



alaska judicial council

1029 W. Third Avenue, Suite 201, Anchorage, Alaska 99501-1969 (907) 279-2526 FAX (907) 276-5046
http://www.ajc.state.ak.us E-Mail: postmaster@ajc.state.ak.us

Appellate Review Memo

I. Introduction

The Judicial Council staff has several ways of evaluating judges' performance. One way is to compare how each judge's decisions withstand appellate review.

The review process begins with a staff member, usually the staff attorney, reading every published appellate decision and every memorandum opinion and judgment released by the appellate courts. Staff first determines how many issues were on appeal and then decides whether the appellate court "affirmed" each of the trial judge's decisions on appeal. Decisions requiring reversal, remand or vacating of the trial court judge's ruling or judgment are not classified as "affirmed." Mooted issues and issues arising only upon appeal, which were not ruled on by the trial judge, are not taken into account. When the Supreme Court or Court of Appeals *clearly* overrules a prior statement of law upon which the trial court reasonably relied to decide an issue, that issue is not considered. These cases are very rare.

After deciding how many issues in a case were affirmed, the case is given a score. For instance, if two of ten issues are affirmed, the case is given a score of "20% affirmed." This scoring system is different than the court system's methodology, which notes only whether the case was affirmed, partly affirmed, reversed, remanded, vacated, or dismissed. Also, the court system tends to attribute the appeal to the last judge of record rather than determine which judge's decisions were appealed. In this analysis, if a case includes more than one judge's decisions, an attempt is made to determine which judge made which rulings and to assign affirmance scores appropriate with those

decisions. If it is not possible to make that determination from the text of the case, the overall affirmance score for that case is assigned to each judge of record.

After the case has been scored, another staff member enters information about the case into a database. The data fields include case type,¹ judge, affirmance score, date of publication or release, opinion number, and trial case number.

Before a retention election, staff cross-checks the cases in its database to make sure the database is as complete as possible. Staff then analyzes each retention judge's "civil," "criminal,"² and overall (combined) affirmance rates. Staff also calculates civil, criminal, and overall affirmance rates for all the judges in the database for the retention period. Staff then compares affirmance rates for that year against affirmance rates for prior years. Cases that are included in the calculation of these rates are only those cases that have been decided in the current retention term, which is a six year span for superior court judges and a four year span for district court judges.

Several problems are inherent with this process. First, the division of an opinion into separate "issues" is sometimes highly subjective. Some opinions have only one or two clearly defined issues and are easy to categorize. Other opinions present many main issues and even more sub-issues. Deciding whether a topic should be treated as a "sub-issue" or an "issue" deserving separate analysis can be problematic and varies depending on the complexity of a given case. Generally, the analysis follows the court's outlining of the case; if the court has given a sub-issue its own heading, the sub-issue will likely have its own affirmed/not affirmed decision.

Second, each issue is weighted equally, regardless of its effect on the case outcome, its legal importance, or the applicable standard of review. For instance, a critical constitutional law issue is weighted equally with a legally less important issue of whether a trial judge properly awarded attorney's fees. Issues that the appellate court reviews independent of the trial court's decision (*de novo* review) are weighted equally with issues that are reviewed under standards of review that defer to the trial court's discretion. The Judicial Council staff has considered ways to weigh each issue to reflect its significance but has decided not to implement a weighted analysis.

Third, appellate courts tend to affirm some types of cases more often than others. For example, criminal cases are affirmed at a higher rate than civil cases. Many criminal appeals involve excessive sentence claims that are reviewed under a "clearly mistaken" standard of review that is very deferential to the trial court's action. Criminal appeals are more likely to include issues that

¹ Cases are classified as general civil, tort, child in need of aid ("CINA"), family law/domestic relations, administrative appeal, criminal, and juvenile delinquency. If a case has issues relating to more than one category, staff decides which category predominates.

² "Criminal" includes criminal, post-conviction relief, and juvenile delinquency cases. All other cases are classified as "civil." Because the supreme court reviews administrative appeals independently of the superior court's rulings, administrative appeals are not analyzed as part of the judge's civil affirmance rate, although they are included in the database.

have less merit than issues raised in civil appeals because, unlike most civil appeals, most criminal appeals are brought at public expense. The cost of raising an issue on appeal is therefore more of a factor in determining whether an issue is raised in a civil appeal than it is in a criminal appeal. Also, court-appointed counsel in a criminal appeal must abide by a defendant's constitutional right to appeal his or her conviction and sentence unless counsel files a brief in the appellate court explaining reasons why the appeal would be frivolous. This circumstance can result in the pursuit of issues in criminal cases that have a low probability of reversal on appeal. Accordingly, a judge's affirmance rate in criminal cases is almost always higher than that judge's affirmance rate in civil cases. Judges who hear a higher percentage of criminal cases tend to have higher overall affirmance rates than those who hear mostly civil cases. For this reason, staff breaks out each judge's criminal and civil appellate rates.

Fourth, the analysis of appellate affirmance rates does not include any cases appealed from the district court to the superior court. Those decisions are not published or otherwise easily reviewable. Staff has reviewed all published decisions from the Alaska Supreme Court and Alaska Court of Appeals and unpublished Memorandum Opinion and Judgments (MO&Js) from the Alaska Supreme Court and the Alaska Court of Appeals since 2002. These decisions are published on the Alaska Court System's website and elsewhere and are easily reviewable.

Fifth, administrative appeals pose a problem. Administrative decisions are appealed first to the superior court, which acts as an intermediate appellate court.³ Those cases may then be appealed to the supreme court, which gives no deference to the superior court's decision and takes up the case *de novo*. Because the supreme court evaluates only the agency's decision, and not the superior court judge's decision, there is little value to these cases as an indicator of a judge's performance and they can be misleading. We have excluded administrative appeals from this analysis for the past several retention cycles.

Sixth, the present analysis involves only a relatively small number of cases for some judges. The fewer the number of cases in a sample, the less reliable the analysis is as an indicator of a judge's performance. Affirmance rates for judges having fewer than ten cases reviewed on appeal can be more misleading than helpful. For descriptive purposes, appellate review records are included for all judges, regardless of the number of cases reviewed. Affirmance rates based on fewer than ten cases, however, are not considered by staff as a reliable indicator of performance. In 2012, six of the fourteen superior court judges and all of the ten district court judges have fewer than ten cases.

³ The Alaska Workers Compensation Appeals Commission hears appeals from Alaska Workers' Compensation Board decisions that were decided after November 7, 2005. Those cases may then be appealed to the Alaska Supreme Court. Because workers' compensation appeals are no longer reviewed by the superior court as an intermediate court of appeal, the supreme court decisions are no longer included in this database and are not included in the "administrative appeals" category.

II. Analysis of Appellate Affirmance Rates

A. Superior Court Judges

Over the past sixteen years, affirmance rates for superior court judges had remained at about 75%. In the current retention period the overall affirmance rate crept upward to 77%. Criminal rates have ranged within eight percentage points, from 78%-85%, over eighteen years. Civil rates have mostly ranged within six percentage points, from 67%-72% with one period (1996-2001) lower, at 61%. The last several retention cycles suggest that criminal affirmance rates were trending downward since the 1998-2003 period but have recently rebounded, and that civil affirmance rates have been trending upward since 1996 and have stabilized at about 72% for the past two retention cycles. Overall, the affirmance rate of all cases has remained remarkably stable at 75-77% over the eighteen years that have been analyzed.

Overall Affirmance Rates Superior Court Judges			
Years	Criminal	Civil	Overall
1994-1999	85%	67%	75%
1996-2001	81%	61%	75%
1998-2003	82%	67%	75%
2000-2005	80%	70%	76%
2002-2007	79%	70%	75%
2004-2009	78%	72%	75%
2006-2011	81%	72%	77%

Affirmance rates for superior court judges who are standing for retention in 2012 are summarized in the following table. The table shows the number of civil cases appealed during the judge's term, the percent of issues in those cases that were affirmed by the appellate court, the number of criminal cases appealed during the judge's term, the percent of issues in those cases that were affirmed by the appellate court, and the combined civil and criminal appeals information. Comparisons of final column figures should be made carefully. As discussed above, judges with higher percentages of criminal appeals will generally have higher overall affirmance rates than those with a greater percentage of civil appeals. Comparisons between the first two columns are likely to be more meaningful. Also, judges having fewer than ten cases reviewed should not be compared with other judges. The figures for those judges are provided for descriptive purposes only.

To provide even more information for this evaluation, an overall affirmance rate has been calculated for all superior court judges, including judges not standing for retention, and retired or inactive judges, for the period in question. This comparison may provide a better performance measure than comparing retention judges against each other.

Judicial Affirmance Rates 2012 Superior Court Judges						
Judge	Criminal Affirmance		Civil Affirmance		Overall	
	Number Reviewed	Rate	Number Reviewed	Rate	Number Reviewed	Rate
Carey, Wm. Barker	3	100%	1	100%	4	100%
Cole, Steve	1	100%	0	n/a	1	100%
Heath, Gregory Louis*	7	50%	1	100%	8	56%
Huguelet, Charles	35	74%	11	44%	46	67%
Jeffery, Michael I.	6	92%	5	73%	11	83%
Lyle, Paul	2	100%	2	100%	4	100%
McConahy, Michael P.	0	n/a	0	n/a	0	n/a
Morse, Wm. F.	1	100%	32	73%	33	74%
Pfiffner, Frank A.	1	100%	2	100%	3	100%
Smith, Eric	71	76%	15	67%	86	75%
Suddock, John	31	90%	39	73%	70	81%
Tan, Sen K.	1	100%	40	79%	41	79%
Volland, Phillip R.	60	82%	4	100%	64	83%
Wolverton, Michael L.	58	72%	1	100%	59	72%
Mean affirmance rates of all superior court judges 2006 - 2011	890	81%	655	72%	1545	77%

Note: Data in shaded cells is provided for descriptive purposes only because too few cases are available for meaningful analysis.

* Six of Judge Heath's cases were decided during the time he was a district court judge.

Statistically, the smaller the number of cases in a sample, the less reliable the conclusions drawn from that are likely to be. Samples of fewer than ten cases are likely to be misleading. In the past we have taken alternative steps to help the reader evaluate appellate court review of decisions by judges with fewer than ten cases. We reviewed and discussed judges' appellate cases individually when a judge had fewer than ten cases.

For this retention cycle, almost all the judges with fewer than ten cases were 100% affirmed in all of those cases. The exception was Judge Heath.

Judge Heath: Six of Judge Heath's cases originated from his time as a district court judge. He was 100% affirmed in three cases and 0% affirmed in three cases. In one case, the court of

appeals held that Judge Heath had no authority to amend a defendant's sentence or to stay a sentence pending the defendant's appeal of a sex offender registration requirement because jurisdiction for that administrative action was in the superior court. In another case, the court of appeals reversed Judge Heath (0%), holding that the defendant's Confrontation Clause objection to some medical records evidence was timely after the witness became unavailable when she asserted her Fifth Amendment right not to incriminate herself. The court then remanded for more information about whether the statements contained in the medical records were "testimonial." After remand, Judge Heath held that the statements were not testimonial and thus did not implicate the Confrontation Clause. The court of appeals affirmed that ruling 100%. In a third case, the court of appeals held that Judge Heath failed to address the goal of rehabilitation in his sentencing remarks, vacated the sentence and remanded for resentencing.

Two of Judge Heath's cases were superior court cases. One was a child in need of aid case, which was affirmed by the supreme court at 100%. The other was a criminal case, which was affirmed by the court of appeals at 50%. In that case, the court of appeals affirmed the defendant's conviction but remanded for redetermination about whether the defendant was a third felony offender for sentencing purposes.

B. District court judges

The mean criminal affirmance rate for all district court judges from 2008-2011 was 81%. Civil appellate affirmance rates for district court judges are not meaningful because no district court judge regularly has ten or more civil cases appealed to the supreme court. District court affirmance rates have ranged from 77% - 85% over the past ten years.

Criminal Affirmance Rates District Court Judges	
Years	Mean
1998-2001	81%
2000-2003	77%
2002-2005	77%
2004-2007	85%
2006-2009	84%
2008-2011	81%

District court judges' affirmance rates are summarized in the following table. The table shows the number of criminal cases appealed to the Alaska Court of Appeals and Alaska Supreme Court during the judge's term, and the percent of issues in those cases that were affirmed by the appellate court. As discussed above, judges having fewer than ten cases reviewed should not be compared with other judges. No judge had more than ten cases in this retention period.

Judicial Affirmance Rates 2012 District Court Judges		
Judge	Criminal Affirmance	
2012 Judges: (date of appointment)	Number Reviewed	Rate
First Judicial District:		
Levy, Keith B. 1/24/05	7	100%
Nave, Thomas G. 9/10/2012	0	n/a
Third Judicial District:		
Hanley, J. Patrick 1/14/05	7	100%
Murphy, Margaret L. 4/20/05	3	60%
Schally, Daniel Appt. 1/17/05	9	89%
Swiderski, Alex M. 4/11/05	5	100%
Wallace, David R. 1/23/09	1	0%
Washington, Pamela Scott 8/9/10	0	n/a
Zwink, David 1/29/10	0	n/a
Fourth Judicial District:		
Hammers, Patrick S. 7/10/09	1	100%
Mean criminal affirmance rate of all district court judges 2008- 2011	132	81%

Note: Data within shaded cells is provided for descriptive purposes only because too few cases are available for meaningful analysis.

First Judicial District:

Judge Levy: Judge Levy's seven cases were all 100% affirmed.

Judge Nave: Judge Nave had no cases appealed and decided since his appointment.

Third Judicial District:

Judge Hanley: Judge Hanley had seven cases appealed; they were all affirmed at 100%.

Judge Murphy: Judge Murphy had three criminal cases appealed and decided. One was affirmed by the court of appeals but was later reversed (0%) by the supreme court on the issue of whether the facts constituted a seizure. In the second case, the court of appeals affirmed (100%) Judge Murphy's determination that a witness could not be compelled to testify due to the privilege against self-incrimination. A third case, involving a case in McGrath during Judge Murphy's tenure as a Magistrate in Aniak, involved a series of guiding violations. She was affirmed on all issues except the form of the judgment, which was vacated and remanded for correction (80%).

Judge Schally: Judge Schally had nine cases appealed and decided for an average of 89%. Eight cases were affirmed at 100%. One case was (not) affirmed at 0%. In that case, the court of appeals held that a four-month delay in setting a trial violated the defendant's right to a speedy trial and was not attributable to the defendant's earlier request for a continuance.

Judge Swiderski: Judge Swiderski had five cases appealed and decided, all at 100%.

Judge Wallace: Judge Wallace had one case appealed and decided at 0%. In that case, the Court of Appeals clarified that a conviction pursuant to Anchorage Municipal Code's "concealment of merchandise" (i.e. shoplifting) ordinance required the government to prove both (1) that the defendant knowingly concealed the merchandise and (2) that the defendant did so with the intent to conceal the merchandise from the rightful owner. Because of the wording of the ordinance, which stated that it was a crime if a person "knowingly conceals" merchandise, the district court instructed the jury on just the first element. The court held that it was plain error not to have instructed the jury that a conviction required the second element of criminal intent because otherwise the ordinance "would pose the constitutional problem of authorizing criminal convictions for people who had no criminal intent."

Judge Washington: Judge Washington had no cases appealed and decided since her appointment.

Judge Zwink: Judge Zwink had no cases appealed and decided since his appointment or while he was a magistrate during the district court retention period. (2008-2011).

Fourth Judicial District:

Judge Hammers: Judge Hammers had one case appealed and affirmed at 100%.