



alaska judicial council

510 L Street, Suite 450, Anchorage, Alaska 99501-1295 (907) 279-2526 FAX (907) 276-5046
http://www.ajc.state.ak.us E-Mail: postmaster@ajc.state.ak.us

MEMORANDUM

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

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

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.

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.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 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

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.

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%.

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%
2008-2013	82%	71%	77%
2010-2015	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
First Judicial District						
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%
Second Judicial District						
n/a						
Third Judicial District						
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%
Fourth Judicial District						
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
First Judicial District		
Nave, Thomas G	2	100%
Third Judicial District		
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%
Fourth Judicial District		
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.