alaska judicial council

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MEMORANDUM

TO: Judicial Council

FROM: Staff

DATE: May 24, 2004

RE: Appellate Evaluation of Judges Eligible for Retention in 2004

I. Introduction

The Judicial Council staff has several ways of evaluating judges' performance in addition to the surveys it commissions. One way it evaluates judges is to compare how each judge's decisions withstand appellate review.

The review process begins with a staff member, usually the staff attorney, reviewing every published appellate decision and memorandum opinion and judgment after the appellate court releases it. Staff first determines how many issues were on appeal and then decides whether the appellate court "affirmed" the trial judge's decisions. Only decisions specifically "affirmed" are classified as such - decisions requiring reversal, remand or vacating of the trial court judge's ruling or judgment are not classified as "affirmed." Another staff member then enters information about the case into a database. The data fields include case type,[1] judge, affirmance rate, date, opinion

[1] Cases are classified as general civil, tort, child in need of aid ("CINA"), family law/domestic relations, administrative appeal, criminal, and juvenile delinquency.

number. Before a retention election, staff analyzes the data by judge and by whether the case is "civil" or "criminal."[2]

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 may varies depending on the complexity of a given case.

Second, each issue is weighted equally, regardless of its effect on the case outcome, its legal importance, the applicable standard of review, or whether the issue was raised in the trial court. 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. Issues that are raised for the first time on appeal are weighted the same as issues that were considered and ruled upon by the trial judge. The Judicial Council staff is reviewing possible ways to weigh each issue to reflect its significance in a particular case and beyond that takes into account these factors. For the 2004 retention evaluation period (1998-2003), however, issues have been weighted equally as was the Council's practice in prior evaluations.

Third, appellate courts affirm some types of cases more often then others types of cases. 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. For these reasons, a judge's affirmance rate in criminal cases is almost always higher than that judge's affirmance rate in civil cases. Judges who hear mostly criminal cases have higher overall affirmance rates than those who hear mostly civil cases.

Fourth, although the vast majority of appeals from 1998 to 2003 were reviewed by Council staff, the information available about appellate decisions is incomplete. Staff have reviewed all published decisions from the Supreme Court, published decisions from the Court of Appeals and unpublished Memorandum Opinion and Judgments (MO&Js)from the Court of Appeals. Staff did not review unpublished MO&Js from the Supreme Court until 2002 because they were not easily available. Criminal and civil appeals from the district court that are heard by the superior court are not published or otherwise reviewable. Thus, the analysis of appellate affirmance rates does not include any cases appealed from the district court to the superior court.

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[2] "Criminal" includes criminal and juvenile delinquency cases. All other cases are classified as "civil."

Fifth, administrative appeals pose a problem. Administrative decisions are appealed first to the superior court, which acts as an intermediate appellate court. Those cases may then be appealed to the supreme court, which gives no deference to the superior court's decision and takes up the case *de novo*. Because the supreme court evaluates only the agency's decision, and not the superior court judge's decision, there is little value to these cases as an indicator of a judge's performance and they can be misleading as an indicator of judicial performance. Despite this problem, we have included administrative appeals in the analysis for consistency with prior evaluations.

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. 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.

Finally, during the relevant time period for superior court judges, the make-up of both the Supreme Court changed. Justice Walter "Bud" Carpeneti was appointed in 1998 when Justice Allen Compton retired. This change could have had an effect on affirmance rates, so care should be taken when comparing the judges up for retention in 2004 to affirmance rates for other years.

II. Analysis of Appellate Affirmance Rates

A. Superior Court Judges

Superior Court judges' affirmance rates 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.

	Criminal Affirmance		Civil Affirmance		Overall	
Judge	Number Reviewed	Rate	Number Reviewed	Rate	Number Reviewed	Rate
Christen	0	n/a	3	50%	3	50%
Cutler	32	82%	22	61%	54	74%
Gleason	2	100%	5	89%	7	92%
Jeffery	21	74%	6	75%	27	74%
Joannides	6	83%	14	64%	20	70%
Rindner	2	100%	10	70%	12	75%
Steinkruger	28	88%	27	70%	55	81%
Stephens	8	88%	3	67%	11	82%
Mean affirmance rates of all superior court judges 1998-2003	873	82%	730	67%	1603	75%

Judges having fewer than 10 cases in a category appear shaded for that category.

Mean "overall" affirmance rates for all judges remain at 75%, as was the case in 2000 and 2002. The mean civil affirmance rate for all superior court judges in from 1998-2003 is 67%, which is similar to the mean civil rates for the 2002 retention judges (61%) and for the 2000 retention judges (67%).[3] The mean criminal affirmance rate for all superior court judges from 1998-2003 was 82%, which was also similar to the 2002 rate (81%) and the 2000 rate (85%). Affirmance rates in Alaska have remained relatively constant in the past six years since the Judicial Council staff has been analyzing them.

Of the superior court judges eligible to stand for retention in 2004 who had ten or more appealed cases, none appears to have a significant problem with appellate reversals. The new judges, Judge Christen, Gleason, Joannides, Rindner and Stephens, all had relatively few cases that were reviewed. Judge Joannides had more than the other new judges because she sat as a superior court judge *pro tem* while she was still a district court judge.

Staff reviewed appellate opinions from judges whose affirmance rates for either case type were 10% or more below average to determine if reversals were based on clear error or abuse of judicial discretion. No judge had an "overall" rate that was 10% below the mean. No judge had a

[3] For those years, mean rates were calculated only for the judges standing for retention in that year, and for judges having more than 10 cases reviewed. The mean rate for 2004 uses all judges in the database having cases reviewed from January 1, 1998 to December 31, 2003.

civil rate that was 10% below the mean. Only one judge, Judge Jeffrey, had an average criminal affirmance rate 10% below the mean. No clear error or abuse of discretion trends appeared. His "overall" affirmance rate (74%) was very close to the mean (75%).

Statistically, the smaller the number of cases in a sample, the less reliable the conclusions drawn from that are likely to be. Because 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. Historically we have reviewed and discussed those judges' cases individually. This year, two superior court judges had fewer than ten cases reviewed overall. Both of these were new judges, Gleason and Christen, who were assigned to a predominately civil calendar.

Judge Christen - Judge Christen had three civil cases reviewed. One was an unremarkable probate case that was affirmed on all points. One was an expedited appeal regarding a ballot summary for an initiative. Judge Christen was reversed on all points but three judges voted to reverse and two to affirm, indicating that it was a close case. The third case also dealt with a ballot initiative. There the court affirmed on one issue and reversed on another. None of these cases indicates a problem with Judge Christen's legal reasoning or application of the law.

Judge Gleason - Judge Gleason had seven cases reviewed. Two of these were criminal cases, which were both 100% affirmed. The other five were civil cases, four of which were 100% affirmed. The remaining case was a family law case that was 44% affirmed. That case had been handled by two judges prior to its assignment to Judge Gleason. It dealt with numerous complex property division and child support orders.

B. District court judges

District court judge's affirmance rates are summarized in the following table. The table shows the number of criminal cases appealed to the Alaska Court of Appeals during the judge's term, and the percent of issues in those cases that were affirmed by the appellate court. Civil appellate affirmance rates for district court judges are not meaningful because no district court judge regularly has over ten civil cases appealed to the Supreme Court. As discussed above, judges having fewer than ten cases reviewed should not be compared with other judges. Because only two district court judges are standing for retention in 2004, the 2002 retention judges' affirmance rates are provided for comparison.

Judge	**Criminal Affirmance**	
2004 Judges:	N	Rate
Funk	**12**	**83%**
Nolan	**1**	**100%**
2002 Judges:	N	Rate
Adams	2	100%
Froehlich	5	60%
Kauvar	20	86%
Lohff	12	75%
Motyka	25	78%
Murphy	24	77%
Miller	1	100%
Neville	5	80%
Rhoades	15	92%
Mean criminal affirmance rate of district court judges 2000-2003	155	78%

Neither Judge Funk nor Judge Nolan appears to have problems with their affirmance rate.

Judge Funk: Judge Funk had twelve cases reviewed, having a mean affirmance rate of 83%. This is above the mean for all judges (78%).

Judge Nolan: Judge Nolan had one case reviewed. It was a case involving a motion to suppress evidence of a DWI that Judge Nolan had denied. The court of appeals upheld Judge Nolan's ruling, holding that a conversation with a driver of a parked vehicle was not a "traffic stop" requiring reasonable suspicion.