M E M O R A N D U M

TO: Judicial Council

FROM: Staff

DATE: April 19, 2000

RE: Appellate Review Rates for Judges Eligible for Retention in 2000

I. Context for Interpreting the Appellate Review Data

Evaluating a judge's performance by how often he or she is affirmed (or reversed) on appeal is problematic. A threshold issue involves the definition of the term "affirmed." As an example, consider an appeal from a complex civil case with fifteen different issues. If the appellate court affirms on fourteen issues but reverses on one relatively inconsequential issue, should that case be considered to have been affirmed or reversed? Would the answer be different if the single issue on which the appellate court reversed the trial court's decision substantially changed the outcome of the case? For the 2000 retention evaluation, we have refined our analysis of judicial affirmance rates. Instead of categorizing entire cases as affirmed or reversed (or "partly affirmed"), we have determined judicial affirmance rate based on the issues on which each trial judge was affirmed or reversed by the appellate courts. For instance, if an appeal involved four issues of relatively similar complexity, and the reviewing court affirmed the trial court on three issues but reversed on one issue, the case is considered to be 75% affirmed. In determining a judge's affirmance rate, each appellate case, regardless of its complexity, has equal weight. As an illustration, a judge who has three cases appealed, who is 100% affirmed in the first case, 75% affirmed in the second case, and 0% affirmed in the third case would appear in the tables below with a 58% affirmance rate $(100 + 75 + 0) \div 3 = 58.3$).

A second issue with interpreting appellate affirmance data is that some types of cases generally are affirmed more often than other types, regardless of the trial court judge. Notably, criminal cases are affirmed on appeal more frequently than civil cases. Criminal case affirmance rates range from about 70% to 95%, while civil case affirmance rates range from about 50% to 80%.[1] One explanation for the different outcomes on appeal is that criminal law is less complex than civil law, and therefore criminal case rulings depend less on interpretation of the law and more on the specific facts of the case. According to this explanation, because the standard of review for findings of fact is less rigorous than the standard of review for proper interpretation of the law, appellate courts find fewer reversible errors in criminal cases. Another explanation hinges on the fact that most criminal appeals are filed at public expense by court-appointed counsel (AS 22.07.020 and AS 18.85.100 guarantee criminal defendants the right to appeal, and the right to be represented by counsel at public expense if the defendant cannot afford to pay), while most civil appeals are pursued by private parties, and are litigated at the parties' expense. Thus, the cost of filing and briefing appeals might deter civil litigants from appealing cases which have a marginal chance of success on appeal, whereas these considerations might not deter criminal defendants from appealing equally marginal cases. A third explanation is that many criminal appeals consist wholly or partly of sentencing issues, a relatively clear-cut area in which trial court decisions are not often reversed. Whatever the explanation, a judge's criminal case affirmance rate is generally higher than his or her civil case affirmance rate, and affirmance rates of judges who hear mostly criminal cases are generally higher than the rates of judges who hear mostly civil cases.

Another problem with appellate affirmance data is that our information about appealed cases decided is not complete for every judge. This is especially true for the district court judges' cases, because civil matters and many criminal matters heard by district court judges are appealed to the superior court. *Our analysis does not include any district court cases appealed to the superior court.*

A final issue in interpreting appellate affirmance data involves the small number of cases we must deal with. The fewer the cases in a sample, the less reliable will be the results of any statistical analysis. We find that calculating affirmance rates for judges with fewer than ten cases reviewed on appeal is misleading more often than it is helpful. For the sake of completeness all retention judges'

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[1]These numbers are higher overall than numbers reported in previous retention election memoranda because of the different way in which affirmance rates have been calculated. In earlier years, cases were classified as affirmed or reversed without regard to individual issues within a case. The current method is intended to reflect more accurately the appellate courts' review of trial judges' decisions.

appellate records are included in the charts below; however, only records based on ten or more cases should be thought of as statistically meaningful. Affirmance rates based on fewer than ten cases (which are thus not statistically reliable) are indicated by brackets.

II. Analysis of Appellate Records

The tables below summarize the outcomes of all cases decided by judges who are eligible for retention in 2000, which were reviewed by the Court of Appeals or the Alaska Supreme Court during the judges' most recent terms in office.[2] Superior court judges' affirmance rates are summarized in the first table and district court judges' rates are summarized in the second table. The superior court table shows the number of civil cases appealed during the judge's term, the percent of those cases that were affirmed by the appellate court, the number of criminal cases appealed during the judge's term, the percent of those cases that were affirmed by the appellate court, and the combined civil and criminal appeals information. (Comparisons based on this final column should be viewed with care. As discussed above, judges with higher percentages of criminal appeals will generally "look" better in this column than judges with higher percentages of civil appeals. Comparisons based on the first two columns are more likely to be meaningful.) Since appeals from district court civil cases are heard by the superior court, the district court table shows only appeals in criminal matters taken directly to the Court of Appeals. Also given for comparison purposes are the average affirmance figures for all superior and district court judges who are eligible for retention in 2000. (A useful figure to have had for comparison would be the average affirmance rates for *all* judges, including judges not standing for retention this year. Due to limitations in our data set, these figures could not be determined exactly. However, a rough calculation shows that for each case type this figure would be 2% to 5% lower than the average for judges standing for retention this year).

[2] The tables include data from published opinions and unpublished Memorandum Opinion & Judgments (MO&Js), which are used by the Alaska Court of Appeals and, to a lesser extent, by the Alaska Supreme Court to dispose summarily of cases containing routine or straightforward issues. See Alaska Rule of Appellate Procedure 214.

APPELLATE AFFIRMANCE RATES FOR SUPERIOR COURT JUDGES
RETENTION EVALUATION 2000

	Civil Cases		Criminal Cases		All Cases	
Judge	**Number of appeals**	**% Affirmed**	**Number of appeals**	**% Affirmed**	**Number of appeals**	**% Affirmed**
Average of Judges Shown on this Table	21	65%	25	85%	45	75%
Andrews	21	73%	63	94%	84	89%
Brown	12	71%	5	[75%]	17	72%
Curda	13	71%	73	77%	86	76%
Erlich	10	74%	23	97%	33	90%
Esch	1	[0%]	15	80%	16	75%
Fabe**	35	64%	6	[96%]	41	68%
Gonzalez	51	59%	47	84%	98	71%
Greene	40	81%	36	85%	76	83%
Hensley	4	[74%]	1	[0%]	5	[59%]
Hopwood	28	56%	20	73%	48	63%
Link	28	57%	39	80%	67	70%
Michalski	83	63%	16	72%	99	64%
Sanders	3	[50%]	28	86%	31	82%
Smith	6	[47%]	11	91%	17	75%
Tan	8	[40%]	0	n/a	8	[40%]
Torrisi	0	n/a	1	[100%]	1	[100%]
Weeks	28	67%	41	96%	69	84%
Wolverton**	14	52%	16	74%	30	64%
Zervos	14	83%	20	88%	34	86%

*This table includes published opinions and MO&Js issued from 1994 through 1999. Percentages enclosed in brackets are based on too few cases to be considered reliable.
**Justice Fabe's affirmance figures reflect cases appealed from her decisions as a superior court judge, before her appointment to the Supreme Court. Judge Wolverton's figures reflect cases he decided as a superior court judge and cases he decided as a district court judge, before his appointment to the superior court .

APPELLATE AFFIRMANCE RATES FOR DISTRICT COURT JUDGES RETENTION EVALUATION 2000

	Criminal Cases	
Judge	**Number of appeals**	**% Affirmed**
Average of Judges Shown on this Table	11	86%
Ashman	17	94%
Finn	19	84%
Wanamaker	19	88%
Lombardi	4	[100%]
Bolger	0	n/a
Funk	0	n/a
Wood	28	81%

*This table includes published opinions and MO&Js issued from 1994 through 1999. Rates enclosed in brackets are based on too few cases to be considered reliable.

A. Judges With Ten or More Appealed Cases

Of the judges eligible to stand for retention this year who had ten or more appealed cases, none appears to have a significant problem with appellate reversals. Thirteen of the twenty-seven judges had ten or more civil cases appealed during their most recent terms in office. These judges were affirmed between 52% and 83% of the time. Given the different methods used to calculate affirmance rates, it is difficult to compare these figures with those from previous retention evaluations. However, the affirmance rates for these judges compare favorably with the pool of all judges with ten or more cases appealed over the same time period (including judges not standing for retention this year). The rates for all judges range from 36% to 83% affirmed.

Nineteen judges had ten or more criminal cases appealed. These judges were affirmed between 72% and 97% of the time. This compares favorably with the rates for all judges with ten or more cases appealed over the same time period (including judges not standing for retention this year), which range between 61% and 97% affirmed.

Staff reviewed appeals from judges whose affirmance rates for either case type were 10% or more below the average for the 2000 retention judges, to determine if those judges had an unusual number of cases reversed on the basis of clear error or abuse of judicial discretion. No such trends were apparent.

B. Judges With Fewer Than Ten Appealed Cases

Statistically, the smaller the number of cases in a sample, the less reliable the conclusions drawn from that sample are likely to be. Our experience is that samples of fewer than ten cases are apt to be misleading when applied to judicial affirmance/reversal records. We have therefore taken alternative steps to help evaluate appellate court review of decisions by judges with fewer than ten cases appealed during their most recent term.[3] This memorandum briefly reviews and summarizes the cases appealed from these judges, including appellate decisions released so far in the year 2000 (data included in the tables is limited to decisions released between 1994 and 1999).

Judge Tan: Judge Tan had nine cases appealed (including one decision released in 2000);

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[3]These judges were each appointed between 1996 and 1998, and all are standing for retention for the first time.

all were civil matters. Three of his cases were entirely affirmed, four were entirely reversed (one by unpublished Memorandum Opinion and Judgment (MO&J), and two were partly affirmed.

Of the three totally affirmed cases, one was an unremarkable appeal from a state licensing board decision in which Judge Tan upheld the sanction of a doctor for professional incompetence, one was an employment discrimination/civil rights case involving numerous issues which the defendant (Wal-Mart) aggressively argued in the Supreme Court, and the third was a highway easement case in which the Supreme Court adopted and incorporated Judge Tan's written decision on the dispositive issue.

Of the two cases that were partly affirmed and partly reversed, one was a divorce case in which the Supreme Court affirmed Judge Tan on two of four property division issues, and the other was Bess v. Ulmer, 985 P.2d 979 (Alaska 1999), in which the Supreme Court explored for the first time the differences between revising and amending the Alaska Constitution. In his ruling, Judge Tan compared the three proposed legislative resolves to earlier Constitutional amendments, and he determined that each of the resolves would amend, rather than revise, the Constitution. His ruling would have allowed all three resolves to go forward. In reviewing this decision de novo, the Supreme Court fashioned a "hybrid . . . quantitative/qualitative analysis," under which one of the legislative resolves was found to be an allowable amendment, one had a sentence excised by the Supreme Court as "surplusage," and was then found to be an allowable amendment, and one was found to be a disallowable revision. Neither the majority nor the dissenting opinion commented on Judge Tan's decision or his analysis.

Two of Judge Tan's four totally reversed cases were unremarkable. In the first case Judge Tan erroneously dismissed a real property action on res judicata grounds; in an MO&J the Supreme Court summarily overturned Judge Tan's decision. The second decision was an insurance reimbursement case. Judge Tan construed a statute to require dismissal of an action against two of the defendants, but the Supreme Court construed the statute to allow the action to go forward.

The third reversed decision, In re J.A., 962 P.2d 173 (Alaska 1998), involved the definition of "probable cause" in CINA cases. Judge Tan held that the facts presented in the case did not establish probable cause that the child was in imminent and substantial risk of physical harm, and he ordered the child returned to the custody of the parents. Although the Supreme Court reversed Judge Tan on this issue, Justices Matthews and Compton agreed with Judge Tan; each wrote a dissent, and each joined the other's dissent.

Finally, Judge Tan authored one decision that the Supreme Court reversed on the basis that the judge had abused his discretion. The case involved a business dispute that, at the time of its dismissal, had been in the superior court for two years. Judge Tan initially denied a motion to dismiss the case on forum non conveniens grounds. Then, 14 months later and seven months before trial was to begin, he granted the renewed motion. The Supreme Court faulted Judge Tan for dismissing the case when "only two of the five [forum non conveniens] factors were even marginally relevant," and went on to state that since the case had proceeded as far as it had, forum non conveniens was largely a moot issue anyway. The court also ruled that Judge Tan abused his discretion in an ancillary discovery issue in the case. The Supreme Court's decision, Baypack Fisheries v. Nelbro Packing Co., 992 P.2d 1116 (Alaska 1999), is appended to this memorandum.

Judge Torrisi: Judge Torrisi had a single case appealed this term. It was a criminal commercial fishing violation case in which Judge Torrisi was affirmed on both issues by the Court of Appeals in an unpublished MO&J.

Judge Hensley: Judge Hensley had eight cases appealed (including three decisions released so far in 2000); all were civil matters. Four of his cases were entirely affirmed (two by MO&J), two were entirely reversed, and two were partly affirmed.

Two of the four totally affirmed cases were unremarkable (a child support modification matter and a summary statute of limitations dismissal). In the third case Judge Hensley upheld a decision by a school district denying special education services to a student. In an MO&J, the Supreme Court affirmed Judge Hensley, "[f]or the reasons stated in Judge Hensley's careful and thorough Decision and Order . . . ." The fourth affirmed case involved a challenge to a Department of Fish and Game regulation allowing limited salmon roe stripping of hatchery salmon. The Supreme Court unanimously affirmed Judge Hensley's decision on several minor issues, and on an issue of statutory construction that Justice Matthews' opinion characterized as a "close and difficult" question.

One of Judge Hensley's two cases that was partially affirmed involved an award of alimony and division of property. The Supreme Court affirmed Judge Hensley on numerous issues, and remanded on a single issue. The other case was more notable. It involved a plaintiff's personal injury claim against an airline. Judge Hensley excluded certain expert testimony, and gave conflicting instructions regarding negligence to the jury. The four members of the Supreme Court who reviewed the case split evenly over whether exclusion of the expert testimony constituted an abuse of the

judge's discretion. Because of the even split, Judge Hensley's decision was not disturbed. On the other issue, the Supreme Court ruled that Judge Hensley committed reversible error when he gave the jury conflicting instructions, and failed to explain the instructions in a "legally correct" way when the jury asked about them. The Supreme Court's decision, Barrett v. ERA Aviation, slip op. No. 5242 (Alaska Feb. 25, 2000), is appended to this memo.

The first of Judge Hensley's two totally reversed cases was unremarkable (Judge Hensley dismissed an admiralty claim based on an employment contract provision; the Supreme Court reversed, holding that the claim arose independently of the contract). The second case, State Dept. of Revenue v. Beans, 965 P.2d 725 (Alaska 1998), was more interesting. The state Child Support Enforcement Division, pursuant to state statute, suspended a father's driver's license for his nonpayment of child support. The father appealed the decision to the superior court. Judge Hensley held a hearing at which he expressed concerns about the constitutionality of the statute. He appointed counsel to represent the father pro bono, and ordered counsel to brief the constitutional issues potentially raised by the statute. Judge Hensley granted the father's summary judgment motion, holding the statute unconstitutional in three respects. The Supreme Court reversed Judge Hensley, although in doing so it "read out" of the statute a minor provision which it found to be potentially irrational (the court stated that the provision had not been unconstitutionally applied in the case under review), and it found one of the constitutional issues to be a close call.

Judge Lombardi: The Court of Appeals reviewed five of Judge Lombardi's cases, (including one decision released in 2000). Her decisions were 100% affirmed by that court, four by unpublished MO&Js and one by a published opinion. Three of the MO&Js involved appeals from DWI convictions. In these cases the appellants challenged Judge Lombardi's rulings on numerous procedural and evidentiary issues, all of which were affirmed by the appellate court. The fourth appeal disposed of by MO&J was brought by a defendant who had been convicted of violating a protective order. The Court of Appeals upheld the conviction, but it noted that the parties and Judge Lombardi were probably mistaken about the culpable mental state required for conviction. The court upheld the conviction because the mental state that Judge Lombardi instructed the jury it needed to find in order to convict the defendant was the more difficult mental state to prove. Thus any mistake on Judge Lombardi's part would have favored the defendant. Judge Lombardi's other decision, which was affirmed by published opinion, also dealt with a protective order violation. The judge convicted a defendant who had received actual notice of a protective order against him, but who had not been served with the order. The Court of Appeals affirmed Judge Lombardi's decision.

Judge Bolger: Judge Bolger had one case appealed to the Supreme Court (Judge Bolger sat pro tem as a superior court judge to hear this case; the appellate decision was released in 2000). In this case, Wescott v. State, Dept. of Labor, slip op. No. 5241 (Alaska Feb. 18, 2000), Judge Bolger upheld a Department of Labor unemployment decision denying benefits to a worker who had quit "suitable" work without good cause. The Supreme Court reviewed this decision de novo and reversed it, holding that the department had not adequately considered the risk of the job to that worker's health when it determined that the work was "suitable" for that worker. The court did not comment on Judge Bolger's decision or his analysis.

Judge Funk: Judge Funk had no cases appealed to the Supreme Court or the Court of Appeals this term.

C. Specific Issues

The authors of appellate decisions in two cases commented specifically regarding the performance of the trial judges in those cases.

Judge Curda: Judge Curda's incarceration of a non-party witness was harshly criticized by both the Court of Appeals and the Supreme Court in their opinions in Raphael v. State, (the Court of Appeals MO&J, No. 3799 (Alaska Ct. App. April 22, 1998) and the Supreme Court opinion reversing that decision, slip op. No. 5229 (Alaska Jan. 7, 2000) are attached to this memorandum). The case involved charges that the defendant kidnaped and assaulted I.W., the woman with whom he lived. I.W. had testified before the grand jury, and had been subpoenaed to testify at the trial in Bethel. During a recess in the trial, while the defense attorney was absent due to illness, Judge Curda held an ex parte conversation with the prosecutor, who expressed concerns that I.W. might not remain sober during the trial, and that she had shown indications of recanting her testimony. Without notifying defense counsel, the judge decided to incarcerate I.W. and place her children in protective custody until after her testimony. He told I.W. that after she testified, the court would "revisit" the matter (just what Judge Curda meant by this comment is not clear from the opinions; the Court of Appeals did not mention the comment, while the Supreme Court treated the comment as referring to the issues of I.W.'s imprisonment and the status of her children). Over her protest and her stated concerns about having her children removed from her, I.W. was jailed for three days, until after the close of the defense case. Upon asking, defense counsel was informed that I.W. had been incarcerated due to intoxication, but was not told of the substance of the hearing, of the placement of the children in protective custody, of the court's directive to keep I.W. from communicating with

the defendant, or of the court's statement regarding "revisit[ing]" the issue after I.W.'s testimony.

I.W. testified against the defendant, who was convicted, and who appealed to the Court of Appeals. That court, while "seriously troubled" by Judge Curda's violation of I.W.'s due process rights, affirmed the conviction, finding that the judge's actions were intended to compel I.W.'s testimony, but were not designed to influence the substance of the testimony. (Judge Mannheimer separately concurred, strongly condemning Judge Curda's actions, characterizing them as "exemplif[ying] the untrammeled exercise of coercive power that our federal and state constitutions were designed to forestall." No. 3799 MO&J at 26-27. On review, the Supreme Court reversed the Court of Appeals decision, holding that the trial court's coercive treatment of I.W. violated the defendant's due process rights as well as the witness's. The Supreme Court focused on Judge Curda's "revisit" comment to conclude that Judge Curda, ". . . conveyed the strong impression that I.W.'s release from imprisonment was conditioned not only on whether she testified, but on how she testified as well . . . ." No. 5229, slip op. at 9 (emphasis in original).

Judge Brown: Attached to this memorandum is a copy of V.D. v. Alaska Dept. of Health and Social Services, 991 P.2d 214 (Alaska 1999), a Child In Need of Aid (CINA) case in which the Supreme Court criticized Judge Brown's analysis and his handling of V.D.'s request to be represented by counsel. In January 1997 V.D. left her six children with friends while she went to Florida to seek work. In April 1997 DFYS took custody of the children and requested the superior court to adjudicate them as children in need of aid (CINA) as the friends were no longer able to care for them, and an attempt by V.D. to bring several of them to Florida had failed. The court held a hearing in early April, which V.D. attended by telephone from Florida. Judge Brown found probable cause to believe the children were in need of aid, and they were ordered placed in foster homes. At the state's prompting, Judge Brown advised V.D. of her right to counsel. V.D. stated her desire to have an attorney appointed and the judge set an adjudication hearing for late May. Because of problems with getting the financial eligibility paperwork to and from V.D., the hearing was continued until late June. When the paperwork still had not arrived, Judge Brown provisionally appointed a public defender to represent V.D. After several further continuances, the hearing was held in December 1997.

The Supreme Court found fault with two aspects of Judge Brown's handling of this case. First, at the December adjudication hearing, both the parties and the court focused on the children's situation at the time they were removed from their mother's custody, eight months before the hearing. The Supreme Court reversed Judge Brown's disposition of the children as being in need of

aid, holding that the "critical question" in a CINA case such as this was not the emergency situation at the time the state took custody of the children, but instead was the situation at the time the adjudication hearing was held, which Judge Brown did not address.

Second, the court was troubled by Judge Brown's limited efforts to secure appointed counsel for V.D. The court did state that Judge Brown "complied with the letter" of both the CINA rules and the Indian Child Welfare Act (ICWA) when he advised V.D. of her right to counsel and mailed her an application form. However, the court went on to state that:

> [t]he trial court's minimal response to V.D.'s request for counsel is nonetheless disturbing. The circumstances that enmeshed V.D. and her children at the time of the April hearing on emergency custody made it obvious that V.D. was impoverished and would likely qualify for appointed counsel. These same circumstances suggested an urgent need for representation to explore the feasibility of prompt reunification. By allowing a lengthy delay before appointing counsel, the court effectively deprived V.D. of the opportunity to request a timely, adversarial review of its probable cause and temporary placement decisions. This delay also worked against ICWA's fundamental goal of promoting stability and security in Indian families. And more pragmatically, V.D.'s inability to secure prompt representation prevented her from exploring practical solutions that might have avoided protracted, costly, and potentially destructive CINA litigation.

991 P.2d at 218 (footnotes omitted).

The Supreme Court went on to "urge courts in the future to recognize the crucial difference that an early appointment of counsel can make in such cases and to remain sensitive to the potentially drastic consequences of unnecessary delay." Id.