170.5 was enacted. In none of them is the arbitrary method of administering the remedy adopted in enacting the statute under attack approved or countenanced.¹²⁴

The court rejected a suggested analogy between the peremptory challenge of a juror and the peremptory challenge of a judge, finding that “[w]hen a cause is called for trial before a judge sitting without a jury the ‘court and jury’ so to speak, have been sworn and are ready without further formalities to proceed with the trial of the case and should proceed unless good cause known to the law, and not

¹²¹ *Austin*, 77 P. 2d at 853.

¹²² *Austin*, 77 P. 2d at 853 (emphasis in original).

¹²³ *Austin*, 77 P. 2d at 853.

¹²⁴ *Austin*, 77 P. 2d at 853.

merely known in the secret recesses of the mind of the litigant, the trial should not go forward.” In contrast, a judge takes an oath upon office to administer justice impartially, which includes the case within which the challenge has been lodged.

Following the decision in *Austin v. Lambert*, the Legislature made four more attempts to pass measures similar to section 170.6, but failed to receive executive approval. Measures were passed by the California Legislature in 1941 (A.B. 442 [pocket vetoed by Governor Olson]), in 1951, (A.B. 479 [vetoed by Governor Warren and veto sustained]), in 1953 (S.B.392 [pocket vetoed by Governor Warren]), and in 1955 (S.B. 89 [pocket vetoed by Governor Knight]).¹²⁵

In 1957, however, a materially different version of section 170.6 was passed by an overwhelming vote of both houses of the Legislature and approved by the Governor. “The enactment of the statute represented the culmination of many years’ effort by the organized bar of this state to obtain legislation which would permit the challenge of a judge for prejudice without an adjudication of disqualification.”¹²⁶ The new statute, set forth in Cal. Civ. Proc. Code § 170.6 provides that “[a] judge . . . shall not try a civil or criminal action or special proceeding of any kind or character nor hear any matter therein that involves a contested law or fact when it is established as provided in this section that the judge . . . is prejudiced against a party or attorney or the interests of a party or

¹²⁵ *Johnson v. Superior Court of Los Angeles County*, 329 P. 2d 5, 7 (Cal. 1958).

¹²⁶ *Id.*

attorney appearing in the action or proceeding.”¹²⁷ Prejudice is “established” by an “oral or written motion without prior notice supported by affidavit or declaration under penalty of perjury, or an oral statement under oath, that the judge . . . is prejudiced against a party or attorney, or the interest of the party or attorney, so that the party or attorney cannot, or believes that he or she cannot, have a fair and impartial trial or hearing”¹²⁸ Cal. Civ. Proc. Code § 170.6 further provided that if the motion is duly presented and the affidavit or declaration under perjury is duly filed, “thereupon and without further act or proof” the judge “shall assign some other judge” to try the cause.¹²⁹ No party or attorney is permitted to make more than one such motion.¹³⁰

Cal. Civ. Proc. Code § 170.6 was again quickly challenged in the Supreme Court of California in *Johnson v. Superior Court of Los Angeles County*.¹³¹ One year after its enactment, the court put to rest concerns that § 170.6 made an unconstitutional delegation of legislative and judicial powers to litigants or constituted an unwarranted interference with the inherent powers of the court. Deferring to the legislature, the court concluded that the legislature acted within its power to adopt reasonable regulations when it provided that prejudice may be established by the filing of an affidavit without judicial determination of the existence of the fact. The court observed that “it is important, of course, not only

¹²⁷ Cal. Civ. Proc. Code § 170.6.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ 329 P. 2d 5 (Cal. 1958).

that the integrity and fairness of the judiciary be maintained, but also that the business of the court be conducted in such a manner as will avoid suspicion of unfairness.” The court explained

Prejudice, being a state of mind, is very difficult to prove, and, when a judge asserts that he is unbiased, courts are naturally reluctant to determine that he is prejudiced. In order to insure confidence in the judiciary and avoid the suspicion which might arise from the belief of a litigant that the judge is biased in a case where it may be difficult or impossible for the litigant to persuade a court that his belief is justified, the Legislature could reasonably conclude that a party should have an opportunity to obtain the disqualification of a judge for prejudice, upon sworn statement, without being required to establish as a fact to the satisfaction of a judicial body.¹³²

The court observed that Cal. Civ. Proc. Code § 170.6 contained safeguards designed to minimize abuses, such as parties seeking to delay trial or to obtain a favorable judge, and that consideration of these abuses and safeguards were matters to be balanced by the legislature against the desirability of accomplishing the objectives of the statute.¹³³ Thus, when the motion is properly and timely made, the challenged judge is vested with no discretion to determine the question of actual prejudice and the statutory allowance is automatic, in the sense that a “belief” in prejudice is sufficient.¹³⁴ The court recognized that this “is an extraordinary right” and that belief in prejudice was decisive, with no way in which the sincerity of the belief can be determined or measured.¹³⁵

¹³² *Johnson*, 329 P. 2d at 8.

¹³³ *Id.*

¹³⁴ *Mayr v. Superior Court of Tehama County*, 228 Cal. App. 2d 60, 63 (1964). See also *McCartney v. Commission on Judicial Qualifications*, 526 P. 2d 268 (Cal. 1974).

¹³⁵ *Id.*

Although *Johnson* established that Cal. Civ. Proc. Code § 170.6, providing for removal supported by an affidavit of prejudice, did not violate the doctrine of separation of powers or impair the independence of the judiciary, the court reconsidered these identical arguments nearly twenty years later in *Solberg v. Superior Court of the City and County of San Francisco*,¹³⁶ and reaffirmed its reasoning in *Johnson* following concerns regarding the constitutionality of the statute from twenty-two trial judges. In so doing, it explained that it is a misreading of *Johnson* to charge that the decision is based on the “fiction” that the affidavit proves the judge is actually prejudiced or that the mere filing of the affidavit creates an irrefutable presumption of actual prejudice. The court reiterated that the belief alone of impartiality will justify removal of the judge and explained:

Although arguing in general against the validity of *section 170.6*, amici judges make this point with commendable candor and persuasiveness in their brief: "It is often stated that it is not only the *fact* but the *appearance* of prejudice that should disqualify a judge. This is a rule that appeals to the reason of the Constitution. . . . [It] is not the fact of prejudice that would impair the legitimacy of the judiciary's role but rather the *probable* fact of prejudice, *i.e.*, the appearance of prejudice. The truth of few, if any, ultimate 'facts' of human existence are established to that point of complete certitude which eliminates all plausible doubt. A fact as difficult of ascertainment as any person's 'prejudice' is seldom, if ever, proven so completely that reasonable persons might not still disagree. And the mere allegation or good faith belief that a fact is true may be sufficient to cause reasonable doubt. Since the legitimacy of the Court's role is essentially a perception of the people, in whose secure

¹³⁶ 561 P. 2d 1148 (Cal. 1977), *superseded by statute*, as stated in *Curlie v. Supreme Court*, 16 P. 3d 166 (Cal. 2001).

confidence the courts must remain if their powers are to be maintained, it follows that merely probable or even alleged facts or a good faith belief in such facts may be sufficient to disqualify a judge.¹³⁷

The record in *Solberg* established that the disqualification motion rested directly upon prior rulings of the trial judge in which she sustained, in separate criminal proceedings, a constitutional challenge to the procedures used to enforce the prostitution solicitation laws in San Francisco. The deputy district attorney stated in open court that “the People don’t feel that we can get a fair trial in cases of these kinds in this court” and thus established that his office used a “blanket challenge” because of the People’s disagreement with the merits of the judge’s views on the legal issue relating to the discriminatory enforcement of the prostitution laws. Observing numerous unauthorized grounds for invoking the statute, the court assumed the charges were true and did not underestimate the effect of these abuses on the operation of the state’s trial courts. Nevertheless the court did not share the trial judges’ “pessimistic view of the effectiveness of the affidavit requirement.” While recognizing that some “minimal degree of false swearing may be unavoidable in any contemporary justice system,” the court reasoned that this does not mean that the requirement is a “hollow formality, or that substantial members of the bar are so neglectful of their personal and professional honor that they repeatedly perjure themselves merely to gain an

¹³⁷ *Solberg*, 561 P. 2d at 1155 n. 10 (emphasis in original).

uncertain advantage in litigation.”¹³⁸ Finally, the court expressed confidence that the Legislature would make adjustments to this sensitive balance as may become necessary or desirable and give due regard for the rights of all concerned.¹³⁹

HAWAII.

Hawaii provides for a judicial peremptory challenge upon the filing of a sufficient and timely affidavit. Haw. Rev. Stat. § 601-7 (b) provides:

Whenever a party to any suit, action, or proceeding, civil or criminal, makes and *files 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 the party or in favor of any opposite party to the suit, the judge shall be disqualified from proceeding therein. *Every such affidavit shall state the facts and the reasons for the belief that bias or prejudice exists* and shall be filed before the trial or hearing of the action or proceeding, 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 affidavit; and no affidavit shall be filed unless *accompanied by a certificate of counsel of record that the affidavit is made in good faith*. Any judge may disqualify oneself by filing with the clerk of the court of which the judge is a judge a certificate that the judge deems oneself unable for any reason to preside with absolute impartiality in the pending suit or action.¹⁴⁰

Where a proper affidavit for disqualification is filed under (b), the judge must take the facts stated in the affidavit as true, and his only function is then to pass upon whether those facts sufficiently establish a personal bias and

¹³⁸ *Solberg*, 561 P. 2d at 1157-58.

¹³⁹ Acting Chief Justice Tobriner wrote a well-reasoned dissent. Recognizing that litigants need not state the grounds for their belief that the challenged judge is prejudiced, when a blanket challenge policy has been adopted, as here, the requirement of a “good faith belief in prejudice” obviously has been violated. Finding that the court’s ruling allowed a litigant to remove a judge from the bench despite the patently false nature of the claim of prejudice offered, the dissent could not accept that the judiciary was powerless to prevent such an abusive exercise of the disqualification procedure.

¹⁴⁰ Haw. Rev. Stat. § 601-7.

prejudice.¹⁴¹ The right to disqualify a judge pursuant to § 601-7 (b) applies in criminal and civil proceedings, and is not confined to defendants.¹⁴² The filing of a disqualifying motion and affidavit under subsection (b) must precede the hearing of contested preliminary motions, if any, unless the failure to file within such time is excused for good cause.¹⁴³

ILLINOIS.

Illinois allows for judicial peremptory challenges in civil proceedings without any showing of prejudice; while in criminal proceedings an allegation of prejudice is required.

The right to peremptorily challenge a judge upon making an allegation of partiality has existed in Illinois criminal proceedings since 1874. “Although the procedure for invoking the protections of the automatic-substitution-of-judge statute has varied over time, the prophylactic purpose of the statute has remained the same: this court has consistently held that the statute vests criminal defendants with the ‘absolute right’ to have an assigned trial judge substituted upon timely written motion containing a good-faith allegation that the judge is prejudiced.”¹⁴⁴

Illinois’ criminal judicial peremptory challenge statute, set forth in 725 Ill. Comp. Stat. § 5/114-5(a) provides:

Within 10 days after a cause involving only one defendant has been placed on the trial call of a judge the defendant may move the court

¹⁴¹ *State v. Mata*, 789 P. 2d 1122 (Haw. 1990); *Schutter v. Soong*, 873 P. 2d 66 (Haw. 1994).

¹⁴² *Peters v. Jamieson*, 397 P. 2d 575 (Haw. 1964).

¹⁴³ *Honolulu Roofing Co. v. Felix*, 426 P. 2d 298 (Haw. 1967).

¹⁴⁴ *People v. Walker*, 519 N.E. 2d 890, 891 (Ill. 1988).

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 punishable by death or life imprisonment, the defendant may name two judges as prejudiced.

In 1987, § 5/114-5 was amended to grant the State the same right to substitute judges that previously had been enjoyed only by defendants. Upon a proper filing of a motion for substitution, the “judge lost all power and authority over the case except to enter the orders necessary to effectuate the change.”¹⁴⁵ Moreover, once the motion is timely filed. “[i]t is not proper for the court to inquire into the truth of the allegations of prejudice contained in the [motion].”¹⁴⁶

The Supreme Court of Illinois has clearly established that an allegation of prejudice is necessary to effectuate removal of a judge in a criminal proceeding. In *People v. Walker*, the court observed that “[i]n compliance with section 114-5(a), the defendant alleged in her motion that Judge Steigman was prejudiced against her and that she believed that she would not receive a fair and impartial trial before him.”¹⁴⁷ The court similarly observed in *People v. Peter*,¹⁴⁸ that a defendant has an “absolute right to substitution of judges if the requirements of the statute were met upon the filing of a proper petition alleging the prejudice of a

¹⁴⁵ *People v. Peter*, 303 N.E. 2d 398, 407 (Ill. 1973).

¹⁴⁶ *Peter*, 303 N.E. 2d at 407.

¹⁴⁷ *Walker*, 519 N.E. 2d at 891.

¹⁴⁸ *Peter*, 303 N.E. 2d at 407.

judge.” Finally, in *Baricevic v. Wharton*,¹⁴⁹ the court reaffirmed the affidavit requirement in criminal matters holding “. . . the defendant’s right to substitute judges has long been interpreted by this court as being an ‘absolute’ right, so long as a written motion alleging prejudice was properly filed within 10 days after cause had been placed on a judge’s trial call.”¹⁵⁰

In *People v. Walker*,¹⁵¹ the court held the substitution rule was constitutional against a challenge that the statute violated the separation of powers doctrine. Reasoning that the “separation of powers provision was not designed to achieve a complete divorce among the three branches of our tripartite system of government,”¹⁵² nor does it “prescribe a division of governmental powers into rigid, mutually exclusive compartments,”¹⁵³ the court observed that the “separation of powers doctrine contemplates a government of separate branches having certain shared or overlapping powers.”¹⁵⁴ Noting that there is no “express, inherent, or other power reposed in a judge to preside over a case or controversy in which his impartiality has been questioned,” the court concluded that § 114-5 (a) does not unduly encroach upon the inherent powers of the courts.¹⁵⁵

¹⁴⁹ 556 N.E. 2d 253, 256 (Ill. 1990).

¹⁵⁰ *Baricevic*, 556 N.E. 2d at 256.

¹⁵¹ 519 N.E. 2d 890 (Ill. 1988).

¹⁵² *Walker*, 519 N.E. 2d at 892, citing *Strukoff v. Strukoff*, 389 N.E. 2d 1170, 1172 (Ill. 1979) and *People v. Reiner*, 129 N.E. 2d 159, 161-162 (Ill. 1955).

¹⁵³ *Walker*, 519 N.E. 2d at 892, citing *People v. Joseph*, 495 N.E. 2d 501, 503-504 (Ill. 1986) and *In re Estate of Barker*, 345 N.E. 2d 484, 488 (Ill. 1976).

¹⁵⁴ *Walker*, 519 N.E. 2d at 892, citing *Gillespie v. Barrett*, 15 N.E. 2d 513, 514 (Ill. 1938); *People ex rel. Witte v. Franklin*, 186 N.E. 2d 137, 139 (Ill. 1933).

¹⁵⁵ *Walker*, 519 N.E. 2d at 895.

Although finding that a judicial peremptory challenge was constitutional and that the provisions regarding a peremptory challenge are to be “liberally construed,” abuse of these statutory rights “should not go unremedied, and remedies have been found for abuses”¹⁵⁶ “Of course, the potentiality for abuse of a statute by litigants is a matter quite different from a separation of powers violation.”¹⁵⁷ In order to provide remedies, the court carved out several exceptions to the rule allowing for a judicial peremptory challenge. In attempting to give guidance to litigants as to the proper use of § 114-5 (a), and thus to “curb abuses” of the statute, the court stated that a challenge is properly denied where it is apparent that the motion is brought for the purpose of delay or avoiding trial.¹⁵⁸ The court also indicated that “a belief that a judge is likely to rule against a defendant based on either facts or circumstances unrelated to the judge’s ability to sit impartially does not afford a proper basis for a claim of prejudice.”¹⁵⁹

Another judicially created exception to the rule that a judge has no discretion to deny a proper motion for a judicial peremptory challenge is “[w]hen the happenings at a pretrial conference allow a party to ‘test the waters’ and get an idea of the judge’s opinion on some of the issues of the case”¹⁶⁰ The purpose “of this exception is to keep parties from ‘judge shopping’ when they are able to

¹⁵⁶ *People v. Williams*, 529 N.E. 2d 558, 309 (Ill. 1988).

¹⁵⁷ *Walker*, 519 N.E. 2d at 896.

¹⁵⁸ *People v. Beamon*, 182 N.E. 2d 656, 657-58 (Ill. 1962); *People v. Stewart*, 169 N.E. 2d 796, 798-99 (Ill. 1960).

¹⁵⁹ *Walker*, 519 N.E. 2d at 896.

¹⁶⁰ *In re Estate of Gay*, 818 N.E. 2d 860, 863 (Ill. 2004).

tell which way a judge is leaning on a case before substantial issues have been decided.”¹⁶¹

Finally, the court has recognized an exception to the rule regarding judicial review of allegations of prejudice contained in judicial peremptory challenges in those instances when a litigant is abusing the rule by filing “blanket” challenges to remove a judge. In *Baricevic* the court addressed the blanket use of peremptory challenges by the State’s Attorney to remove a judge from criminal proceedings following the State’s Attorney’s request to the chief judge that a particular judge no longer be assigned to the felony docket. The State’s Attorney represented to the chief judge that the judicial peremptory challenge statute would be utilized to remove the particular judge if the judge were not reassigned. The court concluded that the substitution statute was being used as a “coercive tool” in violation of the chief judge’s independent exercise of his assignment authority and that this was “an unconstitutional use of a constitutional statute.”¹⁶² Drawing guidance from *Batson v. Kentucky*,¹⁶³ the court concluded that where there is prima facie evidence that a judicial peremptory challenge has been filed merely to delay or avoid trial, the judge can inquire into the basis of the alleged prejudice.

In *Baricevic*, the court set forth a procedure for determining whether judicial peremptory challenges violated the separation of powers doctrine.

¹⁶¹ *Kic v. Bianucci*, 962 N.E. 2d 1071, 1077 (Ill. 2011), citing *Estate of Gay*, 818 N.E. 2d at 863.

¹⁶² *Baricevic*, 556 N.E. 2d at 259.

¹⁶³ *Batson v. Kentucky*, 476 U.S. 79 (1986).

First, the trial judge must determine whether there is *prima facie* evidence that the motions are being used in an effort to thwart the chief judge of the circuit court's independence in assigning cases to the judges in his circuit. Among the factors that may be considered in making a *prima facie* determination are whether the State's Attorney's office has used, and indicates that it plans to continue using, section 114 -- 5(c) motions on a blanket basis in almost every case assigned to the judge; whether the State's Attorney's office has made other attempts besides use of section 114 -- 5(c) motions to have the judge reassigned (such as directly contacting the chief judge and requesting reassignment); whether members of the State's Attorney's office have made statements reflecting a desire that the judge be reassigned; and any other evidence that indicates that the section 114 -- 5(c) motions are being used for the purpose of influencing the chief judge in his assignment decisions.¹⁶⁴

The movant has the burden of substantiating his allegations of prejudice. If there is no evidence of improper use, the trial judge cannot inquire into the good faith of the allegations of prejudice.¹⁶⁵ At the hearing, the prosecutor must explain the basis for his allegation that the judge is prejudiced against the State.¹⁶⁶ The judge named in the motion need not testify at the hearing, but he may submit an affidavit if he wishes. Furthermore, the mere fact that the judge has ruled against the State in the past is not sufficient grounds to support a claim of prejudice.¹⁶⁷ It is not necessary that the prosecutor prove that the judge is, in fact, prejudiced. “Instead, the prosecutor must demonstrate that there are facts or circumstances related to the particular case at hand which indicate that the judge is

¹⁶⁴ *Baricevic*, 556 N.E.2d at 259.

¹⁶⁵ *Baricevic*, 556 N.E.2d at 259.

¹⁶⁶ *Baricevic*, 556 N.E.2d at 259.

¹⁶⁷ See *People v. Taylor*, 464 N.E.2d 705, 710-11 (Ill. 1984); *People v. Vance*, 390 N.E.2d 867, 870-71 (Ill. 1979).

prejudiced.”¹⁶⁸ If the existence of such facts or circumstances can be demonstrated, the peremptory challenge must be granted and the case reassigned to a judge other than the judge named in the motion. If the existence of such facts and circumstances cannot be demonstrated, the peremptory challenge should be denied and the case is not reassigned. It is possible that facts and circumstances may be demonstrated to exist which indicate that the judge involved will be prejudiced against the State in all future criminal cases (or in all future criminal cases of a certain type).¹⁶⁹ If such facts or circumstances are established, the chief judge of the circuit court involved, in the exercise of his assignment authority, may of course transfer the prejudiced judge to a different branch of the circuit court.¹⁷⁰

Illinois also provides for judicial peremptory challenges in civil proceedings.¹⁷¹ Any party is entitled to request removal of judge, without the need to show or allege any prejudice.¹⁷² Each party is entitled to one substitution of judge which “shall be made by motion and shall be granted if it is presented before trial or hearing begins and before the judge to whom it is presented has ruled on any substantial issue in the case”¹⁷³ If a “substantial ruling” or “issue” has been made, then the party may only remove a judge by filing a petition alleging

¹⁶⁸ *Baricevic*, 556 N.E.2d at 259.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ 725 Ill. Comp. Stat. Ann. § 5/2-1001.

¹⁷² 725 Ill. Comp. Stat. Ann. § 5/2-1001.

¹⁷³ 725 Ill. Comp. Stat. Ann. § 5/2-1001(a)(2).

prejudice verified by affidavit.¹⁷⁴ While the right of substitution appears to be a “pure” peremptory challenge that does not require a showing of prejudice -as long as filed before ruling on a substantial issue - the court has interpreted “substantial issue” broadly, effectively narrowing the right. Additionally, the court has narrowed the right by requiring strict compliance with the statute’s provisions.

KANSAS.

Kansas employs a two-step process when a litigant seeks to peremptorily challenge a judge. The first step of the procedure requires that the party file a motion to “change” the judge. It is not necessary that any grounds be set forth.

The relevant statute, Kan. Stat. Ann. § 20-311d, provides:

- (a)** If a party or a party's attorney believes that the judge to whom an action is assigned cannot afford that party a fair trial in the action, the party or attorney may file a motion for change of judge. The motion shall not state the grounds for the party's or attorney's belief. The judge shall promptly hear the motion informally upon reasonable notice to all parties who have appeared in the case. If the judge disqualifies the judge's self, the action shall be assigned to another judge by the chief judge. If the judge refuses to disqualify the judge's self, the party seeking a change of judge may file the affidavit provided for in subsection (b). If an affidavit is to be filed it shall be filed immediately.¹⁷⁵

If the judge refuses to recuse, and the litigant files an affidavit stating the facts supporting the party’s belief that the judge possesses bias, prejudice, or interest toward the case, then the affidavit will be referred by the chief judge to

¹⁷⁴ 725 Ill. Comp. Stat. § 5/2-1002(a)(3).

¹⁷⁵ Kan. Stat. Ann. § 20-311d.

another district judge for “prompt determination” of the “legal sufficiency of the affidavit.”¹⁷⁶ Accordingly, subsection (b) and (c) provide:

(b) If a party or a party's attorney files an affidavit alleging any of the grounds specified in subsection (c), the chief judge shall at once determine, or refer the affidavit to another district judge for prompt determination of, the legal sufficiency of the affidavit. If the affidavit is filed in a district court in which there is no other judge who is qualified to hear the matter, the chief judge shall at once notify the departmental justice for the district and request the appointment of another district judge to determine the legal sufficiency of the affidavit. If the affidavit is found to be legally sufficient, the case shall be assigned to another judge.

(c) Grounds which may be alleged as provided in subsection (b) for change of judge are that:

(1) The judge has been engaged as counsel in the action prior to the appointment or election as judge.

(2) The judge is otherwise interested in the action.

(3) The judge is related to either party to the action.

(4) The judge is a material witness in the action.

(5) The party or the party's attorney filing the affidavit has cause to believe and does believe that on account of the personal bias, prejudice or interest of the judge such party cannot obtain a fair and impartial trial or fair and impartial enforcement of post-judgment remedies. Such affidavit shall state the facts and the reasons for the belief that bias, prejudice or an interest exists.¹⁷⁷

Thus, the process for filing a judicial peremptory challenge in Kansas begins with the filing of a motion requesting a change of judge, which does not require any allegation of cause. If the judge, after hearing the matter informally,

¹⁷⁶ If a litigant fails to file an affidavit under subsection (b), then the mere filing of the motion for recusal of judge under subsection (a) does not require consideration by another judge. *Eferakeya v. Twin City State Bank*, 766 P.2d 837 (Kan. 1989).

¹⁷⁷ Kan. Stat. Ann. § 20-311d (b) and (c).

refuses to remove himself from the proceedings, than a party may continue with his request by filing an affidavit alleging cause. The affidavit is reviewed for sufficiency and compliance with § 20-311d by a different judge and, if deemed sufficient, the assigned judge is removed from any further proceedings in the case.

The recital of previous rulings or decisions by the judge on legal issues or the legal sufficiency of any prior affidavits filed by counsel or counsel's law firm for a party in any other judicial proceeding before the same judge are not, by themselves, legally sufficient to warrant removal of the judge.¹⁷⁸ However, alleged bias or prejudice by the judge against an *attorney* may be ground for disqualification under the statute.¹⁷⁹ To sustain the request for a change of judge, the reviewing judge must find that the party 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.¹⁸⁰ The affidavit "must state facts and reasons which, assuming their truth, give fair support for the belief, that is, demonstrate a well-grounded belief he will not have a fair trial."¹⁸¹ If the judge reviewing the affidavit finds it to be legally sufficient, he is to proceed to hear and determine the case. If the reviewing judge finds the affidavit legally insufficient he should transfer the case back to the first judge for further proceedings, in which event, after final

¹⁷⁸ Kan. Stat. Ann. § 20-311d (d).

¹⁷⁹ *Hulme v. Wolesslagel*, 493 P. 2d 541, 550 (Kan. 1972)

¹⁸⁰ Kan. Stat. Ann. § 20-311d (c) (5).

¹⁸¹ *Hulme*, 493 P. 2d at 548.

determination of the case the propriety of disqualification would be reviewable upon appeal.¹⁸²

Interestingly, in 1996, the Supreme Court of Kansas also enunciated a two-part test to be used on appeal to decide whether the defendant received a fair trial or his due process rights were violated when a claim of error relating to a motion for change of judge is made.¹⁸³ First, the court must determine whether the trial judge had an obligation to stepdown from the case because the judge was biased, prejudiced, or partial. Under this prong, the appellate court would consider whether the disqualifying circumstance would require disqualification pursuant to the state's code of judicial conduct. Second, if the judge did have a duty to recuse himself and failed to do so, is there a showing of actual bias or prejudice sufficient to warrant setting aside the judgment of the trial court? Under this prong, there must be a demonstration of actual bias or prejudice and not merely the creation of reasonable doubt that the judge was biased or prejudiced.¹⁸⁴

Finally, the court considered and rejected a constitutional challenge to the statute on the grounds that it violated the separation of powers doctrine. The court observed that, with one exception, other jurisdictions had “universally upheld this kind of legislation [requiring affidavit] against constitutional attack upon this ground.”¹⁸⁵ “The types of statutes we have discussed differ materially from those

¹⁸² *Id.*

¹⁸³ *Kansas v. Reed*, 144 P.3d 677, 682 (Kan. 2006).

¹⁸⁴ *Reed*, 144 P. 3d at 682.

¹⁸⁵ *Hulme*, 493 P. 2d at 551.

providing a peremptory challenge to a judge without assigning any reason or ground, which have been held unconstitutional.”¹⁸⁶

NORTH DAKOTA.

As early as 1877, the North Dakota Legislature allowed parties a change of judge upon filing an affidavit attesting to bias or prejudice on the part of the judge.¹⁸⁷ North Dakota procedure for effectuating a change of judge is currently codified in N.D. Cent. Code §§ 28-13-01 and 29-15-13, for civil and criminal actions respectively.¹⁸⁸ In 1971, the legislature eliminated the former requirement of an affidavit or prejudice, blended the criminal and civil peremptory challenge statutes, and adopted the current procedure allowing for a party to peremptorily challenge a judge by filing a written demand with a “good faith” statement that it has not been filed for purposes of delay.

N.D. Cent. Code § 29-15-21 provides that “any party to a civil or criminal action or proceeding pending in the district court may obtain a change of the judge before whom the trial or any proceeding . . . is to be heard by filing with the clerk of court . . . a written demand for change of judge.” “The demand for change must state that it is filed in good faith and not for purposes of delay. It must indicate the nature of the proceeding, designate the judge sought to be disqualified, and certify

¹⁸⁶ *Hulme*, 493 P. 2d at 551 (citations omitted).

¹⁸⁷ See Section 285 of the Code of Criminal Procedure, Revised Codes of the Territory of Dakota (1877), providing for a change of judge in criminal actions, and Section 545a of the Revised Codes of the State of North Dakota (1877), allowing for a change of judge in civil actions. See also *Traynor v. Leclerc*, 561 N.W.2d 644 (N.D. 1997)

¹⁸⁸ N.D. Cent. Code, §§ 28-13-01 and 29-15-13.

that that 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 request must contain either (1) the personal signature of the party, or (2) the attorney’s signature for the party and certification that the attorney has mailed a copy of the demand to his client. The certification requirement was added in 1983 and addressed concerns of judges that clients were not aware of a change of judge being demanded by the attorney.¹⁸⁹ In addition to N.D. Cent. Code § 29-15-21, the North Dakota Supreme Court, pursuant to its rulemaking authority,¹⁹⁰ promulgated N.D. Admin. Code R. 2(10) requiring that “[t]he presiding judge assign[], when appropriate, judges from within the judicial district in cases of demand for change of judge under Section 29-15-21, NDCC.”

A party’s right to a peremptory challenge of an assigned judge pursuant to N.D. Cent. Code § 29-15-21 “is not unlimited.”¹⁹¹ A presiding judge may “invalidate[] the demand because it was not timely filed or for other reasons.”¹⁹² The statute sets forth several requirements that, if not satisfied, would invalidate the demand for “other reasons.” These include that the demand must be executed in triplicate; that it be filed before the judge sought to be removed has ruled upon the matter; that it state it is filed in good faith and not for the purpose of delay; that it “indicate the nature of the action or proceeding, designate the judge sought to be

¹⁸⁹ *Traynor*, 561 N.W. 2d at 649.

¹⁹⁰ N.D. Const. art. VI, § 3, provides: “The supreme court shall have authority to promulgate rules of procedure, including appellate procedure, to be followed by all the courts of this state.”

¹⁹¹ *State v. Zueger*, 459 N.W.2d 235, 236 (N.D. 1990)

¹⁹² N.D. Cent. Code § 29-15-21.

disqualified; and that it certify 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.¹⁹³ The court has explained that “[t]he statute does not state that only a ruling on a material or discretionary matter defeats the right to demand a change of judge . . .,” but rather a ruling “upon any matter pertaining to the action or proceeding” is sufficient to defeat the challenge.¹⁹⁴ Accordingly, a ruling setting a trial date was “a ruling on a matter pertaining to the action or proceeding . . .” and, consequently, a demand for a peremptory challenge made subsequent to the judge setting a trial date pursuant to a motion for expedited trial was properly denied.¹⁹⁵

Finally, although North Dakota’s peremptory challenge statute was enacted by the legislature, the North Dakota Supreme Court has acquiesced in the statutory provisions and implicitly recognized the validity of NDCC S 29-15-21 through promulgation of N.D. Admin. R. 2(10) directing assignments when a demand is made. The Court concluded the statute “is a reasonable and workable statutory arrangement for permitting a litigant to obtain a change of judge, thereby assuring fair trials and promoting the fairness and integrity of the courts.”¹⁹⁶ The Court determined the statute did not conflict with any rules promulgated by the court.¹⁹⁷

OREGON.

¹⁹³ N.D. Cent. Code § 29-15-21.

¹⁹⁴ *Zueger*, 459 N.W. 2d at 236.

¹⁹⁵ *Id.*

¹⁹⁶ *Traynor*, 561 N.W. 2d at 648-649.

¹⁹⁷ *Id.*

In 1925 the Oregon Legislature enacted Or. Laws, §§ 45-1 and 45-2 allowing for a judicial peremptory challenge upon the filing of an affidavit of prejudice.¹⁹⁸ The statutes provide that no judge shall sit to hear or try any action when it “shall be established, as hereinafter provided, that such judge is prejudiced against any party or attorney, or the interest of any party or attorney appearing in such case.”¹⁹⁹ Prejudice could be established when the party or attorney filed a supporting affidavit that he “cannot, or believes that he cannot, have a fair and impartial trial before such judge.”²⁰⁰ No discretion was vested in the judge against whom the affidavit is filed as to his recusal.

In the landmark decision of *U'Ren v. Bagley*,²⁰¹ the Supreme Court of Oregon upheld the statute’s constitutionality against a challenge that the legislature had gone beyond its constitutional powers in enacting the law and thus invaded the province of a co-ordinate branch of government. Noting that the disqualification provisions at issue fell into the “twilight zone” between imprecise boundaries and branches of government, the court began with the premise it stated was a “truism” that “every citizen is entitled to a fair and impartial trial. To secure that sacred and constitutional right, legislation undoubtedly may be enacted.”²⁰² The court reasoned that the legislature has, in effect, said it is better, as a matter of

¹⁹⁸ 1925 Or. Laws, §§ 45-1 and 45-2.

¹⁹⁹ 1925 Or. Laws, §§ 45-1 and 45-2.

²⁰⁰ 1925 Or. Laws, § 45-1.

²⁰¹ 245 P. 1074 (Or. 1926).

²⁰² *U'ren*, 245 P. at 1075.

public policy and administration of justice, that a judge when challenged for prejudice “should not act in that particular case, even though he be blessed with all the virtues any judge ever possesses.”²⁰³ The Court observed

It is the design of the law to maintain the purity and impartiality of the courts, and to insure for their decisions the respect and confidence of the community. Their judgments become precedents which control the determination of subsequent cases; and it is important in that respect that their decisions should be free from all bias. After securing wisdom and impartiality in their judgments, it is of great importance that the courts should be free from reproach or the suspicion of unfairness. A party may be interested only that his particular suit should be justly determined; but the state, the community, is concerned not only for that, but that the judiciary shall enjoy an elevated rank in the estimation of mankind."

The law is not so much concerned with the respective rights of judge, litigant or attorney in any particular cause as it is, as a matter of public policy, that the courts shall maintain the confidence of the people: 15 R. C. L. 530. As stated in *People v. Suffolk Common Pleas*, 18 Wend. 550:

"Next in importance to the duty of rendering a righteous judgment, is that of doing it in such a manner as will beget no suspicion of the fairness and integrity of the judge."

No judge has a vested right to sit in a particular case. Neither has a litigant nor an attorney a vested right to have his case heard by any particular judge. In the consideration of this statute a more important question is involved--viz., the purity, stability and integrity of courts.

The court concluded that the statute appeals to the “conscience of the party for reasonable apprehension, not for the truth of the fact upon which the apprehension

²⁰³ U'ren, 245 P. at 1075.

rests.”²⁰⁴ Thus, “it is the challenge of and not the fact of prejudice that ipso facto disqualifies the judge from acting in a particular cause.”²⁰⁵

In 1947, the Oregon legislature amended the provisions known as “the affidavit of prejudice” statute and granted a right to a party or his attorney to disqualify the judge by merely filing an application for a change of judge.²⁰⁶ In *State ex rel Bushman v. Vandenberg*,²⁰⁷ the court held the recusal statute unconstitutional and distinguished *U’Ren* on the ground that “[t]he legislature has now invested litigants and their attorneys with the power to remove duly appointed or elected and qualified judges from the bench in particular cases at will -- for good cause, bad cause, or no cause at all.”²⁰⁸ While it may be true that the “same thing was possible under the former statute, that was only by an abuse of the statute, not by using it for purposes which it was manifestly intended to accomplish.”²⁰⁹ Therein, reasoned the court, lays the distinction between the two laws. The court also rejected a suggested analogy between the peremptory strike of a juror and the peremptory challenge of a judge. The peremptory removal of a judge is in the nature of a challenge. The peremptory strike of a juror, while appropriate for removing jurors, is inappropriate to remove an “an apparently qualified judge who had taken an oath to discharge his or her judicial duties

²⁰⁴ *U’ren*, 245 P. at 1076.

²⁰⁵ *U’ren*, 245 P. at 1076.

²⁰⁶ Or. Rev. Stat. §§ 14.220 and 14.230; 1947 Or. Laws, chs. 145, 162.

²⁰⁷ 280 P. 2d 344 (Or. 1955).

²⁰⁸ *Vandenberg*, 280 P. 2d at 337.

²⁰⁹ *Vandenberg*, 280 P. 2d at 337.

faithfully.”²¹⁰ The court concluded, after discussing and rejecting these several arguments, that the statute contravened the principle of separation of powers.

Following *Vandenberg*, the Oregon legislature re-enacted the recusal statute that had been upheld in *U'Ren*. This statute allowed disqualification of a judge for prejudice and provided that prejudice could be established in the following manner:

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 he 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.²¹¹

In *State ex rel. Lovell v. Weiss*²¹², the court again upheld this recusal provision. In doing so, however, the court cautioned that mere conclusory recitations of good faith were insufficient in instances in which the judge contested recusal:

If we were to hold that an affidavit could, by a pro forma recital of good faith, put beyond question the issue of good faith, it would amount to a holding that good faith in fact is not necessary. Such a holding would render [this] statute unconstitutional for the same reasons that the 1947 statute before the court in *State ex rel Bushman v. Vandenberg* was unconstitutional.²¹³

²¹⁰ *Vandenberg*, 280 P. 2d at 349.

²¹¹ 1955 Or. Laws, ch. 408, § 1.

²¹² 430 P.2d 357 (Or. 1968).

²¹³ *Weiss*, 430 P. 2d at 359.

To guarantee that an allegation of good faith was more than simply a pro forma recital, the court required that the affiant bear the burden of proof in contested cases:

Since the party or attorney seeking to remove a duly elected judge from the bench for the trial of one or more cases may do so only if he believes in good faith that the judge is prejudiced, it is not an undue hardship to require him, when his good faith is challenged, to show that his belief is based upon a rational ground and not upon mere pique, whimsy, or imagination.

The burden of proving good faith . . . will be satisfied if the affiant testifies that he has received information about the trial judge which, if true, reasonably could be a basis for a fear of prejudice. The affiant need not prove that the judge is prejudiced, or even prove that the evidence upon which he bases his apprehension is all true. But he must come forward with some evidence, hearsay or otherwise, from which a reasonable person could conclude that anyone possessed of such evidence might reasonably question the trial judge's impartiality in a matter."²¹⁴

Finally, in *State ex rel. Oliver v. Crookham*,²¹⁵ the court considered yet another version of Oregon's judicial peremptory challenge statute. The statute there at issue, identical in all material respects to that before the court in *Weiss*, required an affidavit stating that the judge was prejudiced and that the party (or the party's attorney) believed that he or she could not receive a fair and impartial hearing before the challenged judge. The court specifically retained the good faith hearing requirement and the burden of proof requirement established in *Weiss*, declining to overrule *Weiss*. The court explained that "we have been overly

²¹⁴ *Weiss*, 430 P. 2d at 360.

²¹⁵ 731 P.2d 1018 (Or. 1987).

generous in our view of the adequacy of affidavits of prejudice. Bare allegations like the one in the present case tell the trial judge and the presiding judge nothing."²¹⁶ The court held that "to be sufficient in the future, an affidavit supporting a motion to recuse a judge under ORS 14.250-14.270 must allege circumstances which would permit a party or attorney reasonably to believe that the party or attorney will not receive a fair trial."²¹⁷

In response to *Oliver*, the legislature amended Or. Rev. Stat. §§ 14.250 and 14.260(1).²¹⁸ Those amendments changed the statutes in three significant ways.

²¹⁶ *Oliver*, 731 P. 2d at 1023-24.

²¹⁷ *Oliver*, 731 P. 2d at 1024.

²¹⁸ These code sections, former and amended, read as follows, with the former provisions bracketed in italics and the amendatory provisions in bold:

14.250. 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, or the interest of any party or attorney appearing in such cause, matter or proceeding*] **any party or attorney believes that such party or attorney cannot have a fair and impartial trial or hearing before such judge**. 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. (1) Any party to or any attorney appearing in any cause, matter or proceeding in a circuit court may establish the [*prejudice*] **belief** 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. **No specific grounds for the belief need be alleged. Such motion shall be allowed unless the judge moved against, or the presiding judge in those counties where there is one, challenges the good faith of the affiant and sets forth the basis of such challenge. In the event of such challenge, a hearing shall be held before a disinterested judge. The burden of proof shall be on the challenging judge to establish that the motion was made in bad faith or for the purposes of delay.**

First, the legislature eliminated the requirement, first stated in *Oliver*, that the affiant allege "circumstances" leading to the belief that a fair and impartial trial cannot be had before the challenged judge. Second, the legislature struck the requirement for alleging that the challenged judge was "prejudiced"; henceforth, the affidavit had to allege *solely* the belief that a "fair and impartial trial or hearing" cannot be had before the challenged judge. Third, the legislature shifted the burden of proof from the affiant onto the challenged judge to prove bad faith at the hearing requested by the judge questioning the affiant's good faith. This third change was in response to the *Oliver* decision in which the court placed the burden upon the affiant to prove that the motion to disqualify the judge was made in good faith and not for purposes of delay.

The court considered a challenge to the statutory revisions in *State ex rel. Ray Wells v. Hargreaves*.²¹⁹ The court first qualified its statements in *Oliver* regarding the sufficiency of an affidavit – the “circumstance which would permit a party or attorney reasonably to believe that the party or attorney will not receive a fair trial”²²⁰ – and explained that “we had in mind practical, not constitutional, concerns” which would have the positive effect of rendering good faith hearings “either shorter or wholly unnecessary because the basis for seeking disqualification would be known to the challenged judge at the outset.”²²¹ The

²¹⁹761 P.2d 1306 (Or. 1988).

²²⁰ *Oliver*, 731 P.2d at 1024.

²²¹ 761 P.2d at 1309.

court held that Or. Rev. Stat. §§ 14.250 and 14.260 (1), as amended in 1987, do not violate the Oregon Constitution's prohibition against one department of government unduly interfering with the functions of another department. The court determined the statutes were constitutional although allowing for a peremptory challenge of a judge only upon the filing of an affidavit stating that the party (or the party's attorney) *believes* that he or she "cannot have a fair and impartial trial or hearing" before the judge assigned to the case, in contrast to alleging the judge was prejudiced. Additionally, the court found that the affidavit need not contain specific allegations of facts or circumstances supporting this belief; and that a judge wishing to contest disqualification may do so only by proving that the affidavit was made in "bad faith or for the purposes of delay."

Finally, the court was called upon to examine the meaning of the term "bad faith," as used in the final sentence of the statute, relative to the burden of proof placed upon the challenging judge. In *Kafoury v. Jones*,²²² the court specifically considered whether the term "bad faith" contained any "objective reasonableness" requirement. The court first explained that a "motion to disqualify is made in 'bad faith' if the primary aim of the motion is something other than the procurement of the fair adjudication of the action in which the motion is made."²²³ After observing that the inquiry would be primarily subjective, the court stated that "there may be rare cases in which a party's sincere belief that it cannot receive a

²²² 843 P.2d 932 (Or. 1992).

²²³ *Kafoury*, 843 P.2d at 937.

fair and impartial hearing before a particular judge is so irrational that permitting the party to succeed on the basis of that belief would be tantamount to reinstating the ‘peremptory challenge’ scheme condemned in *State ex rel. Bushman v. Vandenburg*.²²⁴ The court assumed that “the legislature did not intend to reinstate a statutory scheme that is, for all practical purposes, the twin of one previously ruled unconstitutional by th[e] court in the *Bushman* case.”²²⁵

Thus, the court injected a degree of judicial inquiry and determination into the judicial peremptory challenge procedure by declaring the standard required not only a subjective belief of prejudice by the litigant, but that the litigant’s belief had to also be “rational” or otherwise “objective.”

SOUTH DAKOTA.

South Dakota allows a litigant a change of judge upon the filing of an affidavit alleging prejudice; that the affidavit is made in good faith; and that it has not been filed for purposes of delay.²²⁶ S.D. Codified Laws § 15-12-22 provides

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 in 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

²²⁴ *Kafoury*, 843 P.2d at 937.

²²⁵ *Kafoury*, 843 P.2d at 937.

²²⁶ S.D. Codified Laws § 23A-21-1, which pertains to criminal proceedings, states that “[a] judge . . . may be disqualified in the manner specified in chapter 15-12 [which set forth the rules of civil procedure].”

shall remain in full force and effect, if filed, or becomes effective upon filing, unless thereafter vacated or reversed.²²⁷

S.D. Codified Laws § 15-12-26 sets forth the requirements for the affidavit's content:

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 affidavit. It shall not be necessary to state in such affidavit the ground or reason for such belief.²²⁸

South Dakota also provides that an informal request of the particular judge to remove himself from the proceedings should first be made by the litigant, orally or by letter, although the litigant is not required to state his reasons.²²⁹

When an affidavit for a judicial peremptory challenge is filed, the judge "shall proceed no further . . . and shall thereupon be disqualified as to any further acts with reference thereto unless otherwise ordered to proceed by the presiding

²²⁷ S.D. Codified Laws § 15-12-22. (Emphasis supplied.)

²²⁸ S.D. Codified Laws § 15-12-16. (Emphasis supplied.)

²²⁹ S.D. Codified Laws § 15-12-21.1 provides: "Prior to filing an affidavit for change of judge, the party or his attorney shall informally request the judge . . . 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 . . . 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."

judge. . . ." ²³⁰As the court noted in *State v. Tapio*²³¹, once an affidavit is properly served and filed, the presiding judge reviews it pursuant to S.D. Codified Laws § 15-12-32. "If the presiding judge determines that the affidavit is 'timely and that the right to file the affidavit has not been waived or is not otherwise legally defective,'" the case is assigned to another judge.²³² Once a litigant files an affidavit, a trial judge must immediately stop the proceedings and await the presiding judge's decision pursuant to statute to these statutory requirements. The judge sought to be removed has no authority to decide on his own whether the affidavit was proper; with the filing of the affidavit his disqualification was automatic and mandatory. Further, as a consequence of continuing with the case without jurisdiction, all subsequent orders and judgments are void.²³³

WASHINGTON.

Washington allows for a judicial peremptory challenge of a judge upon the filing of a motion and affidavit that the judge is prejudiced and that "the party or attorney cannot, or believes that he or she cannot, have a fair and impartial trial" before the particular judge. ²³⁴

²³⁰ S.D. Codified Laws § 15-12-22; see *Hickmann v. Ray*, 519 N.W.2d 79, 81 (S.D. 1994) (Wuest, J., concurring).

²³¹ 432 N.W.2d 268, 271 (S.D. 1988).

²³² S.D. Codified Laws § 15-12-32.

²³³ *State v. Finder*, 81 N.W. 959 (S.D. 1900).

²³⁴ Wash. Rev. Code §§ 4.12.040 and 4.12.050. *See also* Wash. Rev. Code § 10.25.070 pertaining to change of venue in criminal proceedings:

The defendant may show to the court, by affidavit, that he or she believes he or she cannot receive a fair trial in the county where the action is pending, owing to the prejudice of the judge, or to the excitement or prejudice against the defendant in the

Wash. Rev. Code Ann. § 4.12.040 provides, in part:

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.²³⁵

Wash. Rev. Code Ann. § 4.12.050 provides, in pertinent part:

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. . . .²³⁶

county or some part thereof, and may thereupon demand to be tried in another county. The application shall be granted on the ground of excitement or prejudice other than prejudice of the judge, unless the affidavit of the defendant be supported by other evidence, nor in any case unless the judge is satisfied the ground upon which the application is made does exist.

²³⁵ Wash. Rev. Code § 4.12.040. (Emphasis supplied.)

²³⁶ Wash. Rev. Code § 4.12.050. (Emphasis supplied.)

The statute is clear that once a party timely complies with the terms of Wash. Rev. Code § 4.12.050, prejudice is deemed established.²³⁷ Thereafter, "the judge to whom [the motion] is directed is divested of authority to proceed further into the merits of the action."²³⁸ The statute "permits of no ulterior inquiry; it is enough to make timely the affidavit and motion, and however much the judge moved against may feel and know that the charge is unwarranted, he may not avoid the effect of the proceeding by holding it to be frivolous or capricious."²³⁹

When first enacted in 1911, the statute did not contain a timeliness provision.²⁴⁰ In order to further the orderly administration of justice and to avoid and un contemplated result, the court read a timeliness requirement into the statute.

[W]e cannot conclude that it was intended by the act that a party could submit to the jurisdiction of the court by waiving his rights to object until by some ruling of the court in a case he becomes fearful that the judge is not favorable to his view of the case. In other words, he is not allowed to speculate upon what rulings the court will make on propositions that are involved in the case and, if the rulings do not happen to be in his favor, to then for the first time raise the jurisdictional question.²⁴¹

From these concerns developed the rule that a motion for change of judge had to be filed prior to any discretionary ruling by the trial court.²⁴² This judicially

²³⁷ *Marine Power & Equip. Co. v. State, Dep't of Transportation*, 687 P.2d 202, 204 (Wash. 1984).

²³⁸ *State v. Dixon*, 446 P.2d 329 (Wash. 1968); Wash. Rev. Code § 4.12.040.

²³⁹ *State ex rel. Talens v. Holden*, 164 P. 595, 597 (Wash. 1917).

²⁴⁰ 1911 Wash. Laws, ch. 121, § 2, p. 617.

²⁴¹ *State ex rel. Lefebvre v. Clifford*, 118 P. 40 (Wash. 1911).

²⁴² See also *State ex rel. Deavers v. French*, 138 P. 869 (Wash. 1914); *State ex rel. Mead v. Superior Court*, 185 P. 628 (Wash. 1919); *State ex rel. Davis v. Superior Court*, 195 P. 25 (Wash. 1921).

created limitation was incorporated into Wash. Rev. Code § 4.12.050 by amendment in 1927.²⁴³

In *Marine Power*, the Supreme Court of Washington refused to read into the statute a provision which would allow the trial court to consider, on a case-by-case basis, the circumstances surrounding complex litigation before determining whether a judicial peremptory challenge was timely. Although finding that it was within the power of the court to dictate, under the separation of powers principle, its own court rules - even where those rules are contrary to those established by the legislature - the court declined to find that the statute was unconstitutional in cases of complex, multi-party litigation. “It has long been the rule of this court to interpret statutes as they are plainly written, unless a literal reading would contravene legislative intent by leading to a strained or absurd result. . . . Although we leave open the question whether the statute might lead to such a result in another case, we find it does not do so here.”²⁴⁴

WYOMING.

Wyoming repealed its rule allowing for a peremptory change of judge in 2013. The Editor’s Note explains the history of the rule and states succinctly the reasons for repealing the rule. These comments are the best narrative of Wyoming’s struggle surrounding abuses of the peremptory challenge and the

²⁴³ 1927 Wash. Laws, ch. 145, § 2, p. 129.

²⁴⁴ *Marine Power*, 687 P.2d at 204 (citations omitted).

interest in ensuring trial occurs before an unbiased and impartial tribunal. The comments provide in their entirety:

This matter came before the Court on its own motion following reconsideration of the rules providing for peremptory disqualification of judges in criminal and juvenile cases. On December 4, 2012, this Court entered its "Order Suspending Rules Providing for Peremptory Disqualification of Judge." That order suspended the rules that permit peremptory disqualifications in criminal and juvenile cases. The Court stated it intended to consult the rules committees and consider the future, if any, of the peremptory disqualification rules in criminal and juvenile cases. The report and recommendation of the Permanent Rules Advisory Committee, Criminal Division, was to reinstate the rule. However, the judges serving on the committee favored elimination of the preemptory disqualification rule for criminal and juvenile matters. Now, having carefully examined the matter, the Court finds it necessary and proper for the reasons set forth below to repeal Rule 21.1(a) of the Wyoming Rules of Criminal Procedure and to amend Rule 40.1 of the Wyoming Rules of Civil Procedure. Because the Court has not identified any similar problems or concerns in the civil arena, the Court has chosen not to curtail, in any manner, the use of peremptory qualifications disqualifications in civil cases.

Wyoming is in the minority of States that permit peremptory challenges of judges. R. Flamm, *Judicial Disqualification: Recusal and Disqualification of Judges*, 789-822 (2d ed. 2007) (state-by-state review of statutes and court rules). The peremptory disqualification rule dates back to 1975. While no clear statement of intent was provided by the Court when the peremptory disqualification rules were initially adopted, we conclude that its purpose was to allow attorneys to remove judges selectively when they had concerns that a certain judge may have attitudes that, while not sufficient to support a motion to remove a judge for cause, created concerns for that party that the judge may have a predisposition in that particular case. It was never intended to allow wholesale removal of a judge from all cases in which that attorney may be involved. Throughout its history, Rule 21.1(a) (and its predecessor W.R.Cr.P. 23(d)) has been the subject of intermittent misuse by individual attorneys who utilized it to remove a particular judge from many or all of their cases before that judge. That misuse resulted in this Court

suspending the rule and reconsidering its efficacy. In the most recent example, a prosecutor invoked Rule 21.1(a) as a means to remove an assigned judge from eight newly filed juvenile actions and another prosecutor requested blanket disqualification of a judge in all criminal matters. When misuse has risen to an unacceptable level, district judges have objected to this Court and sought relief from the burdens that practice created for them.

This marks at least the third time the rule has been abolished or suspended. The Court previously abolished the rule in 1983, reinstated it and later suspended it in 1998. Each time we ultimately reinstated the rule and admonished attorneys to not use the rule to seek removal of a judge for all cases. In 2010, at the request of the district court judges, the Board of Judicial Policy and Administration established a task force to once again evaluate the apparent misuse of the disqualification rule. Over the objection of the district court judges on the taskforce, it recommended amendments to the rule which would have required a formal procedure for handling these motions and required the judge to respond, a process perceived by the district judges to be similar to disqualifications for cause with a lesser burden of proof. On March 10, 2011, after careful consideration of the taskforce's recommendation to revise the rule, this Court reluctantly decided to leave the rule intact without limitation, but once again admonished the officers of the bar that lawyers should refrain from improper use of the rule and reminded them the rule was not intended to allow attorneys to replace a judge in all cases. By December, 2012, the practice of blanket disqualification of a local judge returned. While these situations were not widespread, they did cause the predictable disruption of multiple district court dockets and demonstrated that compliance with the intent of the rule could not be assured in the future.

The blanket use of the disqualification rules negatively affects the orderly administration of justice. Judicial dockets are interrupted, replacement judges must be recruited, sometimes including their court reporters, and unnecessary travel expenses are incurred. Peremptory disqualifications of assigned judges affect not only the specific cases at issue, but also the caseload of judges and the cases of other litigants whose cases are pending before the removed judge and the replacement judge at the same time. Where replacement judges are from other judicial districts, the cost and efficient utilization of judicial resources is greatly impacted. These costs cause financial burdens upon district courts budgets. Each district

court has a limited budget for outside judges brought in to preside over cases in which challenges have been utilized. Criminal and juvenile cases comprise a significant portion of the cases on a district court's docket and, consequently, multiple disqualifications in those types of cases have a severe impact on the operation of the district court.

In addition, when peremptory challenges are exercised, delays in the timely resolution of juvenile and criminal cases may result. Quick resolution of matters involving children is not only statutorily required, but of paramount concern to this Court. Further, any delay in criminal proceedings resulting from a judge's removal, however slight, can impact a defendant's speedy trial rights, potentially contributing to a dismissal of criminal charges.

Allowing unfettered peremptory challenges of judges encourages judge shopping. In practice, it permits parties to strike a judge who is perceived to be unfavorable because of prior rulings in a particular type of case rather than partiality in the case in question. Disqualifying a judge because of his or her judicial rulings opens the door for manipulation of outcomes. Such undermines the reputation of the judiciary and enhances the public's perception that justice varies according to the judge. It also seriously undercuts the principle of judicial independence and distorts the appearance, if not the reality, of fairness in the delivery of justice.

The inherent power of this Court encompasses the power to enact rules of practice. Included in this power is the authority to suspend or repeal those rules where appropriate. Wyo. Const. Art. V, § 2; *Wyo. Stat. Ann. § 5-2-114* (LexisNexis 2013); *White v. Fisher*, 689 P.2d 102, 106 (Wyo. 1984). In accordance with our inherent authority, and given our duty to ensure the orderly and efficient function of Wyoming's judicial system, we find it advisable to repeal and amend the rules that permit peremptory disqualifications in criminal and juvenile cases.

While Wyoming continues to provide for a peremptory challenge to a judge without any allegation of prejudice in civil proceedings,²⁴⁵ by court order dated

²⁴⁵ Wyo. R. Civ. Proc. 40.1 provides:

(b) Change of judge.

December 4, 2012, the Wyoming Supreme Court suspended Wyo. R. Civ. P. 40.1(b)(1) in juvenile proceedings until such time as the Permanent Rules Advisory Committee, Juvenile Division, may consider this suspension and make recommendations to the Court regarding the future, if any of peremptory disqualification of judges in juvenile proceedings.

CONSTITUTIONAL CONSIDERATIONS OF JUDICIAL PEREMPTORY CHALLENGES.

1. THE EVOLUTION OF COMPETING CONSTITUTIONAL PRINCIPLES WHICH DEFINE DISQUALIFICATION FOR CAUSE AND JUDICIAL PEREMPTORY CHALLENGE JURISPRUDENCE.

Although the judicial peremptory challenge constitutes a different procedure for effectuating removal of a trial judge than disqualification for cause, the two procedures are premised upon the same fundamental principle that a litigant has a constitutional guarantee of a trial before a fair and impartial tribunal. Any discussion concerning constitutional considerations underlying the judicial peremptory challenge must therefore begin with the evolution of disqualification

(1) Peremptory Disqualification. [See Editor's Note regarding suspension in juvenile proceedings] -- A district judge may be peremptorily disqualified from acting in a case by the filing of a motion requesting that the judge be so disqualified. The motion designating the judge to be disqualified shall be filed by the plaintiff within five days after the complaint is filed; provided, that in multi-judge districts, the plaintiff must file the motion to disqualify the judge within five days after the name of the assigned judge has been provided by a representative of the court to counsel for plaintiff by personal advice at the courthouse, telephone call, or a mailed notice. The motion shall be filed by a defendant at or before the time the first responsive pleading is filed by the defendant or within 30 days after service of the complaint on the defendant, whichever first occurs, unless the assigned judge has not been designated within that time period, in which event the defendant must file the motion within five days after the name of the assigned judge has been provided by a representative of the court to counsel for the defendant by personal advice at the courthouse, telephone call, or a mailed notice. 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 time and against only one judge. This rule, and the procedures set forth herein, shall not apply to criminal cases or proceedings in juvenile court.

for cause jurisprudence and two competing principles at the heart of this country's administration of justice: (1) that "the law will not suppose a possibility of bias or favour in a judge, who is already sworn to administer impartial justice, and whose authority greatly depends upon that presumption and idea . . .";²⁴⁶ and, (2) that the Fifth and Fourteenth Amendment guarantee a litigant's trial be in a fair and impartial tribunal. Thus, the Supreme Court's disqualification for cause precedent is significant to understanding how these often competing principles are balanced within the context and evolution of the several state statutes allowing for judicial peremptory challenges.

From the principle of presumed impartiality evolved the traditional common law rule that disqualification for bias or prejudice was not permitted.²⁴⁷ The Supreme Court had long recognized that "matters of kinship, personal bias, state policy, [and] remoteness of interest, would seem generally to be matters merely of legislative discretion[,]"²⁴⁸ and that "most matters relating to judicial disqualification [do] not rise to a constitutional level."²⁴⁹ In reflecting on this precedent and reconciling it with expansion of the disqualification standard to include considerations of due process and public perception of impartiality, the

²⁴⁶ *Aetna Life Insurance Co. v. Lavoie, et al.*, 475 U.S. 813 (1986) quoting Blackstone, 3 W. Blackstone, Commentaries 361.

²⁴⁷ *Id.* See also *Clyma v. Kennedy*, 29 A. 539 (Conn. 1894); John P. Frank, *Disqualification of Judges*, 56 Yale L.J. 605 (1947).

²⁴⁸ *Tumey v. Ohio*, 273 U.S. 510, 523 (1927).

²⁴⁹ *FTC v. Clement Institute*, 333 U.S. 683, 702 (1948).

Court observed that, despite this tradition, it had never foreclosed a constitutional challenge alleging judicial bias and prejudice.²⁵⁰

In *Tumey*, the Court concluded nearly a century ago that “it certainly violates the Fourteenth Amendment . . . to subject [a person’s] liberty or property to the judgment of a court the judge of which has a direct, personal, substantive, pecuniary interest in reaching a conclusion against him in his case.”²⁵¹ Nevertheless, the fundamental right to an impartial trial has frequently been at odds with the presumption that a judge could set aside and act professionally in judging matters before him, which might otherwise implicate concerns regarding his bias or prejudice. In striking a balance between these interests, the successful disqualification motion was primarily limited to proceedings in which the judge had a pecuniary interest.²⁵²

This narrow disqualification challenge was expanded in 1955 to include instances involving criminal contempt when Justice Black, in *Murchison*,²⁵³ explained that the Due Process Clause guaranteed no “judge can be a judge in his own case [or be] permitted to try cases where he has an interest in the outcome.”

²⁵⁴ The Court reaffirmed that “[a] fair trial in a fair tribunal is a basic requirement

²⁵⁰ 556 U.S. 868, 888.

²⁵¹ *Tumey*, 273 U.S. at 523.

²⁵² In *Tumey*, a justice on the Alabama Supreme Court participated in a *per curiam* decision involving an insurer’s refusal to pay benefits while at the same time that the case was pending the Justice filed two actions in an Alabama court alleging the company’s bad-faith to pay claims.

²⁵³ 349 U.S. 133 (1955).

²⁵⁴ *Murchison*, 349 U.S. at 136.

of due process.”²⁵⁵ In *Murchison* a judge, although having no pecuniary interest in the case, participated in the earlier proceeding which was followed by the judge’s decision to charge the defendant with criminal contempt. The Court likened the scenario to a “one-man grand jury” which required the judge to recuse himself in the subsequent contempt proceeding. Based upon the foregoing precedent, the standard which emerged for deciding judicial disqualification, although it could not “be defined with precision,”²⁵⁶ was whether the “situation is one ‘which would offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear, and true.’”²⁵⁷

In 2009, in the landmark decision of *Caperton v. A.T. Massey Coal Co.*,²⁵⁸ the Supreme Court addressed the impact of large campaign contributions on the perception of a judge’s impartiality. The Court enunciated the disqualification standard as follows: “The inquiry is an objective one. The Court asks not whether the judge is actually, subjectively biased, but whether the average judge in his position is ‘likely’ to be neutral, or whether there is an unconstitutional ‘potential for bias.’”²⁵⁹ The Court reasoned that this more expansive interpretation has always existed in common law and interpreted *Tumey* to mean that “the Court was . . . concerned with more than the traditional common law prohibition on direct

²⁵⁵ *Murchison*, 349 U. S. at 136.

²⁵⁶ *Lavoie*, 475 U.S. at 822, quoting *Murchison*, 349 U.S. at 136.

²⁵⁷ *Ward v. Village of Monroeville*, 409 U.S. 57, 60 (1972), quoting *Tumey*, 273 U.S. at 532.

²⁵⁸ 556 U.S. 868 (2009).

²⁵⁹ 556 U.S. at 881.

pecuniary interest.”²⁶⁰ The Court observed that historically it had referred to the more “general concept of interest that tempts adjudicators to disregard neutrality.”

²⁶¹ Noting that the problem arises in the context of judicial elections, “a framework not presented in the precedents we have reviewed and discussed,” the Court reasoned:

The difficulties of inquiring into actual bias, and the fact that the inquiry is often a private one, simply underscore the need for objective rules. Otherwise there may be no adequate protection against a judge who simply misreads or misapprehends the real motives at work in deciding the case. The judge's own inquiry into actual bias, then, is not one that the law can easily superintend or review, though actual bias, if disclosed, no doubt would be grounds for appropriate relief. In lieu of exclusive reliance on that personal inquiry, or on appellate review of the judge's determination respecting actual bias, the *Due Process Clause* has been implemented by objective standards that do not require proof of actual bias. See *Tumey*, 273 U.S., at 532, 47 S. Ct. 437, 71 L. Ed. 749, 5 Ohio Law Abs. 159, 5 Ohio Law Abs. 185, 25 Ohio L. Rep. 236; *Mayberry*, *supra*, at 465-466, 91 S. Ct. 499, 27 L. Ed. 2d 532; *Lavoie*, 475 U. S., at 825, 106 S. Ct. 1580, 89 L. Ed. 2d 823. In defining these standards the Court has asked whether, “under a realistic appraisal of psychological tendencies and human weakness,” the interest “poses such a risk of actual bias or prejudice that the practice must be forbidden if the guarantee of due process is to be adequately implemented.” *Withrow*, 421 U.S., at 47, 95 S. Ct. 1456, 43 L. Ed. 2d 712.²⁶²

The *Caperton* test included consideration of the *perception* of bias and enunciated an objective standard under the Due Process Clause that did not require proof of actual bias. “Due process requires an objective inquiry into whether the

²⁶⁰ 556 U.S. at 878.

²⁶¹ 556 U.S. at 878.

²⁶² *Caperton*, 556 U.S. at 883. (I have not omitted the Court's reference to its precedent as I think it is the Court's attempt to respond to the dissents contentions that the Court was espousing a new rule of law.)

contributor's influence on the election under all the circumstances 'would offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear, and true.'"²⁶³ The due process standard enunciated in *Caperton* requires recusal when "the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable."²⁶⁴ Under this standard, recusal may be required "whether or not actual bias exists or can be proved." The crucial question is whether, "under a realistic appraisal of psychological tendencies and human weaknesses, the interest poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented."²⁶⁵

The minority Justices in *Caperton* (C.J. Roberts, Thomas, Alito and Scalia) rejected the Court's attempt to find authority for its due process standard in precedent. The minority argued that the Court has never acknowledged a "probability" of bias and maintained that the two narrow exceptions requiring recusal (pecuniary interest and criminal contempt) provided clear guidance for recusal decisions. The minority urged that "bad facts make bad law" and that "the cure is worse than the disease". The primary effect of the Court's decision, the minority maintained, was that public confidence in their judiciary would be eroded. The minority reasoned that Congress and the states may enact judicial

²⁶³ *Caperton*, 556 U.S. at 885, quoting *Tumey*, 273 U.S. at 532.

²⁶⁴ 556 U.S. at 883-884, citing *Withrow v. Larkin*, 421 U.S. 35, 47 (1975).

²⁶⁵ *Id.*

standards that are more rigorous than those mandated by the Court and that application of a constitutional due process standard will be confined to rare instances.

The standard enunciated in *Caperton* for assessing bias and impartiality of a trial judge was the first instance in federal jurisprudence that the *perception* of bias was relevant to the inquiry. Although it may only be the extraordinary situation, as predicted by the Court in *Caperton*, where due process requires recusal because the risk of bias is so severe, recusal is nonetheless required even though bias and partiality of the judge has not been demonstrated by the movant.

2. STATE STATUTES DEVELOP TO PROVIDE PROCEDURES FOR REMOVAL OF A TRIAL JUDGE.

The principle that it was offensive to a party's due process rights, protected by the Fourteenth Amendment, to subject his liberty or property to the judgment of a court the judge of which was partial, biased and/or prejudiced resonates through the evolution of jurisprudence concerning both disqualification for cause and judicial peremptory challenges. Within the context of these common law principles informing the constitutional inquiry under the Fourteenth Amendment, state statutes evolved as a method to more effectively remove a biased judge and maintain public confidence in the integrity of its judiciary. Significant to the development of state statutes allowing for judicial peremptory challenges, "the matter of what constitutes a basis for judicial disqualification . . . [was] . . .

recognized as within the discretion of state legislators.”²⁶⁶ “All questions of judicial disqualification may not involve constitutional validity. Thus matters of kinship, personal bias, state policy, remoteness of interest, would seem generally to be matters merely of legislative discretion.”²⁶⁷ With the exception of a few cases that carved out circumstances where failure to recuse was constitutionally intolerable and in the absence of the judge recusing on his own, it was difficult for a litigant to successfully challenge, on the basis of due process, bias or prejudice, a judge whom the party believed was biased against either him or his cause. The difficulties for a party given the presumption of a judge’s impartiality were only minimally alleviated by the broader standard enunciated in the *Caperton* decision. As Justice Kennedy wrote, the circumstances surrounding the *Caperton* controversy were extraordinary and presented the rare instance where failure to recuse was constitutionally intolerable. Justice Kennedy endorsed the position of the Conference of Chief Justices that state codes of judicial conduct “maintain the integrity of the judiciary and the law” and are the “principle safeguard” against abuses that threaten to imperil public confidence in the fairness and integrity of the judiciary.²⁶⁸ Accordingly, “[i]t is for this reason that States may choose to ‘adopt recusal standards more rigorous than due process requires.’”²⁶⁹

²⁶⁶ See *Wheeling v. Black*, 25 W. Va. 266, 270 (1884), and cases cited therein.

²⁶⁷ *Tumey*, 273 U.S. at 523.

²⁶⁸ *Caperton*, 556 U.S. at 889.

²⁶⁹ *Id.*

State courts and legislatures accepted the invitation to promulgate court rules and statutes on behalf of their citizens, establishing procedures for a litigant to remove a judge when the litigant could demonstrate the particular judge was actually biased or prejudiced. Indeed, many state constitutions specifically protect the right of a party to a fair and impartial tribunal. Most state statutes establishing the right to disqualify a judge for cause were enacted in the second half of the nineteenth century and the turn of the twentieth. These statutes establish procedures and guidelines allowing a party to demonstrate actual prejudice of the judge. As noted by Justice Kennedy in *Caperton*, the disqualification for cause statutes are often guided by state judicial codes specifying when a judge ought to be disqualified or would be well-advised to recuse himself from the proceeding. Judicial peremptory challenge statutes arose to address the difficulty, still remaining, of successfully demonstrating actual bias or prejudice.

Prejudice, being a state of mind, is difficult to prove. It is particularly difficult when a party is trying to convince the judge, against whom the party has alleged prejudiced, that the judge must recuse himself. The peremptory challenge is a formal recognition of the deeply felt need for enlarging the basis upon which a party may object to a judge.²⁷⁰ “A party should be able to avoid having his case tried by a judge who, though he is not disqualified for cause, the party believes

²⁷⁰ ABA Standard 2.32, Standards Relating to Trial Courts (1976), Commentary, pp. 51-53.

cannot afford him a fair trial.”²⁷¹ Many of the judicial peremptory challenge statutes evolved as a method of protecting a party’s *perception* that he obtained a fair and impartial judge; all, however, were procedurally designed to avoid a judicial inquiry into the underlying facts giving rise to bias. State legislatures, pursuant to their authority to establish public policy, enacted legislation which defined when a judge is disqualified. In doing so, they were advancing the legitimate public policy of effectuating a party’s constitutional right to a fair judge. The statutory variations are numerous, with the policies underlying the states varying widely as well.

3. CONSTITUTIONAL ATTACKS ON JUDICIAL PEREMPTORY CHALLENGE STATUTES AND RULES.

With the evolution of state judicial peremptory statutes came constitutional challenges. The contention normally advanced was that the disqualification of a judge without demonstrating actual bias or prejudice violates the doctrine of separation of powers; that is, a judge who may be removed pursuant to an authorizing statute without a demonstration of actual bias, in effect, delegates to litigants the judicial power to determine whether a ground to remove a presumptively impartial judge exists. As the peremptory challenge does not require proof of facts or permit judicial review, the statute, it is argued, delegates

²⁷¹ ABA Standard 2.32, Standards Relating to Trial Courts (1976), Commentary, pp. 51-53.

to the same persons mounting the challenge the judicial authority to determine whether such ground exists in the matter in which it has been invoked.

Implicit in the principle of separation of powers is the division of government into three branches – legislative, executive and judicial – and the assignment of specified duties on which neither of the branches may encroach. Such a separation establishes the constitutional principle of checks and balances upon which citizens are protected from potential overreaches of any particular branch. It may be extraordinarily difficult, however, to define precisely the governmental powers attributable to a particular branch or to say this power belongs exclusively to this department or branch and that power belongs to another. Governmental powers are not divided into rigid, mutually exclusive compartments.²⁷² Moreover, the branches of government are not required to exercise power in complete isolation of the other branches and the doctrine of separation of powers contemplates certain shared and overlapping powers.

It is well established that courts have express, inherent, implied and incidental powers necessary to the administration of the courts. Judicial power thus extends beyond the power to adjudicate a particular matter and includes the implied and inherent power to regulate matters related to the adjudication. Courts may regulate their budget, court administration, the bar, practice and procedure, and enact judicial codes to guide their judges. Courts must ensure “not only the

²⁷² *Walker*, 519 N.E.2d at 892.

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.”²⁷³ Similarly, the legislature, pursuant to its duty to effectuate public policy, may enact laws to assure a fair trial and prescribe the grounds which will constitute the disqualification of a judge. Correspondingly, because the legislature may adopt reasonable regulations and rules regarding the disqualification of a judge, the legislature may properly consider prejudice of judges and enact measures regarding prejudice as a ground for disqualification of a judge. The rightly may also be considered a subject of legislative regulation.

There are thus “great borderlands of power,”²⁷⁴ “twilight zone[s],”²⁷⁵ and “vast stretches of ambiguous territory”²⁷⁶ where the functions of government overlap and where it is difficult to determine where one function ends and another begins. Courts are nevertheless unanimous in concluding that any particular legislative regulation must be subject to the court’s authority to preserve the integrity of the judicial system and the doctrine of separation of powers. If the court has promulgated a rule regarding the method or procedure of disqualification which conflicts with a legislative enactment, then the rule adopted by the court

²⁷³ *Holmes*, 315 N.W.2d at 709.

²⁷⁴ *In re Appointment of Revisor*, 124 N.W. 670 (Wis. 1910).

²⁷⁵ *U’ren*, 245 P. at 1075.

²⁷⁶ Frankfurter & Landis, *Power of Congress Over Procedure in Criminal Contempts in ‘Inferior’ Federal Courts – A Study in Separation of Powers*, 37 Harv. L. Rev. 1010, 1016(1924).

must prevail.²⁷⁷ Where a legislative enactment directly and irreconcilably conflicts with a rule of the court on a matter within the court's authority, the rule will prevail.²⁷⁸

As regulation of the removal of judges falls within this ambiguous area where two branches – the legislature and the judiciary – overlap; both may enact legislation or promulgate rules to advance their interests. Courts recognize that the legislature has the power to enact laws concerning judicial practice which “do not unduly infringe upon the inherent powers of the judiciary.”²⁷⁹ In recognition of this principle and the doctrine of separation of powers, courts attach a strong presumption of constitutionality to all legislative enactments. Although the legislature is the branch of government charged with the determination of public policy and may enact statutes to enhance and enforce that policy, it is not within the authority of the legislature to enact statutes which solely concern court administration or the day-to-day business of the courts. Not surprisingly, state courts are quite varied in their decisions regarding which branch of government – legislature or judiciary – from which the rule or statute regulating the procedure for removal of a judge originates.

When courts have considered separation of powers challenges to legislative enactments establishing and defining judicial disqualification, and where the

²⁷⁷ *State ex rel. Gatson v. Gibson Circuit Court*, 462 N.E.2d 1049 (Ind. 1984); *Jeffries v. Lawrence Circuit Court*, 467 N.E. 2d 741 (Ind. 1984).

²⁷⁸ *Walker*, 519 N.E. 2d at 893.

²⁷⁹ *Taylor*, 464 N.E.2d at 1062-63.

statute requires presentation of an affidavit alleging prejudice, state courts have uniformly determined that the legislation was within the “concurrent” constitutional authority of the legislature and courts to enact.²⁸⁰ Conversely, those statutes which allow for removal of a judge without any recognized basis for disqualification such as bias or prejudice have uniformly been held unconstitutional, because they do not have as a basis or origin the legitimate public policy determination of providing a trial before an unbiased and impartial judge.²⁸¹ The filing of an affidavit alleging a belief of bias or prejudice of the judge is at least an imputation of prejudice which salvages the peremptory procedure from constitutional invalidity. The affidavit establishes a *prima facie* allegation of bias sufficient to legitimize the removal of the judge under principles of due process. That it may not be contested or judicial reviewed is a matter of procedure, not substance, which is premised upon protecting the party’s perception that he has received a fair and impartial judge, and not to test whether the judge is actually biased.

²⁸⁰ See *Solberg*, 561 P.2d 1148, 1162 (Cal. 1977); *Hulme v. Woleslagel*, 493 P.2d 541, 551 (Kan. 1972); *Channel Flying, Inc. v. Bernhardt*, 451 P.2d 570, 575 (Alaska 1969); *State ex rel. Peery v. District Court*, 400 P.2d 648, 660 (Mont. 1965); *Johnson v. Superior Court*, 329 P.2d 5, 8 (Cal. 1958); *Moruzzi v. Federal Life and Casualty Co.*, 75 P.2d 320, 325 (N.M. 1938); *State ex rel. Hannah v. Armijo*, 28 P.2d 511, 512 (N.M. 1933); *State ex rel. Beach v. Fifth Judicial District Court*, 5 P.2d 535, 537 (Nev. 1931); *U'ren v. Bagley*, 245 P. 1074, 1077 (Or. 1926); *Barber v. State*, 149 N.E. 896 (Ind. 1925); *State ex rel. Anaconda Copper Mining Co. v. Clancy*, 77 P. 312, 318 (1904); Annot., *Constitutionality of Statute Making Mere Filing of Affidavit of Bias or Prejudice Sufficient to Disqualify Judge*, 46 A.L.R. 1179 (1927); Note, *Disqualification of Judges for Prejudice or Bias -- Common Law, Evolution, Current Status and the Oregon Experience*, 48 Or. L. Rev. 311, 349, n. 209 (1969).

²⁸¹ *Bushman v. Vandenberg*, 280 P.2d 344 (Or. 1955); *Austin v. Lambert*, 77 P.2d (Cal. 1938); *Clover Valley Lumber Co. v. Sixth Judicial District*, 83 P.2d 1031 (Nev. 1938).

There remains, however, the question of constitutionality of the peremptory challenge without an affidavit when the authority has as its source not a statute, but a court rule promulgated by the court itself. It is probably safe to conclude, as Alaska has, that a court will not declare unconstitutional its own court rules promulgated pursuant to its authority to manage the business of the court and ensure the integrity of trial proceedings. However, arguments have been advanced in state courts that a court rule which does not require an affidavit alleging prejudice is susceptible to the similar attack on separation of powers grounds. The distinction being that it authorizes an unwarranted interference with the constitutional powers and duties of a judge upon the mere caprice or whim of a party litigant. That the “the legislature may designate causes which, if established in the manner by it provided, shall work a disqualification of a judge, is an entirely different matter from empowering a private citizen, though a litigant, simply by his act, to bar the exercise of judicial functions by a qualified judge. One relates simply to facts and the other to an act, not necessarily or inferentially, based upon any facts; just simply an act.”²⁸²

No litigant or any attorney has a vested right to have his case heard by any particular judge nor, so the argument goes, to object to a judge elected by the people, qualified as provided by law, and against whom no intimation of prejudice, bias, pecuniary interest or relationship exists tending to prevent a fair trial. That is the interest of the public, as a third party, who has undergone the expense of electing a qualified judge to hear and determine every case which arises within the jurisdiction of the court over which such judge is

²⁸² *Daigh v. Shaffer*, 73 P.2d 927, 934 (Cal. 1937).

elected to preside, and no party has a vested right to add to the expense of the public by interposing a challenge, where no cause therefore exists, as he has no vested right to have his cause heard by a particular judge, and if the judge provided by the public who pays his expenses is qualified, as we have said, all the rights of the parties to the action have been fully and completely provided for.²⁸³

The focus of such a challenge appears to be on the litigant and the unwarranted interference of the litigant into matters of judicial authority, rather than an unauthorized interference by the legislature. The distinction, while appearing in early cases, has nevertheless been lost in subsequent discussions and analysis.

Another infrequent comparison and constitutional attack on the judicial peremptory challenge is likening the judicial peremptory challenge to the peremptory strike of a juror. As was seen in Illinois, the misuse of the judicial peremptory challenge was analogized to *Batson*, and provided the premise for the court to inquire into the reasons for the challenge and whether they were improper. However, the analogy to *Batson* and misuse of the judicial peremptory challenge has also been dismissed on the basis that a judge, unlike a juror during *voir dire*, is already sworn to try the cause thus implicating the traditional presumption that a judge has been sworn to administer justice impartially. Regardless of which view has more merit, neither argument has been consistently advanced as a basis for finding a statute or rule unconstitutional. A race-based judicial challenge

²⁸³ *Daigh v. Shaffer*, 73 P.2d at 931.

nevertheless presents a real concern for those championing peremptory judicial challenges.²⁸⁴

CONCLUSION.

Having been a general jurisdiction trial judge in a rural judicial district comprising four counties, the Blackfeet Indian Reservation, and nearly 10,000 square miles of land, I have experienced first-hand many of the abuses wrought by Montana's "pure" peremptory challenge or substitution statute: the disruption of orderly court business, the threat to judicial independence, and the stifling affect upon court innovation. The abuses are measured only in part by statistics and figures and have been eloquently described by Judge Weisel in his memorandum decision in *Holmes*:

None of the decisions cited [from other jurisdictions invalidating peremptory substitution statutes] have touched upon the subtle and unconscious effect that these statutes have upon the trial judge. Perhaps it is because they were written by appellate judges. Under these statutes a judge lives knowing, perhaps not caring, that at any time the Bar can exercise its potential power and literally force out that judge from ever trying another case in the county in which he has been elected as circuit judge. Like it or not, deny it if you will, the Bar under these statutes has that power. . . . No judge will admit to being influenced by it. No judge honest with himself will deny that he is not bothered by it.

Should we, as an independent judiciary, have to live under that cloud? There is a subtle threat to conform to the Bar's standards of practice. The judge who deviates from that norm set by the local Bar is faced with repeated requests for substitution. He is then under a subtle force, or at least incurs the displeasure of the Court Administrator's office and from the Bar. We are exposed to this

²⁸⁴ See Nancy J. King, *Batson for the Bench? Regulating the Peremptory Challenge of Judges*, 73 Chi. – Kent L. Rev. 509 (1998).

power every day. It cannot help but have a stifling effect upon the innovation of court procedures, and attempts by the court to solve the problem. The result is the loss of the independence of the judiciary. It stifles the court's attempts at discipline, at reform, at efficiency which is met not by cooperation from the local Bar which has traditionally resisted change, but by antagonism and the subsequent requests for substitution of judge. The judge is faced with situations where he cannot fulfill his oath of office because he is prevented from doing so by the whim and caprice of counsel.²⁸⁵

Having personally shared these same experiences described by Judge Weisel, I began my study intent to find a legal basis upon which the peremptory challenge of a judge might be considered unconstitutional. However, as I have also learned from my experience as a judge, there are two sides to every story - both of which must be entertained and adequately considered before our adversarial process can be deemed to have produced a just and reasoned outcome. Or, stated differently, a viewpoint is precisely that – a view from a particular point or place, which may change if we step from the shoes within which we stand.

My examination of the struggle to balance the right of every citizen to receive a trial before an impartial tribunal against sound disqualification procedure and prevention of abuses, has brought me face-to-face with the notion that our courts must be perceived by its users as fair and impartial, despite its gate-keepers believing they are so endowed. An impartial and independent tribunal has always been considered an essential component of our nation's promise of equal justice under the law. The judiciary has more at stake in its institutional reputation than

²⁸⁵ *Holmes*, 315 N.W. 2d at 723.

the other two branches of government, since “[t]he Court’s authority – possessed of neither purse nor sword – ultimately rests on sustained public confidence in its moral sanction.”²⁸⁶ Hence, as our disqualification laws and rules evolve, the search for judicial probity must remain in the forefront of our considerations, as public confidence is essential to effective functioning of the judiciary.

In order to preserve the “crown jewel” of our American experiment,²⁸⁷ we must consider the judicial peremptory challenge and whether it advances judicial probity. As captured so eloquently by Justice Harrison of the Montana Supreme Court:

It is the design of the law to maintain the purity and impartiality of the courts, and to insure for their decisions the respect and confidence of the community. Their judgments become precedents which control the determination of subsequent cases; and it is important, in that respect, that their decisions should be freed from all bias. After securing wisdom and impartiality in their judgments, it is of great importance that the courts should be free from reproach or the suspicion of unfairness. The party may be interested only that his particular suit be justly determined; but the state, the community, is concerned not only for that, but that the judiciary shall enjoy an elevated rank in the estimation of mankind.²⁸⁸

It is a truism that every citizen is entitled to a fair and impartial trial. “To secure that sacred and constitutional right, legislation undoubtedly may be enacted.”²⁸⁹ Given the paramount importance of judicial probity in the eyes of both the individual litigant and the community as a whole, the decision of whether

²⁸⁶ *Baker v. Carr*, 369 U.S. 186, 267 (1962) (Frankfurter, J., dissenting); *see also* The Federalist No. 78, p. 490 (Alexander Hamilton) (Benjamin Fletcher Wright, ed., 1974).

²⁸⁷ Chief Justice Rehnquist, Brennan Center for Justice, p.3.

²⁸⁸ *Perry*, 400 P. 2d at 655.

²⁸⁹ *Id.*

to allow a litigant to remove a presumptively impartial judge invokes considerations beyond administration of the courts which, in my opinion, ought to be decided by users of the court – citizens of the state. Whether to allow the removal of a presumptively impartial judge involves considerations of policy implicating what citizens of a state want and expect of their judiciary – and are willing to sacrifice in order to achieve. Aside from the constraints imposed by federal and state constitutions and the law, decisions regarding whether a litigant should be allowed to peremptorily remove a judge are best left to the branch of government deciding policy for the state. Having found no constitutional infirmity involving judicial peremptory challenges, except perhaps under circumstances unique to the evolution of a state’s particular rule or statute, it is my opinion that the decision of whether a judge may be removed by a judicial peremptory challenge ought to be left for the legislature. The legislature, and not the judiciary, is the branch of government designated to express the will of its citizens.

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