

**Alaska Judicial Council  
Summary of Performance Evaluation for:**

**Judge David L. Zwink  
Palmer District Court**

The Judicial Council finds Judge Zwink to be **qualified** and recommends unanimously that the public vote **“YES”** to retain him as a district court judge.

**Summary**

The Judicial Council’s recommendation to vote “YES” on Judge Zwink is based on his performance on many measures, including: surveys of attorneys and other professionals who have direct experience with Judge Zwink; public records; APOC files; and any disciplinary files.

In addition, the Council researched specific aspects of Judge Zwink’s performance such as how many times his decisions were affirmed on appeal, whether his pay was withheld for untimely decisions, and how often a party requested assignment of a new judge. Based on its review of all this information, the Judicial Council recommends a “YES” vote on Judge Zwink. Performance evaluation information about Judge Zwink is detailed below.

**Details**

- **Biographical Information.** Judge Zwink has been a district court judge since 2010. This is his second retention election. For more biographical information about Judge Zwink, click [here](#).
- **Survey Ratings.** People who had direct experience with the judge took a survey to rate him on qualities such as legal ability, impartiality and fairness, integrity, judicial temperament, diligence, and overall performance. These survey participants used a 1 to 5 scale to evaluate the judge’s performance, where 5.0 was “excellent,” 4.0 was “good,” 3.0 was “acceptable,” 2.0 was “deficient,” and 1.0 was “poor.”
  - ♦ **Attorney Survey Results.** Attorneys who responded to the Judicial Council’s survey on Judge Zwink’s performance gave him an average rating of 4.5 overall. For detailed attorney survey results on Judge Zwink, click [here](#).
  - ♦ **Peace and Probation Officer Survey Results.** Peace and probation officers who responded to the Judicial Council’s survey on Judge Zwink’s performance gave him an

- average rating of 3.5 overall. For detailed peace officer survey results on Judge Zwink, click [here](#).
- ◆ **Court Employee Survey Results.** Court employees who responded to the Judicial Council’s survey on Judge Zwink gave him an average rating of 4.5 overall. For detailed court employee survey results on Judge Zwink, click [here](#).
  - ◆ **Juror Survey Results.** Jurors who served on trials in Judge Zwink’s courtroom rated him 4.8 in overall performance. For detailed juror survey results on Judge Zwink, click [here](#).
- **Peremptory Challenge Rates.** Alaska law and court rules allow a party one opportunity to request assignment of a new judge. For more information about peremptory challenge rates for Judge Zwink, click [here](#).
  - **Recusal Rate.** Judges are required to step down from a case when there is a conflict of interest (for example, when the judge is related to a party or an attorney), or there is some other reason why they should not preside over the case (for example, the judge has personal knowledge of disputed facts). For more information about the number of times Judge Zwink recused himself from a case, click [here](#).
  - **Appellate Affirmance Rate.** The Council studies how often trial judges are reversed on appeal. For Judge Zwink’s performance on this item, click [here](#).
  - **Salary Withholdings.** Alaska law requires a judge’s pay to be withheld for unfinished work. No salary was withheld for Judge Zwink during this time. For general information about salary withholding, click [here](#).



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ALASKA JUDICIAL COUNCIL

# alaska judicial council

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## Alaska Judicial Council Trial Judge Questionnaire

### 2016 Candidates for Judicial Retention

October 2015

David L. Zwink

Palmer District Court

Name

Court

1. Please estimate your workload during your present term.

a) $\frac{30}{65+5}$ % civil cases	b) $\frac{19}{157+0}$ # of jury trials/year
$\frac{65}{65+5}$ % criminal cases	$\frac{157}{157+0}$ # of non-jury trials/year
$\frac{5}{65+5}$ % court administrative work	$\frac{0}{157+0}$ # of administrative appeals/year
100 % Total	

The majority of the non-jury trials are either traffic trials, which rarely include an attorney on either side, or small claims, generally between pro se litigants. Most district court civil cases have an attorney on only one side.

2. Please describe your participation on court/bar committees or other administrative activities during your current term of office.

I am a training judge for three Magistrate Judges. In addition to doing their required performance reviews and follow up training, I also have given presentations at the annual Magistrate Judges' Conferences.

3. Please assess, in one or two paragraphs, your judicial performance during your present term. Appropriate areas of comment could include: satisfaction with your judicial role, specific contributions to the judiciary or the field of law, increases in legal knowledge and judicial skills, or other measures of judicial abilities that you believe to be important.

I have been on the district court bench for almost 6 years now after having been a magistrate/standing master for 19+ years. Rather than finding my self burnt out, I am finding new challenges as both the problems in my community and the financial realities of the system continue to change. Together with some attorneys who are willing to look at a greater picture in a person's life rather than just the criminal offence for which they have been charged, I feel that we are doing more to both reinforce societal norms and get people on a path in life in which they can succeed. In my role as a training judge, not only can I share my experience with newer judicial officers, but as so often happens, when one teaches, one sharpens one's own skills. I am grateful for the opportunity.

My involvement over this past year in the Community Resources Project court, the Palmer Mental Health Court, is an incredible challenge and very rewarding. My recent work in settlement conferences to try to help resolve CINA cases, while not always completely successful, at least seems to help parties navigate through a complex and emotionally difficult situation in a manner that serves the best interests of the children involved.

4. During your most recent term as a judge, have you:
- a) had a tax lien filed or other collection procedure instituted against you by federal, state, or local authorities?  Yes  No
  - b) been involved in a non-judicial capacity in any legal proceeding whether as a party or otherwise?  Yes  No
  - c) engaged in the practice of law (other than as a judge)?  Yes  No
  - d) held office in any political party?  Yes  No
  - e) held any other local, state or federal office?  Yes  No
  - f) had any complaints, charges or grievances filed against you with the Alaska Commission on Judicial Conduct, the Alaska Bar Association, or with the Alaska Court System that resulted in public proceedings or sanctions?  Yes  No
5. If your answer to any of the questions above is "yes," please give full details, including dates, facts, case numbers and outcomes.

re: 4.b. I filed a post-divorce motion to enforce the property settlement in my divorce case, 3AN-08-12810 CI. The matter reached a stipulated resolution on March 6, 2013.

6. Please provide any other information which you believe would assist the Council in conducting its evaluations and in preparing its recommendations for the 2016 retention elections.

As we have had many new people start here in Palmer since my last retention, I have made it a point of being open to any questions and being able to offer assistance to the others here. I have tried to continue to foster a feeling of unity in this court house, particularly between the judges and the clerical staff. I believe that in that way we can better serve the community and each other here.

For questions 7 through 10 please do not list any cases that have pending issues in your court.

- 7. Please list your three most recent jury trials including case names and numbers. Please list the names, current addresses, including zip codes and suite numbers where applicable, of each attorney involved in these trials. (Attach additional pages if necessary.)

**Case Number 1**

Case Name: State of Alaska Case Number: 3PA-15-1188CR  
 v. Gordon R. Howe

**Attorneys Involved:**

Name: <u>Raymond Beard</u>	Name: <u>Jon-Marc Petersen</u>
Address: <u>515 E. Dahlia Ave. #150</u>	Address: <u>360 N. Main St.</u>
City, State, Zip: <u>Palmer, AK 99645</u>	City, State, Zip: <u>Wasilla, AK 99654</u>

Name: _____	Name: _____
Address: _____	Address: _____
City, State, Zip: _____	City, State, Zip: _____

**Case Number 2**

Case Name: State of Alaska Case Number: 3PA-15-423 CR  
 v. Jeffrey A. Estrada

**Attorneys Involved:**

Name: <u>Raymond Beard</u>	Name: <u>Michael Horowitz-supervisor</u>
Address: <u>515 E. Dahlia Ave. #150</u>	Address: <u>515 E. Dahlia Ave. #100</u>
City, State, Zip: <u>Palmer, AK 99645</u>	City, State, Zip: <u>Palmer, AK 99645</u>

Name: _____	Name: _____
Address: _____	Address: _____
City, State, Zip: _____	City, State, Zip: _____

**Case Number 3**

Case Name: State of Alaska Case Number: 3PA-14-3816 CR  
 v. Shannon Bartholomew

**Attorneys Involved:**

Name: <u>Raymond Beard</u>	Name: <u>Derek Koehler-supervisor</u>
Address: <u>515 E. Dahlia Ave. #150</u>	Address: <u>515 E. Dahlia Ave. #100</u>
City, State, Zip: <u>Palmer, AK 99645</u>	City, State, Zip: <u>Palmer, AK 99645</u>

Name: _____	Name: _____
Address: _____	Address: _____
City, State, Zip: _____	City, State, Zip: _____

- 8. Please list your three most recent non-jury trials including case names and numbers. Please list the names, current addresses, including zip codes and suite numbers where applicable, of each attorney involved in these trials. (Attach additional pages if necessary.)

**Case Number 1**

**Case Name:** State of Alaska **Case Number:** 3PA-15-1481 CR  
v. James R. Smyth

**Attorneys Involved:**

Name: <u>Raymond Beard</u>	Name: <u>Kenneth A. Norsworthy</u>
Address: <u>515 E. Dahlia Ave. #150</u>	Address: <u>711 H. ST. #410</u>
City, State, Zip: <u>Palmer, AK 99645</u>	City, State, Zip: <u>Anchorage, AK 99501</u>
Name: _____	Name: _____
Address: _____	Address: _____
City, State, Zip: _____	City, State, Zip: _____

**Case Number 2**

**Case Name:** State of Alaska **Case Number:** 3PA-14-1702 CR  
v. James Bair III

**Attorneys Involved:**

Name: <u>Raymond Beard</u>	Name: <u>Richard Payne</u>
Address: <u>515 E. Dahlia Ave. #150</u>	Address: <u>360 N. Main St.</u>
City, State, Zip: <u>Palmer, AK 99645</u>	City, State, Zip: <u>Wasilla, AK 99654</u>
Name: _____	Name: _____
Address: _____	Address: _____
City, State, Zip: _____	City, State, Zip: _____

**Case Number 3**

**Case Name:** Bruce Derstine **Case Number:** 3PA-15-472 SC  
v. Shauna Henry

**Attorneys Involved:**

Name: <u>(pro se)</u>	Name: <u>Kenneth M. Gutsch</u>
Address: _____	Address: <u>360 K. St. #200</u>
City, State, Zip: _____	City, State, Zip: <u>Anchorage, AK 99501</u>
Name: _____	Name: _____
Address: _____	Address: _____
City, State, Zip: _____	City, State, Zip: _____

- 9. Please list your three most recent cases, including case names and numbers, which did not go to trial, but on which you did significant work (such as settlement conference, hearings, motion work, etc.). Please list the names, current addresses, including zip codes and suite numbers where applicable, of each attorney involved in these cases. (Attach additional pages if necessary.)

**Case Number 1**

*Case Name:* State of Alaska *Case Number:* 3PA-15-606 CR  
*v.* Grant Salisbury

**Attorneys Involved:**

<i>Name:</i> <u>Raymond Beard</u>	<i>Name:</i> <u>Joshua Fannon</u>
<i>Address:</i> <u>515 E. Dahlia Ave. #150</u>	<i>Address:</i> <u>550 S. Alaska St. #203</u>
<i>City, State, Zip:</i> <u>Palmer, AK 99645</u>	<i>City, State, Zip:</i> <u>Palmer, AK 99645</u>
<i>Name:</i> _____	<i>Name:</i> _____
<i>Address:</i> _____	<i>Address:</i> _____
<i>City, State, Zip:</i> _____	<i>City, State, Zip:</i> _____

**Case Number 2**

*Case Name:* In re: M.I.S., J.N.S., *Case Number:* 3PA-13-154,155,156,157 CN  
*v.* K.H.S., C.M.S.

**Attorneys Involved:**

<i>Name:</i> <u>Anna Cometa</u>	<i>Name:</i> <u>Jessica Gustin</u>
<i>Address:</i> <u>515 E. Dahlia Ave. #150</u>	<i>Address:</i> <u>515 E. Dahlia Ave. #130</u>
<i>City, State, Zip:</i> <u>Palmer, AK 99645</u>	<i>City, State, Zip:</i> <u>Palmer, AK 99645</u>
<i>Name:</i> <u>Cecily Skoog-Moore (G.A.L.)</u>	<i>Name:</i> <u>Cynthia Robinson (S.W.)</u>
<i>Address:</i> <u>515 E. Dahlia Ave. #130</u>	<i>Address:</i> <u>515 E. Dahlia Ave. #150</u>
<i>City, State, Zip:</i> <u>Palmer, AK 99645</u>	<i>City, State, Zip:</i> <u>Palmer, AK 99645</u>

**Case Number 3**

*Case Name:* State of Alaska *Case Number:* 3PA-14-1416 CR  
*v.* Robert J. Klima

**Attorneys Involved:**

<i>Name:</i> <u>Raymond Beard</u>	<i>Name:</i> <u>Jeffrey Bradley</u>
<i>Address:</i> <u>515 E. Dahlia Ave. #150</u>	<i>Address:</i> <u>515 E. Dahlia Ave. #100</u>
<i>City, State, Zip:</i> <u>Palmer, AK 99645</u>	<i>City, State, Zip:</i> <u>Palmer, AK 99645</u>
<i>Name:</i> _____	<i>Name:</i> _____
<i>Address:</i> _____	<i>Address:</i> _____
<i>City, State, Zip:</i> _____	<i>City, State, Zip:</i> _____



- 10. *Optional:* If you deem it helpful to the Council, please list up to three other cases during your past term in which you believe your work was particularly noteworthy. Please list the names, current addresses, including zip codes and suite numbers where applicable, of each attorney involved in these cases. (Attach additional pages if necessary.)

**Case Number 1**

Case Name: \_\_\_\_\_ Case Number: \_\_\_\_\_  
 v. \_\_\_\_\_

**Attorneys Involved:**

Name: _____	Name: _____
Address: _____	Address: _____
City, State, Zip: _____	City, State, Zip: _____

Name: _____	Name: _____
Address: _____	Address: _____
City, State, Zip: _____	City, State, Zip: _____

**Case Number 2**

Case Name: \_\_\_\_\_ Case Number: \_\_\_\_\_  
 v. \_\_\_\_\_

**Attorneys Involved:**

Name: _____	Name: _____
Address: _____	Address: _____
City, State, Zip: _____	City, State, Zip: _____

Name: _____	Name: _____
Address: _____	Address: _____
City, State, Zip: _____	City, State, Zip: _____

**Case Number 3**

Case Name: \_\_\_\_\_ Case Number: \_\_\_\_\_  
 v. \_\_\_\_\_

**Attorneys Involved:**

Name: _____	Name: _____
Address: _____	Address: _____
City, State, Zip: _____	City, State, Zip: _____

Name: _____	Name: _____
Address: _____	Address: _____
City, State, Zip: _____	City, State, Zip: _____

**Table 58**  
**David Zwink**  
**Demographic Description of Respondents**

	<i>n</i>	<i>%</i>
<b>All respondents</b>	<b>110</b>	<b>100.0</b>
<b>Experience with Judge</b>		
Direct professional experience	93	84.5
Professional reputation	11	10.0
Other personal contacts	6	5.5
<b>Detailed Experience*</b>		
Recent experience (within last 5 years)	86	92.5
Substantial amount of experience	39	41.9
Moderate amount of experience	33	35.5
Limited amount of experience	21	22.6
<b>Type of Practice</b>		
No response	1	0.9
Private, solo	18	16.4
Private, 2-5 attorneys	19	17.3
Private, 6+ attorneys	5	4.5
Private, corporate employee	1	0.9
Judge or judicial officer	32	29.1
Government	25	22.7
Public service agency or organization	1	0.9
Retired	5	4.5
Other	3	2.7
<b>Length of Alaska Practice</b>		
No response	1	0.9
5 years or fewer	11	10.0
6 to 10 years	13	11.8
11 to 15 years	11	10.0
16 to 20 years	14	12.7
More than 20 years	60	54.5
<b>Cases Handled</b>		
No response	1	0.9
Prosecution	5	4.5
Mainly criminal	16	14.5
Mixed criminal & civil	52	47.3
Mainly civil	30	27.3
Other	6	5.5
<b>Location of Practice</b>		
No response	1	0.9
First District	1	0.9
Second District	1	0.9
Third District	101	91.8
Fourth District	6	5.5
Outside Alaska	-	-
<b>Gender</b>		
No response	1	0.9
Male	67	60.9
Female	42	38.2

\*Only among those respondents reporting direct professional experience with the judge.

**Table 59**  
**David Zwink**  
**Detailed Responses**

		<b>Legal Ability</b>	<b>Impartiality/ Fairness</b>	<b>Integrity</b>	<b>Judicial Temperament</b>	<b>Diligence</b>	<b>Overall</b>
	<i>n</i>	<i>M</i>	<i>M</i>	<i>M</i>	<i>M</i>	<i>M</i>	<i>M</i>
All respondents	110	4.2	4.4	4.5	4.4	4.3	4.4
<b>Basis for Evaluation</b>							
<b>Direct professional experience</b>	93	4.2	4.4	4.5	4.5	4.4	4.5
Experience within last 5 years	86	4.2	4.4	4.6	4.5	4.4	4.5
Experience not within last 5 years	5	3.8	4.4	4.2	4.0	4.5	3.8
Substantial amount of experience	39	4.3	4.5	4.7	4.6	4.4	4.6
Moderate amount of experience	33	4.0	4.3	4.4	4.3	4.2	4.4
Limited amount of experience	21	4.3	4.4	4.6	4.4	4.5	4.3
Professional reputation	11	4.1	4.1	4.4	4.4	4.2	4.1
Other personal contacts	6	4.2	4.3	4.0	4.3	4.2	4.2
<b>Type of Practice*</b>							
Private, solo	18	4.3	4.5	4.5	4.5	4.5	4.5
Private, 2-5 attorneys	16	3.9	4.3	4.3	4.2	4.0	4.4
Private, 6+ attorneys	4	4.8	5.0	5.0	4.8	5.0	5.0
Private, corporate employee	-	-	-	-	-	-	-
Judge or judicial officer	27	4.2	4.4	4.6	4.4	4.3	4.4
Government	20	4.2	4.4	4.6	4.6	4.5	4.5
Public service agency or organization	1	5.0	3.0	4.0	4.0	4.0	4.0
Retired	4	4.5	4.8	5.0	4.8	4.3	4.5
Other	2	4.5	4.5	5.0	5.0	4.5	5.0
<b>Length of Alaska Practice*</b>							
5 years or fewer	9	4.6	4.6	4.9	4.9	4.7	4.8
6 to 10 years	12	3.9	4.4	4.4	4.2	4.3	4.4
11 to 15 years	10	4.5	4.4	4.6	4.6	4.6	4.6
16 to 20 years	11	4.5	4.7	4.6	4.7	4.5	4.7
More than 20 years	50	4.1	4.3	4.5	4.3	4.3	4.3
<b>Cases Handled*</b>							
Prosecution	4	3.5	3.5	3.8	3.5	3.8	3.5
Criminal	15	4.4	4.5	4.9	4.7	4.6	4.7
Mixed criminal & civil	47	4.2	4.4	4.5	4.4	4.2	4.4
Civil	22	4.3	4.5	4.5	4.4	4.6	4.5
Other	4	4.0	4.8	5.0	5.0	4.5	4.8
<b>Location of Practice*</b>							
First District	-	-	-	-	-	-	-
Second District	-	-	-	-	-	-	-
Third District	87	4.2	4.4	4.6	4.4	4.4	4.5
Fourth District	5	4.8	4.4	4.6	4.6	4.6	4.6
Outside Alaska	-	-	-	-	-	-	-
<b>Gender*</b>							
Male	61	4.3	4.4	4.6	4.4	4.4	4.4
Female	31	4.1	4.4	4.5	4.5	4.4	4.5

\*Ratings from only those respondents reporting direct professional experience with the judge.

**Table 52**  
**David Zwink**  
**Demographic Description of Respondents**

	<i>n</i>	<i>%</i>
<b>All respondents</b>	<b>40</b>	<b>100.0</b>
<b>Experience with Judge</b>		
Direct professional experience	36	90.0
Professional reputation	3	7.5
Other personal contacts	1	2.5
<b>Detailed Experience*</b>		
Recent experience (within last 5 years)	33	91.7
Substantial amount of experience	10	27.8
Moderate amount of experience	19	52.8
Limited amount of experience	7	19.4
<b>Type of Work</b>		
No response	-	-
State law enforcement officer	35	87.5
Municipal/Borough law enforcement officer	2	5.0
Village Public Safety Officer (VPSO)	-	-
Probation/Parole officer	3	7.5
Other	-	-
<b>Length of Time as Alaskan Officer</b>		
No response	-	-
5 years or fewer	7	17.5
6 to 10 years	4	10.0
11 to 15 years	15	37.5
16 to 20 years	8	20.0
More than 20 years	6	15.0
<b>Community Population</b>		
No response	-	-
Under 2,000	2	5.0
Between 2,000 and 35,000	3	7.5
Over 35,000	35	87.5
<b>Location of Work</b>		
No response	-	-
First District	-	-
Second District	-	-
Third District	37	92.5
Fourth District	3	7.5
Outside Alaska	-	-
<b>Gender</b>		
No response	-	-
Male	36	90.0
Female	4	10.0

\*Only among those respondents reporting direct professional experience with the judge.

**Table 53**  
**David Zwink**  
**Detailed Responses**

		<b>Impartiality/ Fairness</b>	<b>Integrity</b>	<b>Judicial Temperament</b>	<b>Diligence</b>	<b>Overall Evaluation</b>
	<i>n</i>	<i>M</i>	<i>M</i>	<i>M</i>	<i>M</i>	<i>M</i>
All respondents	40	3.3	3.7	3.4	3.6	3.4
<b>Basis for Evaluation</b>						
<b>Direct professional experience</b>	<b>36</b>	<b>3.4</b>	<b>3.7</b>	<b>3.4</b>	<b>3.7</b>	<b>3.5</b>
Experience within last 5 years	33	3.3	3.7	3.4	3.7	3.5
Experience not within last 5 years	3	3.7	4.0	3.7	3.7	3.7
Substantial amount of experience	10	3.1	3.5	3.4	3.7	3.4
Moderate amount of experience	19	3.7	3.9	3.7	3.7	3.8
Limited amount of experience	7	3.0	3.7	2.7	3.4	2.9
Professional reputation	3	2.3	2.3	2.3	2.7	2.3
Other personal contacts	1	5.0	5.0	5.0	5.0	5.0
<b>Type of Work*</b>						
State law enforcement officer	32	3.2	3.6	3.3	3.6	3.4
Municipal/Borough law enforcement officer	2	5.0	5.0	5.0	5.0	5.0
Village Public Safety Officer (VPSO)	-	-	-	-	-	-
Probation/Parole officer	2	5.0	5.0	4.5	4.5	4.5
Other	-	-	-	-	-	-
<b>Length of Time as Alaskan Officer*</b>						
5 years or fewer	6	3.3	3.7	3.2	3.0	3.3
6 to 10 years	3	3.7	4.3	4.7	4.7	4.3
11 to 15 years	13	3.4	3.6	3.2	3.8	3.3
16 to 20 years	8	2.6	3.3	2.9	3.3	3.0
More than 20 years	6	4.2	4.3	4.0	4.0	4.2
<b>Community Population*</b>						
Under 2,000	2	3.0	3.5	4.0	3.0	3.0
Between 2,000 and 35,000	3	4.0	4.5	4.0	4.5	4.0
Over 35,000	31	3.4	3.7	3.3	3.6	3.5
<b>Location of Work*</b>						
First District	-	-	-	-	-	-
Second District	-	-	-	-	-	-
Third District	34	3.4	3.8	3.4	3.7	3.5
Fourth District	2	3.0	3.5	4.0	3.0	3.0
Outside Alaska	-	-	-	-	-	-
<b>Gender*</b>						
Male	33	3.4	3.7	3.4	3.6	3.5
Female	3	3.3	4.0	3.3	4.0	3.7

\*Ratings from only those respondents reporting direct professional experience with the judge.

**Table 52**  
**David Zwink**  
**Description of Respondents' Experience**

	<i>n</i>	<i>%</i>
<b>All respondents</b>	<b>37</b>	<b>100.0</b>
<b>Experience with Judge</b>		
Direct professional experience	27	73.0
Professional reputation	7	18.9
Other personal contacts	3	8.1
<b>Detailed Experience*</b>		
Recent experience (within last 5 years)	26	96.3
Substantial amount of experience	16	59.3
Moderate amount of experience	9	33.3
Limited amount of experience	2	7.4

\*Only among those respondents reporting direct professional experience with the judge.

**Table 53**  
**David Zwink**  
**Detailed Responses**

	<i>n</i>	<b>Impartiality/ Fairness</b> <i>M</i>	<b>Integrity</b> <i>M</i>	<b>Judicial Temperament</b> <i>M</i>	<b>Diligence</b> <i>M</i>	<b>Overall Evaluation</b> <i>M</i>
All respondents	37	4.6	4.5	4.6	4.4	4.5
<b>Basis for Evaluation</b>						
<b>Direct professional experience</b>	<b>27</b>	<b>4.6</b>	<b>4.6</b>	<b>4.6</b>	<b>4.4</b>	<b>4.5</b>
Experience within last 5 years	26	4.7	4.6	4.6	4.5	4.5
Experience not within last 5 years	-	-	-	-	-	-
Substantial amount of experience	16	4.8	4.6	4.7	4.4	4.6
Moderate amount of experience	9	4.4	4.6	4.4	4.7	4.4
Limited amount of experience	2	4.0	4.0	4.5	4.0	4.0
Professional reputation	7	4.3	4.1	4.3	4.1	4.1
Other personal contacts	3	5.0	5.0	5.0	5.0	5.0



# alaska judicial council

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## MEMORANDUM

**TO:** Judicial Council  
**FROM:** Staff  
**DATE:** August 3, 2016  
**RE:** Juror Survey Report

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The Alaska Judicial Council surveyed all jurors who sat in trials during 2014 and 2015. The jurors sat before the 30 trial court judges eligible to stand for retention in 2016. A total of 1,837 jurors responded on Council-provided postcards that judges distributed to jurors at the end of each trial (see attached example). Jurors completed the surveys on the postage-paid cards and mailed them to the Council.

Council staff entered the data from the surveys and ran basic descriptive statistics. This memorandum summarizes the findings. It is distributed to Council members and judges, and posted on the Council's website.

Table 1 shows the distribution of jurors by type of trial reported for each judge. Some jurors only wrote comments and did not rate the judge on the specific variables. Thus, there may be more respondents shown on Table 1 than appear on the judges' individual tables.

Judge	Civil	Criminal	No Answer	Total
Eric A. Aarseth	20	20	2	42
Douglas L. Blankenship	0	4	1	5
Matthew Christian	14	32	4	50
Leslie N. Dickson	12	40	7	59
Catherine M. Easter	67	12	3	82
David V. George	17	88	12	117
Patrick S. Hammers	14	17	4	35
J. Patrick Hanley	4	9	0	13
Bethany S. Harbison	0	49	3	52
Jennifer Stuart Henderson	10	29	2	41
Jane F. Kauvar	30	16	0	46
Kari Kristiansen	8	63	3	74
Michael A. MacDonald	25	46	4	75
Erin B. Marston	56	13	4	73
Dwayne W. McConnell	1	51	9	61
Anna M. Moran	13	68	0	81
Margaret L. Murphy	0	35	1	36
Thomas G. Nave	11	22	5	38
Philip M. Pallenberg	1	12	1	14
Nathaniel Peters	3	58	11	72
Mark Rindner	21	21	3	45
Kevin Saxby	0	74	3	77
Daniel Schally	7	46	6	59
Jack W. Smith	4	198	3	205
Trevor Stephens	12	39	5	56
Alex M. Swiderski	7	62	5	74
David R. Wallace	2	76	2	80
Pamela Scott Washington	6	29	2	37
Vanessa H. White	0	67	7	74
David Zwink	2	59	3	64



Table 2 shows the distribution of number of days served, as reported by the jurors. Sixty-Eight percent of the jurors served fewer than five days.

<b>Table 2: Distribution of Days Served</b>		
<b>Number of Days Served</b>	<b>%</b>	<b>N</b>
1 - 2 Days	26%	481
3 - 4 Days	42%	770
5 - 7 Days	16%	287
8 - 10 Days	6%	104
11 - 20 Days	6%	111
21 or More Days	1%	22
No Answer	3%	62
Total		1837

**Individual Results**

Table 3 shows each judge’s mean rating for each question on the survey. Each judge’s individual survey results are provided in separate tables. Jurors used a five-point scale, with *excellent* rated as five, and *poor* rated as one. The closer the jurors' ratings were to five, the higher that judge's evaluation by the jurors. The last column shows the total number of jurors who evaluated the judge on at least one variable.

**Table 3**  
**Mean Rating for each Variable and for “Overall Performance,” by Judge**  
 Alaska Judicial Council 2016 Retention Juror Survey

	Impartiality & Fairness	Respectful & Courteous	Attentive During Proceedings	Control During Proceedings	Intelligence & Skill as a Judge	Overall Mean	Total Respon.
Eric A. Aarseth	4.9	5.0	4.7	4.8	4.9	4.9	42
Douglas L. Blankenship	4.8	4.8	4.8	4.8	4.8	4.8	4
Matthew Christian	4.9	4.9	4.9	4.9	4.9	4.9	50
Leslie N. Dickson	4.8	4.9	4.7	4.7	4.8	4.8	58
Catherine M. Easter	4.9	5.0	4.9	4.9	4.9	4.9	82
David V. George	4.9	4.9	4.8	4.8	4.9	4.9	116
Patrick S. Hammers	4.9	4.9	4.9	4.9	4.9	4.9	35
J. Patrick Hanley	4.8	4.9	4.8	4.8	4.8	4.9	13
Bethany Spalding Harbison	4.9	4.9	4.9	4.9	4.9	4.8	52
Jennifer Stuart Henderson	5.0	5.0	5.0	5.0	5.0	5.0	41
Jane F. Kauvar	4.8	4.8	4.8	4.8	4.8	4.8	46
Kari Kristiansen	4.8	4.8	4.8	4.8	4.8	4.8	74
Michael A. MacDonald	4.9	4.9	4.9	4.9	4.9	4.9	75
Erin B. Marston	5.0	5.0	4.9	5.0	5.0	4.9	73
Dwayne W. McConnell	4.6	4.7	4.6	4.7	4.7	4.7	61
Anna M. Moran	4.7	4.9	4.8	4.6	4.8	4.8	81
Margaret L. Murphy	4.9	5.0	4.9	4.9	4.8	4.9	36
Thomas G. Nave	4.9	4.9	4.8	4.8	4.9	4.9	38
Philip M. Pallenberg	4.9	5.0	4.9	4.7	4.9	4.9	14
Nathaniel Peters	4.5	4.7	4.6	4.6	4.6	4.7	72
Mark Rindner	5.0	5.0	4.8	4.9	5.0	5.0	45
Kevin Saxby	4.9	5.0	4.7	4.9	4.9	4.9	77
Daniel Schally	4.8	4.8	4.8	4.8	4.8	4.8	59
Jack W. Smith	4.9	4.9	4.9	4.9	4.9	4.9	204
Trevor Stephens	4.9	5.0	4.9	5.0	5.0	5.0	56
Alex M. Swiderski	4.9	4.9	4.9	4.9	4.9	4.9	74
David R. Wallace	4.9	5.0	4.9	4.9	4.9	4.9	80
Pamela Scott Washington	4.9	4.9	4.9	4.9	4.9	4.9	37
Vanessa H. White	4.9	4.9	4.8	4.8	4.9	4.9	74
David Zwink	4.9	4.9	4.6	4.8	4.9	4.8	64

**Juror Survey Results  
2016 Retention Evaluation  
David Zwink**

<b>Survey Category</b>	<b>Mean</b>	<b>Excellent (5)</b>	<b>Good (4)</b>	<b>Acceptable (3)</b>	<b>Deficient (2)</b>	<b>Poor (1)</b>	<b>Total Responses</b>
Impartiality / Fairness	4.9	57	7	-	-	-	64
Respectful / Courteous	4.9	56	8	-	-	-	64
Attentive During Proceedings	4.6	47	11	5	1	-	64
Control Over Proceedings	4.8	51	12	1	-	-	64
Intelligence / Skill as a Judge	4.9	57	7	-	-	-	64
Overall Evaluation	4.8	54	10	-	-	-	64



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## MEMORANDUM

**TO:** Judicial Council  
**FROM:** Staff  
**DATE:** August 3, 2016  
**RE:** Peremptory Challenges of Judges Eligible for Retention in 2016

---

### **I. Introduction**

In Alaska, a defendant has a right to a fair trial before an unbiased judge and the right to preempt a judge without proving bias or interest.<sup>1</sup> Two different authorities govern the challenge right. The legislature created the substantive right and defines its scope by statute.<sup>2</sup> The court regulates peremptory challenge procedures by court rules.<sup>3</sup> In general, each side in a case gets one peremptory challenge.<sup>4</sup>

This memo examines peremptory challenge records for judges who are eligible to stand for retention in November 2016. The tables display civil and criminal case challenges for each judge, by year. Because superior court judges' terms are six years, a six year period is examined for them. Because district court judges' terms are four years, a four year period is examined for them. Parties have no right to challenge an appellate judge, so those judges are not discussed.

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<sup>1</sup>See Gieffels v. State, 552 P.2d 661 (Alaska 1976).

<sup>2</sup>See id.; AS 22.20.020.

<sup>3</sup>See Alaska R. Crim. P. 25(d); Alaska R. Civ. P. 42(c).

<sup>4</sup>See id.

## II. Context for evaluating peremptory challenge data

Although the peremptory challenge provisions were designed to ensure each litigant's right to a hearing by a fair and impartial judge, in practice many factors prompt litigants or attorneys to challenge judges. Some parties might challenge a judge because they perceive the judge to be unfair in a certain type of case, while others might challenge a judge because they perceive the judge to be "too fair," and hope their case will be reassigned to a judge who they perceive as being more favorable to their case. Such a scenario can be especially relevant in smaller judicial districts and communities, where attorneys often can predict which other judge will receive the reassigned case. Other reasons parties might challenge judges include unfamiliarity with a new judge or seeking to avoid the demands of a judge who insists on high standards of practice or timeliness. Sometimes an attorney will use a peremptory challenge with the hope that a change of judge will result in additional time to prepare the case.

The Alaska Court System provides the Council with data regarding "disqualifications." The data are categorized into disqualifications brought in criminal cases by defense attorneys or prosecutors, those brought in civil cases by plaintiffs or defendants, and those initiated by the judges themselves. Judge-initiated disqualifications are discussed in a separate memorandum. Children's delinquency cases are included among criminal cases in this analysis because that is how they are accounted for in the court's case management system. Child in Need of Aid cases are included in the civil category.

Please note that in Child in Need of Aid cases, guardians ad litem and parents have the right to preempt the judge. These are noted as "other" on the following charts. Please also note that a CINA "case" that a judge may handle may include several consolidated cases, because each child in a family is assigned a different case number. So if a judge receives a peremptory challenge in a consolidated CINA case, challenges are recorded for each individual child's case, magnifying the effect of challenges in CINA cases.

For the first time, one system was used for compiling the disqualification data. Over the past twelve years, the court has instituted a computerized case management system (CourtView) that has facilitated the collection and reporting of more detailed and accurate data for all court locations in the state. All of the CourtView data were compiled and reported by the Alaska Court System to the Alaska Judicial Council.

Care must be taken when comparing judges because they have different caseloads. Judges with higher-volume caseloads generally will have more peremptory challenges than those with lower-volume caseloads. Presiding judges sometimes ease one court's heavy caseload by assigning cases to judges from other venues within their judicial district, and to *pro tem* judges. Moreover, superior courts with heavy caseloads may ease their burden somewhat by assigning the bulk of a case to masters and/or magistrates. Similarly, district court judges may have very different caseloads. Cases may be handled by magistrates as well as by district court judges. The court system's caseload data do not reflect when a judge regularly travels to another community to hear cases. Finally, consideration must be taken of judges who handle predominately criminal or predominately civil caseloads, as judges in Anchorage do, versus those judges who handle all cases.

Parties who have not previously exercised their right of peremptory challenge may challenge a judge when one is newly assigned midstream, as if their case had been newly filed. Consequently, challenges often increase when a judge is assigned to a different caseload (e.g., from civil to criminal). Challenges also often occur when a new judge is appointed because those judges are newly assigned to existing cases and because that judge is “unknown” and thus less predictable. Another factor to consider is that some communities have only one or two assistant district attorneys or assistant public defenders. If an assistant DA or PD perceives a reason to categorically challenge a particular judge, that judge’s criminal peremptory challenge rate will be high, even though just one or two attorneys might be responsible for virtually all of that judge’s challenges. This may also occur in high-volume civil cases that involve only a few public attorneys, such as in Child in Need of Aid practice.

Care must also be taken when comparing judges across judicial districts. In 1995, the Anchorage Superior Court consolidated into civil and criminal divisions. Since then, all civil cases (including domestic relations, Child in Need of Aid, and domestic violence protective order cases) have been assigned equally to each of the Anchorage Superior Court judges in the civil division. Criminal division judges handle criminal and child delinquency cases, but do not routinely handle domestic cases. For this reason, it may be misleading to compare the peremptory challenges of a superior court judge in Anchorage with the rate of a superior court judge in another judicial district. Also, some judges in some judicial districts currently handle the therapeutic courts, such as Wellness Court. The impact of those caseloads on a judge’s challenge rate is unknown.

Because so many factors may potentially affect the number of peremptory challenges filed, these numbers should only be used as a signal of a potential issue with a judge. Once a high number of challenges is identified from the table, please refer to the explanatory text on the following pages which gives context for the judge’s caseload and potential factors which may have affected his or her challenge rates.

In the following tables:

- “d” signifies “defendant” in both criminal and civil cases;
- “p” signifies “plaintiff” in civil cases and “prosecutor” in criminal cases;
- “oth” signifies “other”.

Blank spaces in the tables represent years that preceded the judge’s appointment to his or her current position.

Peremptory Challenge Memorandum

August 3, 2016

Page 4

A. Superior Court

Judicial District	Judge	2010		2011		2012		2013		2014		2015		Judge Statistics			Summary Statistics	
		Total		Total		Total		Total		Total		Total		Total	Mean	Median	District	All
		Civ	Crim	Civ	Crim	Civ	Crim	Civ	Crim	Civ	Crim	Civ	Crim					
First	George, David V	0	2d	1d 3p	0	1d 1p 2oth	1d	3d 1p	0	2p	4d	2d 3p	6d	--	--	--	Mean 4.1 Median 4 Min/Max 0/11	
	Pallenberg, Philip M	1p	2d 1p	0	5p	1d 2p	0	1d 4p	0	7d 4p	0	4d 1p 2oth	0	--	--	--		
	Stephens, Trevor N	2d	1d	0	2d	0	0	0	0	0	1d	0	0	--	--	--		
Third	Aarseth, Eric A	14d 18p 7oth	1p	2d 11p 3oth	0	4d 12p 2oth	1d 1p	1d 5p 1oth	2d	5d 5p	4d	7p	0	--	--	--	Mean 31.8 Median 18 Min/ Max 1/189	Mean 34.8 Median 18 Min/ Max 0/189
	Easter, Catherine M	--	--	--	--	11d 8p	0	5d 5p	0	7d 4p	0	9d 9p	0	--	--	--		
	Kristiansen, Kari C	9d 14p 6oth	6d 154p	4d 8p 4oth	72p	8d 24p 15oth	4d	11d 43p 21oth	32d 9p	6d 51p 5oth	10d 21p	9d 44p 4oth	2d 23p	--	--	--		
	Marston, Erin B	--	--	--	--	--	--	1d 3p 3oth	0	1d 2p	0	4d 3p	0	--	--	--		
	Moran, Anna M	2d 4p	44d 1p	4d 11p 4oth	26d 1p	14d 1p 9oth	3d 2p	4d 7p 6oth	3p	4d 2p	6d 4p	2d 8p 7oth	7d	--	--	--		
	Rindner, Mark	12d 11p 1oth	0	7d 12p 1oth	0	7d 14p 1oth	0	3d 13p 2oth	0	7d 10p	0	5d 8p 4oth	0	--	--	--		
	Saxby, Kevin M	--	--	--	--	4d 5p 1oth	0	1d 7p	20d	1p	4d	1p	34d	--	--	--		
	Smith, Jack W	0	1p	0	6p	0	13d 1p	0	9d	1p	2d	1d	3d	--	--	--		
	White, Vanessa H	1d 2p 5oth	6d	7p 1oth	12d	1d 3p	2d 5p	1d 3p	5d 3p	2d 4p 45oth	59d	3d 8p 58oth	38d	--	--	--		
	Fourth	Blankenship, Douglas L	1d 20p 19oth	17d 7p	1d 64p 9oth	5d 11p	1d 35p 7oth	28d 10p	5d 24p 11oth	16d 3p	9d 27p	32d 7p	6d 74p 23oth	17d 23p	--	--		
Harbison, Bethany		--	--	--	--	--	--	4d 7p 12oth	5d 1p	1d 5p 4oth	3d 17p	6d 6p 2oth	2d 6p	--	--	--		
Kauvar, Jane F		1d 2p	4d 3p	2d 1p	3d 90p	3p	6d 68p	8d 17p	6d 21p	14d 14p 1oth	4d 43p	5d 15p 1oth	1d 69p	--	--	--		
MacDonald, Michael A		2d 5p	6d 1p	10d 11p 1oth	4d 7p	5d 11p	4d 1p	10d 7p 2oth	0	5d 7p 3oth	2d	9d 8p 12oth	12d	--	--	--		
McConnell, Dwayne W		--	--	--	--	2d 4p 2oth	17d	2d 12p 21oth	106d	5d 14p 19oth	141d 2p	4d 6p 9oth	62d	--	--	--		

Civ = Civil

Crim = Criminal

-- = No value or statistic not applicable

d = defendant in both criminal and civil cases

p = plaintiff in civil cases and prosecutor in criminal cases

oth = other

**Overall:** The average number of peremptory challenges for the superior court judges on the ballot for 2016 was 35 per year. The average number of peremptory challenges for the superior court judges on the ballot for recent years has ranged from a low of 27 (2010) to a high of 36 (2006 and 2008).

### **First Judicial District:**

The judges standing for retention in the First Judicial District all had lower than average peremptory challenges. This is typical for First Judicial District Judges.

### **Second Judicial District:**

No judges are standing for retention in the Second Judicial District in 2016.

### **Third Judicial District:**

Only two Superior Court judges standing for retention in the Third Judicial District experienced unusually high peremptory challenges: Judge Kari Kristiansen and Judge Vanessa White. Both are judges on the Palmer Superior Court. In both cases, peremptory challenge practices of local attorneys played a significant role in the reasons they were challenged. These practices suggest that attorneys in Palmer may use peremptory challenges for strategic reasons that may not necessarily reflect on the judges' performance.

**Judge Kari Kristiansen:** Judge Kristiansen received frequent peremptory challenges. Her mean was 103 per year and her median was 91 per year. In some years she received many challenges from the state in criminal cases. In 2010 she received 160 criminal challenges; 154 were from the state. In 2011 she received 72 challenges in criminal cases and 72 were from the state. But in 2013 she received 41 challenges in criminal cases, and only 9 were from the state. In civil cases, the challenges were well distributed across all party types until 2014 and 2015, when she began receiving more challenges from the state in CINA cases (42 of 62 civil challenges in 2014, and 37 of 57 in 2015). Staff review indicated that in 2010-2011 the state prosecutors had implemented a "blanket preempt" policy against Judge Kristiansen but the state rescinded the policy in 2012.

**Judge Vanessa White:** Judge White's peremptory challenges were lower than average for 2010, 2011, 2012, and 2013. They were extremely high in 2014 and 2015, largely due to challenges from criminal defense attorneys and from non-state parties (parents and *guardians ad litem*) in child in need of aid cases.

### **Fourth Judicial District:**

Peremptory challenge rates tend to be higher in the Fourth Judicial District. Although the statewide average is typically 27-36 per year, the Fourth Judicial District mean for superior court judges standing for retention was 63 per year. By this measure, two judges experienced high peremptory challenges: Judge Blankenship in Fairbanks and Judge McConnell in Bethel.

**Judge Douglas L. Blankenship:** Judge Blankenship received an average of 85 peremptory challenges per year; the mean for the Fourth Judicial District was 63. He received many peremptory challenges in civil cases from the state in CINA cases, although that pattern has fluctuated from a low of 9 in 2013 to a high of 67 in 2015. He tends to receive more challenges from defense in criminal cases than from prosecutors.



**Judge Dwayne McConnell:** Judge McConnell received a mean of 107 challenges per year since his appointment. In his first full year he had 141, in his second he had 181. In 2016 he had only 81. The mean for superior court judges in the Fourth Judicial District was 63. The majority of the Judge McConnell’s challenges come from defendants in criminal cases. These likely come because he was formerly a prosecutor, and perhaps because the criminal defense bar perceived that the other Bethel Superior Court Judge or another Fourth District judge would be more favorable.

B. District Court

District Court														
Judicial District	Judge	2012		2013		2014		2015		Judge Statistics			Summary Statistics	
		Total		Total		Total		Total		Total	Mean	Median	District	All
		Civ	Crim	Civ	Crim	Civ	Crim	Civ	Crim					
First	Nave, Thomas G	1		1		5		1		8	2.0	1.0	See Judge Statistics	
		1d	0	0	1p	1d 2p	2d	1d	0	--	--	--		
Third	Dickson, Leslie N	--		9		6		10		25	8.3	9.0	Mean 24.5 Median 7.5 Min/Max 0/186	Mean 25.5 Median 8.0 Min/Max 0/186
		--	--	2d 3p	1d 3p	2d 2p	2d	2d 3p	5p	--	--	--		
	Hanley, James Patrick	0		0		1		4		5	1.3	0.5		
		0	0	0	0	1p	0	1p	3p	--	--	--		
	Henderson, Jennifer S	--		16		8		12		36	12.0	12.0		
		--	--	1d	15d	1d	7d	2p	10d	--	--	--		
	Murphy, Margaret L	7		7		10		38		62	15.5	8.5		
		0	7d	0	7d	1d 3p	6d	24p 40th	9d 1p	--	--	--		
	Schally, Daniel	1		1		0		0		2	0.5	0.5		
		1d	0	1d	0	0	0	0	0	--	--	--		
Swiderski, Alex M	53		6		33		47		139	34.8	40.0			
	4d 49p	0	2p	3d 1p	2d 27p	2d 2p	42p	3d 2p	--	--	--			
Wallace, David R	1		1		4		5		11	2.8	2.5			
	0	1d	0	1p	2p	1d 1p	2p	3p	--	--	--			
Washington, Pamela Scott	36		73		11		31		151	37.8	33.5			
	1d 33p	2d	6d 66p	1d	2d 3p	4d 2p	12d 10p	7d 2p	--	--	--			
Zwink, David L	7		54		154		186		401	100.3	104.0			
	1d	3d 3p	1p	53p	0	154p	1p	1d 184p	--	--	--			
Fourth	Christian, Matthew C	--		--		39		42		81	40.5	40.5	Mean 41.6 Median 40.5 Min/Max 3/107	
		--	--	--	--	1p	3d 35p	0	42p	--	--	--		
	Hammers, Patrick S	48		63		107		23		241	60.3	55.5		
1d		46d 1p	2d 1p	60d	1d 3p	101d 2p	2d 3p	18d	--	--	--			
Peters, Nathaniel	--		--		8		3		11	5.5	5.5			
	--	--	--	--	0	7d 1p	0	3d	--	--	--			

Civ = Civil  
Crim = Criminal  
-- = No value or statistic not applicable

d = defendant in both criminal and civil cases  
p = plaintiff in civil cases and prosecutor in criminal cases  
oth = other

**Overall:** The average number of peremptory challenge for a district court judge appearing on the ballot in 2016 was 29. From 2006 to 2012 the average ranged from 13-17. In 2014 the average was 64, which was very atypical.

**First Judicial District:**

District Court judges in the First Judicial District received very few peremptory challenges.

**Second Judicial District:**

The Second Judicial District has no district court judges.

**Third Judicial District:**

District Court Judges in the Third Judicial District received an average of 25 peremptory challenges per year, slightly less than the average of 29 per year statewide. Three judges had high average peremptory challenges:

**Judge Alex Swiderski (Anchorage):** Judge Swiderski received an average of 35 challenges per year. These came mostly from plaintiffs in civil cases. Judge Swiderski explained that the challenges came almost entirely from one law firm, which represented landlords in eviction cases.

**Judge Pamela Washington (Anchorage):** Judge Washington received an average of 38 challenges per year. These came mainly in 2012 and 2013 from plaintiffs in civil cases.

**Judge David Zwink (Palmer):** Judge Zwink had only seven challenges in 2012, but he had 54 in 2013, 154 in 2014, and 186 in 2015. The challenges in the last three years of review came almost entirely from prosecutors in criminal cases. Judge Zwink explained that the Palmer District Attorney's office had started blanket preempting him in DUI cases.

**Fourth Judicial District:**

As was the case for superior court, district court judges in the Fourth Judicial District received a higher average than judges statewide - 42 challenges per year compared to statewide average of 29 per year.

**Judge Patrick Hammers:** Judge Hammers received 60 challenges per year. These came mostly in 2012 - 2014 from defendants in criminal cases. In 2015 he received only 23 peremptory challenges.



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## MEMORANDUM

**TO:** Judicial Council  
**FROM:** Staff  
**DATE:** August 8, 2016  
**RE:** Recusal Records of Judges Eligible for Retention in 2016

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### **I. Introduction**

One tool that the Judicial Council uses for evaluating judges is a judge's record of self-disqualification from cases, or "recusals." Judges are required to disclose potential reasons for disqualification and then step down from cases when there is a conflict. If a judge's activities prevent him or her from sitting on an inordinate number of cases, however, that judge may not be as effective as other judges in handling his or her caseload. This memo examines recusal records of those judges who are eligible for retention in 2016.

## **II. Context for interpreting data**

Alaska Statute 22.20.020 sets forth the matters in which a judge may not participate. Judges may not act in matters: when the judge is a party; when the judge is related to a party or an attorney; when the judge is a material witness; when the judge or a member of the judge's family has a direct financial interest; when one of the parties has recently been represented by the judge or the judge's former law firm; or when the judge for any reason feels that a fair and impartial decision cannot be given. Judicial officers must disclose any reason for possible disqualification at the beginning of a matter.

Alaska Code of Judicial Conduct Canon 3E presents even broader bases for recusal. The canon states that a judge is disqualified whenever the judge's impartiality might reasonably be questioned. The rule also requires a judge to disclose on the record any information that the parties or their lawyers might consider relevant to the question of disqualification, even if the judge believes there is no real basis for disqualification. The canon provides examples, including instances when the judge has a personal bias or prejudice concerning a party or an attorney, the judge has personal knowledge of the disputed facts, the judge or the judge's former law partner served as a lawyer in the matter in controversy, or when the judge knows that he or she, or the judge's spouse, parent, or child has an economic or other interest in the matter, or is likely to be a material witness in the proceeding.

Canon 4 requires judges to conduct their extra-judicial activities so as to comply with the requirements of the Code and so that the activities do not cast reasonable doubt on the judge's capacity to act impartially as a judge, demean the judicial office, or interfere with the proper performance of judicial duties. Canon 4 restricts a judge's activities so as to minimize the instances that would require disqualification.

Conflicts and resulting disqualifications are unavoidable. Judges must recuse themselves when conflicts arise. Recusals do not necessarily indicate that a judge has failed to sufficiently regulate his or her extra-judicial activities. Only very high disqualification rates should trigger an inquiry about whether a judge is comporting him or herself so as to perform his or her judicial duties effectively.

The following tables list the number of instances each judge recused him or herself in the preceding six (for superior court judges) and four (for district court judges) years. Blank cells indicate that the judge had not yet been appointed to his or her current position.

**III. Recusal Records - Superior Court Judges**

Superior Court																		
Judicial District	Judge	2010		2011		2012		2013		2014		2015		Judge Statistics			Summary Statistics	
		Total		Total		Total		Total		Total		Total		Total	Mean	Median	District	All
		Civ	Crim	Civ	Crim	Civ	Crim	Civ	Crim	Civ	Crim	Civ	Crim					
First	George, David V	1	0	1	0	0	0	5	0	1	0	3	0	11	1.8	1.0	Mean 2.6 Median 2.5 Min/Max 0/6	
	Pallenberg, Philip M	2	0	3	1	4	0	5	1	4	0	4	1	25	4.2	4.0		
	Stephens, Trevor N	3	2	3	0	0	0	0	2	0	0	0	1	11	1.8	1.5		
Third	Aarseth, Eric A	7	0	5	0	3	0	0	0	5	2	4	0	26	4.3	4.5	Mean 3.8 Median 3.0 Min/Max 0/21	Mean 4.8 Median 3.0 Min/Max 0/36
	Easter, Catherine M	--	--	--	--	6	0	2	0	4	0	4	0	16	4.0	4.0		
	Kristiansen, Kari C	7	0	4	1	6	0	2	1	5	2	7	5	40	6.7	6.5		
	Marston, Erin B	--	--	--	--	--	--	6	0	4	0	6	0	16	5.3	6.0		
	Moran, Anna M	3	1	4	0	2	1	3	0	1	1	0	0	16	2.7	3.0		
	Rindner, Mark	4	0	5	0	5	0	2	0	2	0	3	0	21	3.5	3.5		
	Saxby, Kevin M	--	--	--	--	1	0	0	3	1	0	0	0	5	1.3	1.0		
	Smith, Jack W	0	0	0	0	1	0	0	0	0	0	1	0	2	0.3	0.0		
	White, Vanessa H	3	0	0	1	0	0	7	1	0	2	18	3	35	5.8	2.5		
	Blankenship, Douglas L	2	6	2	1	0	0	1	2	3	0	1	0	18	3.0	3.0		
Fourth	Harbison, Bethany	--	--	--	--	--	--	35	1	8	1	4	3	52	17.3	9.0	Mean 8.0 Median 4.0 Min/Max 0/36	
	Kauvar, Jane F	1	2	1	5	0	0	1	0	2	2	5	0	19	3.2	3.5		
	MacDonald, Michael A	11	4	8	0	7	1	18	1	21	2	28	2	103	17.2	17.0		
	McConnell, Dwayne W	0	0	0	0	14	3	2	2	1	1	0	1	24	4.0	1.5		
		0	0	0	0	14	3	2	2	1	1	0	1	--	--	--		

Civ = Civil  
 Crim = Criminal  
 -- = No value or statistic not applicable

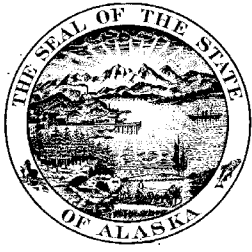
Overall, the recusal rates for superior court judges eligible for retention election in 2016 are unremarkable. Newly appointed judges frequently have a higher recusal rate their first year or two on the bench, and then the number of recusals sharply declines. In this group of superior court judges, Judge Harbison experienced that pattern, recusing herself 36 times in 2013 (her first full year on the superior court bench) and infrequently after that. All other superior court judges who will appear on the ballot recused themselves infrequently except for Judge MacDonald in Fairbanks, who averaged about seventeen recusals per year, mostly in civil cases, due to his many community and family ties in Fairbanks.

**IV. Recusal Records - District Court Judges**

District Court																
Judicial District	Judge	2012		2013		2014		2015		Judge Statistics			Summary Statistics			
		Total		Total		Total		Total		Total	Mean	Median	District	All		
		Civ	Crim	Civ	Crim	Civ	Crim	Civ	Crim							
First	Nave, Thomas G	2		2		2		1		7	1.8	2.0	See Judge Statistics	Mean 3.0 Median 1.0 Min/Max 0/41		
		1	1	1	1	2	0	1	0	--	--	--				
Third	Dickson, Leslie N	--		0		3		4		7	2.3	3.0	Mean 3.5 Median 1.0 Min/Max 0/41			
	Hanley, James Patrick	--		0		3		4		3	0.8	0.0				
	Henderson, Jennifer S	--		41		25		1		67	22.3	25.0				
	Murphy, Margaret L	0		0		4		0		5	1.3	0.5				
	Schally, Daniel	0		0		1		0		1	0.3	0.0				
	Swiderski, Alex M	2		0		1		2		5	1.3	1.5				
	Wallace, David R	0		1		0		1		2	0.5	0.5				
	Washington, Pamela Scott	1		3		1		3		8	2.0	2.0				
	Zwink, David L	3		6		9		2		20	5.0	4.5				
		0	3	1	5	1	8	1	1	--	--	--				
	Fourth	Christian, Matthew C	--		--		0		1		1	0.5			0.5	Mean 1.8 Median 1.5 Min/Max 0/4
		Hammers, Patrick S	2		4		3		0		9	2.3			2.5	
Peters, Nathaniel		2		3		0		0		--	--	--				
		--		--		3		1		4	2.0	2.0				
		--	--	--	--	2	1	0	1	--	--	--				

Civ = Civil  
 Crim = Criminal  
 -- = No value or statistic not applicable

With one exception, district court judges recused themselves infrequently, which is typical. The exception was Judge Henderson, who recused herself frequently from civil cases in her first and second year on the bench but only one time in 2015. The recusal data for the other district court judges standing for retention in 2016 was unremarkable.



# alaska judicial council

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## MEMORANDUM

**TO:** Judicial Council  
**FROM:** Staff  
**DATE:** August 3, 2016  
**RE:** Appellate Evaluation of Judges Eligible for Retention in 2016

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### **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,<sup>1</sup> 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,”<sup>2</sup> 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.

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<sup>1</sup> 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.

<sup>2</sup> “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.



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 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.<sup>3</sup> 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 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.

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<sup>3</sup> 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.

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.

## II. Analysis of Appellate Affirmance Rates

### A. Superior Court Judges

For sixteen years, overall affirmance rates for superior court judges had remained at about 75%. For the last three retention periods, however, the overall affirmance rate has crept upward to 79%. Criminal rates have ranged within eight percentage points, from 78%-85%, over twenty-two 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 indicate that criminal affirmance rates were trending downward since the 1998-2003 period but have recently rebounded, and that civil affirmance rates trended upward beginning in 1996, stabilized at 71%-72% for three retention cycles, and then jumped up to 75% in the recent cycle. Overall, the affirmance rate of all cases was stable at about 75% until 2006, when the rates began climb to the current rate of 79%.

<b>Overall Affirmance Rates Superior Court Judges</b>			
<b>Years</b>	<b>Criminal</b>	<b>Civil</b>	<b>Overall</b>
<b>1994-1999</b>	85%	67%	75%
<b>1996-2001</b>	81%	61%	75%
<b>1998-2003</b>	82%	67%	75%
<b>2000-2005</b>	80%	70%	76%
<b>2002-2007</b>	79%	70%	75%
<b>2004-2009</b>	78%	72%	75%
<b>2006-2011</b>	81%	72%	77%
<b>2008-2013</b>	82%	71%	77%
<b>2010-2015</b>	82%	75%	79%

Affirmance rates for superior court judges who are standing for retention in 2016 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 2016 Superior Court Judges						
	Criminal Affirmance		Civil Affirmance		Overall	
	Number Reviewed	Rate	Number Reviewed	Rate	Number Reviewed	Rate
<b>First Judicial District</b>						
George, David V	12	79%	9	51%	21	67%
Pallenberg, Philip M	22	99%	15	77%	37	90%
Stephens, Trevor N	11	97%	5	71%	16	89%
<b>Second Judicial District</b>						
n/a						
<b>Third Judicial District</b>						
Aarseth, Eric A	21	88%	34	66%	55	74%
Easter, Catherine M	2	98%	7	81%	9	85%
Kristiansen, Kari C	24	82%	18	81%	42	82%
Marston, Erin B	1	0%	7	86%	8	75%
Moran, Anna M	12	91%	15	85%	27	87%
Rindner, Mark	2	100%	35	81%	37	82%
Saxby, Kevin M	3	67%	2	100%	5	80%
Smith, Jack W	35	86%	10	71%	45	83%
White, Vanessa H	25	93%	26	69%	51	81%
<b>Fourth Judicial District</b>						
Blankenship, Douglas L	12	100%	13	82%	25	91%
Harbison, Bethany	3	33%	4	75%	7	57%
Kauvar, Jane F	1	100%	--	--	1	100%
MacDonald, Michael A	15	80%	16	91%	31	86%
McConnell, Dwayne W	2	100%	1	100%	3	100%
Number and mean affirmance rates, superior court judges 2010 - 2015	248	84%	272	77%	520	80%

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

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, six of the superior court judges eligible for retention had fewer than ten cases. These were all judges newly appointed to the superior court.

**Judge Catherine Easter:** Judge Easter had two criminal cases reviewed. One was affirmed at 100%. One was mostly affirmed at 95% but ultimately remanded:

Lepping v. State, A-10935 (July 2, 2014) (95%). The court of appeals upheld most of Judge Easter's rulings (23 of which were on appeal) but remanded the case for clarification of a single probation condition because it was too broad and because it unnecessarily restricted the defendant's association with friends and family.

Judge Easter had seven civil cases appealed and decided. Three were child in need of aid cases which were 100% affirmed. One family law case was also 100% affirmed. One tort case was 100% affirmed. Two cases were reversed or partly reversed:

Lieutenant Governor of the State of Alaska v. Alaska Fisheries Conservation Alliance, Inc., S-15662 (General civil; December 31, 2015) (0%). In this case a group of sponsors of a ballot initiative sued the Lieutenant Governor for declining to certify a ballot initiative concerning commercial salmon setnetters. Judge Easter granted summary judgment in favor of the initiative sponsors. The supreme court reversed, finding that the Lieutenant Governor had properly declined the initiative because the initiative would result in an improper allocation of salmon stock to other fisheries and would violate the Alaska Constitution's prohibition on appropriation via initiative.

Guerro v. Guerrero, S-15340 (Family; September 18, 2015) (67%). In this family law case the supreme court affirmed Judge Easter's decisions (1) not to divide the husband's military disability retirement pay and not to issue a Qualified Marital Relations Order and (2) to force the sale of the marital home. It reversed her decision to not re-open the property division under Rule 60(b)(6) for exceptional circumstances and remanded the case for an equitable marital property distribution, while vacating the award of attorney's fees.

**Judge Bethany Harbison:** Judge Harbison had four cases affirmed at 100%: two family cases, a criminal case, and a CINA case. Three cases were entirely reversed and/or remanded (0%):

State v. Stidson, A-11734 (Criminal; February 20, 2015). Judge Harbison ruled that AS 12.45.045(a), the "rape shield" statute, was unconstitutional because it did not contain a good cause exception to the statutory deadline that would allow a court to consider a mid-trial application to present evidence of a complaining witnesses sexual history. The Court of Appeals reviewed the statute's legislative history and concluded that the statute included a good cause exception and was thus not unconstitutional.

Geisinger v. State, A-11881 (Criminal; September 26, 2014). Judge Harbison granted a motion to dismiss a petition for post-conviction relief, concluding it was untimely because the statute of limitations was not tolled while the defendant pursued a sentence appeal. The court of appeals reversed, concluding that the statute of limitations is tolled while a defendant pursues an appeal of either a conviction or sentence.

Sagers v. Alaska Fast Cash, S-15360 (Tort; August 26, 2015). In this case, Judge Harbison approved a minor settlement of a personal injury case. The father of the victim appealed, arguing that the superior court abused its discretion by approving the attorney's fees in the settlement, which totaled over 50% of the settlement amount. The supreme court concluded that the superior court did not have enough evidence before it to determine whether the attorney's fees were reasonable and remanded the case for an evidentiary hearing.

**Judge Erin B. Marston:** Judge Marston had seven civil cases reviewed with an affirmance rate of 86%. Six of his civil cases were affirmed at 100%. One was reversed.

Becker v. Fred Meyer, S-15314, 6962 (Tort; October 16, 2014). The supreme court reversed Judge Marston's grant of summary judgment for an employer, concluding that the employee had raised genuine issues of material fact about whether a loss prevention policy manual created a contract and about whether similarly situated employees were treated differently.

He had one criminal case reviewed and reversed:

Selvester v. State, A-11746, 2452 (May 8, 2015). The court of appeals reversed Judge Marston's review of a writ of habeas corpus from a criminal defendant because the defendant could have sought relief using normal trial court or appellate procedures.

**Judge Dwayne McConnell:** Judge McConnell had two criminal cases and one civil case reviewed. All were affirmed at 100%.

**Judge Kevin Saxby:** Judge Saxby had five cases reviewed. His two civil cases were affirmed at 100%. He had two criminal cases affirmed at 100%. One criminal case was reversed:

Alaska Public Defender Agency v. Superior Court, Third Judicial District, Anchorage, A-12053 (February 27, 2015). In this case, the court was asked to consider whether the statute enabling the Alaska Public Defender Agency allowed appointment as "standby" or "advisory" counsel in criminal cases in which defendants have waived their constitutional right to counsel. The court found that the statute did not authorize the agency to act in that role and vacated Judge Saxby's appointment of public defender counsel.

## B. District court judges

The mean criminal affirmance rate for all district court judges from 2012-2015 was 84%. 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 fifteen 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%
2010-2013	79%
2012-2015	84%

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.

Judicial Affirmance Rates 2016 District Court Judges		
	Criminal Affirmance	
	Number Reviewed	Rate
<b>First Judicial District</b>		
Nave, Thomas G	2	100%
<b>Third Judicial District</b>		
Dickson, Leslie N	3	100%
Hanley, James Patrick	3	83%
Murphy, Margaret L	2	100%
Schally, Daniel	4	50%
Swiderski, Alex M	2	100%
Wallace, David R	2	100%
Washington, Pamela S	5	80%
Zwink, David L	9	80%
<b>Fourth Judicial District</b>		
Hammers, Patrick S	2	100%
Number and mean affirmance rates, district court judges 2012 - 2015	34	84%

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

As discussed above, judges having fewer than ten cases reviewed should not be compared with other judges. In the current retention period, no district court judge had more than ten cases.

**Judge J. Patrick Hanley:** Judge Hanley had three criminal cases. Two were 100% affirmed. One was 50% affirmed:

Maupin v. State, A-11224 (November 26, 2014). In this case the defendant was convicted of repeat minor consuming alcohol. The defendant argued on appeal that she had not waived her right to a jury trial on the prior conviction element of the offense, and that the district court abused its discretion when it did not allow her to introduce evidence of her boyfriend's domestic violence toward her to support her claim that she falsely confessed so that the police would take her into custody. The court of appeals reversed and remanded on the jury trial issue because Judge Hanley did not obtain a personal waiver but relied on a stipulation from counsel. But the court of appeals held that any error in the limitation of evidence was harmless.

**Judge Daniel Schally:** Judge Schally had four criminal cases reviewed. Two were reversed:

Brandon v. State, A-12057. In this case Judge Schally granted the state's motion to dismiss a petition for post-conviction relief. The state conceded error because the judge erred by granting the motion to dismiss without waiting for an attorney to appear on the petitioner's behalf and giving the attorney an opportunity to respond to the state's motion.

Hicks v. State, A-10820 (2015). Here the court of appeals initially found that Judge Schally made an "obvious error" by failing to instruct the jury on the requirement that its verdict be factually unanimous, although there had been no objection to the jury instruction by defense counsel. The court of appeals, however, found no "plain error" by the district court because the defense had not proven that it did not object due to non-tactical reasons. The supreme court reversed the court of appeals, concluding that the burden of proving a tactical reason for not objecting should be on the state, and that a tactical reason may not be presumed from a silent record. The supreme court remanded the case to the court of appeals. On remand, the court of appeals found that Judge Schally committed plain error, the error involved a constitutional right, and that the error prejudiced the defendant. It therefore reversed the conviction.

**Judge Pamela Washington:** Judge Washington had five cases reviewed. Four were affirmed and one was reversed:

Carson v. Municipality of Anchorage, A-11222 (March 27, 2013). In this case Judge Washington failed to instruct a jury in a municipal "refusal" case that the municipal code required a defendant to have a mental state of "recklessness" as to the fact that he/she was required to submit to a breath test (state law requires only negligence). The municipality conceded error and the court of appeals reversed the conviction.

**Judge David Zwink:** Judge Zwink had nine criminal cases reviewed and decided. Three were reversed or partly reversed:



Johnnie v. Alaska, A-11258 (December 4, 2013). Here Judge Zwink accepted a DUI plea agreement. He then imposed a sentence containing an enhanced fine, finding that the offense had been committed in a traffic safety corridor. The defendant objected, arguing that he had not admitted that his offense occurred in a traffic safety corridor. The court of appeals agreed with the defendant because the judge had not clearly ascertained whether the defendant's plea included an admission of the disputed fact, and it vacated the fine portion of the sentence.

Fyfe v. State, A-11058 (August 29, 2014) (50% affirmed). In this case Judge Zwink again imposed an enhanced (double the mandatory \$10,000) fine for DUI based on a traffic safety corridor. The defendant argued that the legislature did not intend to require courts to impose double fines for DUIs in traffic safety corridors. The court of appeals reviewed the legislative history and agreed, vacating the \$20,000 fine. But the court of appeals upheld Judge Zwink's admission of evidence verifying the Datamaster alcohol test machine, concluding that the admission of the evidence did not violate the defendant's Six Amendment right to confront the witnesses against him even though the individual performing the verifications and reports did not testify.

Cohen v. State A-11075 (November 4, 2015). In this case the court of appeals affirmed an evidentiary ruling and the sufficiency of evidence for conviction of the defendant, but concluded that Judge Zwink should have merged the offenses of theft and issuing a bad check and entered only one conviction (and sentence) because the protected society values were the same, and the offenses were based on a single physical transaction.





# alaska judicial council

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## Salary Warrant Withholding

Alaska law states: "A salary disbursement may not be issued to a [justice or judge] until the [justice or judge] has filed with the state officer designated to issue salary disbursements an affidavit that no matter referred to the [justice or judge] for opinion or decision has been uncompleted or undecided by the judge for a period of more than six months." As soon as the judge completes or decides the matter and signs the affidavit, the salary warrant may be issued.

No appellate judge had any salary warrants withheld. The appellate judges on the 2016 ballot are Supreme Court Justice Peter Maassen, Supreme Court Justice Joel Bolger, and Court of Appeals Judge Marjorie Allard.

Of the sixteen superior court judges on the ballot in 2016, two had pay withheld during the evaluation period:

Judge Pallenberg had four salary warrants withheld during the evaluation period:

<u>Pay period</u>	<u>Regular warrant date:</u>	<u>Late Pay issued:</u>
2/29/2012	3/9/2012	3/13/2012
1/15/2013	1/25/2013	1/31/2013
2/15/2015	2/24/2015	3/2/2015
3/31/2015	4/9/2015	4/13/2015

Judge White had two salary warrants withheld during the evaluation period:

<u>Pay period</u>	<u>Regular warrant date:</u>	<u>Late Pay issued:</u>
10/31/2010	10/09/2010	11/24/2010
2/15/2011	2/24/2011	3/8/2011

Judges Eric Aarseth, Catherine Easter, David George, Bethany Harbison, Jane Kauvar, Kari Kristiansen, Michael MacDonald, Erin Marston, Dwayne McConnell, Anna Moran, Mark Rindner, Kevin Saxby, Jack Smith, and Trevor Stephens had no salary warrants withheld.

No district court judge appearing on the 2016 ballot had salary warrants withheld. The district court judges on the 2016 ballot are Matthew Christian, Patrick Hammers, J. Patrick Hanley, Jennifer Henderson, Margaret Murphy, Thomas Nave, Nathaniel Peters, Daniel Schally, Alex Swiderski, David Wallace, Pamela Washington, and David Zwink.