alaska judicial council

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MEMORANDUM

TO: Judicial Council

FROM: Staff

DATE: April 24, 2006

RE: Appellate Evaluation of Judges Eligible for Retention in 2006

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" each of the trial judge's decisions on appeal. 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." 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." It should be noted that the 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. 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,[2] affirmance rate, date of publication or release, opinion number, and trial case number.

Before a retention election, staff cross-checks the cases in its database against those cases in the court system's database to make sure the database is as complete as possible and that the case is assigned to the proper judge. Staff then analyzes each judge's "civil" or "criminal"[3] and overall (combined) affirmance rates, civil, criminal, and overall affirmance rates for all the judges standing for retention that year, and civil, criminal, and overall affirmance rates for all the judges in the database. Staff also 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 judge's current 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 have its own affirmed/not affirmed decision.

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. The Judicial Council staff has reviewed ways to weigh each issue to reflect its significance in a particular case and beyond that would take into account these factors but has decided not to implement a weighted analysis. For

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

[2] As noted, 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 rates appropriate with those decisions. If it is not possible to make that determination from the text of the case, the overall affirmance rate for that case is assigned to each judge of record.

[3] "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.

the 2006 retention evaluation period, issues have been weighted equally, as was the Council's practice in prior evaluations.

Third, appellate courts tend to affirm some types of cases more often then 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. 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 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, although the vast majority of appeals from 2000 to 2005 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. After the Supreme Court began making its MO&J's easily available in 2002, staff did include them in its database. Also, 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.

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. In past evaluations, we included administrative appeals in the analysis for consistency with prior evaluations. In this evaluation we decided to exclude them.

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. In 2006, many new judges are standing for retention who have fewer than ten cases.

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.

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

Judicial Affirmance Rates 2006 Superior Court Judges						
	Criminal Affirmance		Civil Affirmance		Overall	
Judge	Number Reviewed	Rate	Number Reviewed	Rate	Number Reviewed	Rate
Bolger	16	89%	4	71%	20	85%
Brown	26	67%	37	71%	63	69%
Devaney	2	50%	3	100%	5	80%
Erlich	20	68%	4	50%	24	65%
Esch	19	80%	6	83%	25	81%
Huguelet	2	75%	1	100%	3	83%
Michalski	4	100%	71	66%	75	68%
Morse	0	n/a	11	72%	11	72%
Olsen	5	86%	2	50%	7	77%
Smith, Eric	34	87%	23	79%	57	84%
Suddock	1	100%	8	96%	9	96%
Tan	1	0%	31	78%	32	76%
Torrisi	21	79%	4	63%	25	76%
Volland	1	100%	2	50%	3	67%
Weeks	29	78%	25	84%	54	81%
Wolverton	62	76%	17	61%	79	73%
Wood	37	87%	7	86%	44	86%
Zervos	23	91%	11	62%	34	82%
Mean affirmance rates of all superior court judges 2000 - 2005	891	80%	734	70%	1625	76%

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

Civil appellate affirmance rates seem to be climbing. The mean overall (civil and criminal combined) affirmance rate for all superior court judges from 2000-2005 was 76%. The overall rate from 1998-2003 (calculated for the 2004 retention election) was 75%, as was the case from 1996-2001 (calculated for the 2002 retention election) and 1994-1999 (calculated for the 2000 retention election). The mean civil affirmance rate for all superior court judges from 2000-2005 was 70%. This rate was higher than previous years. from 1998-2003, the civil rate for all judges was 67%. From 1996-2001 the civil affirmance rate was 61%, and from 1994-1999 it was 67%.[4]

The mean criminal affirmance rate for all superior court judges from 2000-2005 was 80%. That rate was similar to, although somewhat lower than, the 1998-2003 criminal rate (82%) and was also similar to the criminal rate for superior court judges in 1996-2001 (81%) and 1994-1999 (85%). In general, although civil rates have risen somewhat and criminal rates have ranged within five percent, these small changes are probably not significant. Affirmance rates for superior court judges in Alaska have thus remained relatively constant in the twelve years since the Judicial Council staff has been analyzing them.

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%

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, five superior court judges had fewer than ten cases reviewed. These judges were all new judges.

Judge Devaney - Judge Devaney was appointed in 2002 and serves the Fourth Judicial District in Bethel. From 2002-2005 he had only five cases appealed and decided. His overall affirmance rate in these cases was 80%. Three were civil cases, including a family law case, a child-in-need of aid case, and a tort case. These were all affirmed at 100%. He also had two criminal law cases, one of which was affirmed at 100% and one of which was reversed (0%). In the reversed case, Judge Devaney excluded a witness's statement on the grounds that it was inadmissable hearsay. The court

[4] For the 1994-1999 and 1996- 2001 periods, 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 rates for the 1998- 2003 and 2000-2005 periods includes all judges in the database for those time periods.

of appeals disagreed, reasoning that the statement should have been admitted as a statement of the defendant's state of mind at the time of the offense, and held that the failure to admit the statement prejudiced the defendant's ability to present his defense.

Judge Huguelet - Judge Huguelet was appointed in 2003 and serves the Third Judicial District in Kenai. From 2003-2005 he had three cases appealed and decided. His overall affirmance rate in those cases was 83%. His one civil case was affirmed at 100%. One criminal case was also affirmed at 100%. The other criminal case was affirmed at 50%. There Judge Huguelet sentenced a defendant to serve greater than the benchmark sentence for a typical second felony offender committing a typical offense without making the required factual findings. In that case, the court of appeals remanded the case to Judge Huguelet for further factual findings on the record to support the sentence or reduction of the sentence.

Judge Olsen - Judge Olsen was appointed in 2003 and serves the Fourth Judicial District in Fairbanks. From 2003-2005 he had eight cases appealed and decided. His overall affirmance rate in those cases was 79%. Five were criminal cases and two were civil cases. Four of the criminal cases were 100% affirmed. One case was 50% affirmed. In that case, the court of appeals affirmed Judge Olsen's sentencing decision after deciding that a new statute superceded prior case law and authorized Judge Olsen's sentence. The court, however, vacated two conditions of probation that the defendant challenged; another challenged condition was declared moot.

One of the civil cases, a child-in-need-of-aid case, was 100% affirmed. The other was 0% affirmed. The issue in that appeal was whether a group claiming a public easement over land had to show continuous use by the group or by the public to validly assert the easement. Judge Olsen granted summary judgment for the defendant who asserted that the group had not even been in existence for the required time period and therefore lacked standing; he then dismissed the case. The supreme court reversed the dismissal of the case, holding that a public prescriptive easement may be established by relying on evidence of continuous use by members of the public.

Judge Suddock - Judge Suddock was appointed in 2002 and serves the Third Judicial District in Anchorage. From 2002-2005 he had nine cases appealed and decided. His overall affirmance rate in those cases was 96%. One was a criminal case affirmed at 100%. Eight were civil cases. Seven of those were affirmed at 100% as well. One case was affirmed at 67%. That case was a custody case in which Judge Suddock granted shared physical custody to a non-parent without making the proper factual findings before overriding the parental preference. The supreme court remanded the case for further proceedings.

Judge Volland - Judge Volland was appointed in 2002 and serves the Third Judicial District in Anchorage. From 2002-2005 he had three cases appealed. His overall affirmance rate in those cases was 67%. He had one criminal case, which was affirmed at 100%. He had one general civil case affirmed at 100%. The third case was a tort case which Judge Volland dismissed on grounds of res judicata and the doctrine against claim-splitting, based on two earlier actions which had also been dismissed. The supreme court majority disagreed that res judicata or the doctrine against claim splitting applied to the case, vacated the dismissal and remanded for further proceedings. Justice Bryner wrote a lengthy dissent.

B. District court judges

The mean criminal affirmance rate for all district court judges from 2002-2005 was 77%. The mean criminal affirmance rate for all district court judges from 2000-2003 was also 77%. From 1998-2001, the mean criminal affirmance rate for all district court judges was 81%. Civil appellate affirmance rates for district court judges are not meaningful because no district court judge regularly has ten or more civil cases appealed to the supreme court.

Criminal Affirmance Rates
District Court Judges

Years	Mean
1998-2001	81%
2000-2003	77%
2002-2005	77%

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 during the judge's term, and the percent of issues in those cases that were affirmed by the appellate court. As discussed above, judges having fewer than ten cases reviewed should not be compared with other judges. Those judges' cases are discussed after the table.

Only one judge having more than ten cases for analysis had a criminal affirmance rate substantially below the mean of 77%. Judge Motyka's affirmance rate was 43%. Staff reviewed his fourteen cases to see if he displayed a pattern of clear error. Judge Motyka was 100% affirmed in seven of his cases. In one of the cases he was 50% affirmed. There he was affirmed on most issues but his sentencing decision was reversed. In seven cases he was 0% affirmed. These cases included errors in two cases on admissibility of evidence questions, a statutory interpretation error, errors on a constitutional due process of law question and a decision about whether a lawyer had provided inadequate representation of his client, and one case that was remanded for additional fact-finding (and thus received a 0% affirmed) and then was determined to be in error for failing to give the defendant proper credit for time served on appeal after remand. Thus, no patterns of error occurred.

Judicial Affirmance Rates 2006 District Court Judges		
Judge	**Criminal Affirmance**	
2006 Judges:	**Number Reviewed**	**Rate**
Burbank	7	71%
Clark	0	n/a
Estelle	1	100%
Heath	0	n/a
Kauvar	26	89%
Landry	7	57%
Lohff	16	66%
Miller	6	100%
Motyka	14	43%
Murphy, Sigurd	12	83%
Rhoades	9	83%
Smith, Jack	4	25%
Wolfe	0	n/a
Mean criminal affirmance rate of all district court judges 2002-2005	154	77%

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

Judge Burbank - Judge Burbank was appointed in 2003 and serves the Fourth Judicial District in Fairbanks. From 2002-2005 he had seven cases appealed and decided. His criminal affirmance rate was 71%. Five of his cases were affirmed at 100%. The two others were affirmed at 0%. In one case, the court of appeals determined that Judge Burbank erred in denying a motion to suppress evidence stemming from a traffic stop when the police officer did not have reasonable suspicion to justify the stop. There the district court never found, and the State never argued, that the police officer believed there was imminent public danger or that serious harm to persons or property had occurred to justify the stop. The court remanded the case so that Judge Burbank could determine whether the stop was supported by probable cause, rather than just reasonable suspicion, to believe that the defendant had just run a stop sign. The other case in which Judge Burbank was reversed was a three-case consolidated appeal. All three cases involved instances in which the judges (three different judges) released a defendant from jail and ordered the defendant to resume his or her sentence at a later date. The court of appeals held that the judges had erred by modifying the defendants' sentences beyond the scope and time period allowed by Criminal Rule 35(a) for sentence modifications.

Judge Estelle - Judge Estelle was appointed in 2003 and serves the Third Judicial District in Palmer. From 2003-2005 he had only one criminal case appealed and decided. That case was affirmed at 100%.

Judge Landry - Judge Landry was appointed in 2005 and serves the Third Judicial District in Kenai. Judge Landry's affirmance rate, analyzing seven cases, was 57%. In four cases he was 100% affirmed. In three cases he was 0% affirmed. In one case the court of appeals determined that Judge Landry erred by declining to instruct a jury on a defense of necessity. In two of the three cases Judge Landry was serving as a magistrate in Kenai. One of those cases presented a fisheries regulation for interpretation and relied on precedent. In that case the court of appeals wrote:"In the present case Magistrate Landry was aware of our decision in [previous case] but he evidently concluded that we had misread the regulation." Because then-magistrate Landry had dismissed the prosecution of the fishing violation based on his interpretation of it, the court of appeals reversed him and reinstated prosecution against the defendant. In another case, the court of appeals determined that then-magistrate Landry had unlawfully held a defendant for four days before an indictment was presented against him in the superior court, having had no preliminary examination hearing in the district court. Apparently then-magistrate Landry was aware that the grand jury had found a true bill in the case, although it had not been presented to the superior court, and had declined to hold the preliminary examination. Although the state had presented no evidence that the defendant had committed any offense, Landry refused to release him from custody. Although the case was technically moot, the court of appeals reviewed it as it was an issue likely to arise again, and disapproved of Landry's action.

Judge Miller - Judge Miller was appointed in 1999 and serves the First Judicial District in Ketchikan. From 2002-2005 he had six criminal cases appealed and decided. All six were affirmed at 100%.

Judge Rhoades - Judge Rhoades was appointed in 1992 and serves the Third Judicial District in Anchorage. From 2002-2005 she had nine criminal cases appealed and decided. Her overall affirmance rate was 83%. In seven cases she was affirmed 100%. In one case she was affirmed at

50%. The court of appeals affirmed Judge Rhoades' rejection of a defendant's lesser-included offense but remanded for her reconsideration of a guilty verdict in light of the court's determination that the ordinance in question had two mental states, and not just the one that Judge Rhoades had considered. The other case was affirmed at 0%. In that case Judge Rhoades denied a motion to suppress evidence based on a claim of an illegal search warrant. The court of appeals agreed with the defendant that the affidavit supporting the warrant had failed to establish probable cause that the defendant had driven while under the influence of alcohol and reversed the judgment of the district court.

Judge Jack Smith - Judge Smith was appointed in 2003 and serves the Third Judicial District in Anchorage. From 2002-2005 he had four cases appealed and decided. Judge Smith's affirmance rate was 25%. Because he had only four cases reviewed, this rate should not be used as a reliable indicator of performance. In one case he was affirmed at 100%. The other three cases were affirmed at 0%. In one case, the court of appeals remanded for further findings because the record did not adequately describe the conduct supporting the charge to which the defendant pleaded; apparently Judge Smith relied on information alleged in a previous information to establish the conduct in the case and failed to establish a factual basis of the plea on-record. In another case, Judge Smith denied a defendant credit for time served on another case that was connected to the crime for which he was sentenced. The court of appeals disagreed, reasoning that the subsequent charges were sufficiently connected to the first because they involved violations of conditions of bail release in the first case. Last, in a complex constitutional case that involved equal protection claims by minors charged with minor-consuming violations, Judges Smith and Sigurd Murphy agreed with the respondents that a statute violated equal protection because it authorized different probationary periods for minors depending on their ages at the time of the offense. Both judges dismissed the cases. The court of appeals disagreed, holding that the challenged provision had a substantial relationship to the legislature's goal of preventing unlawful underage drinking and that the statute, on its face, did not violate equal protection.