



alaska judicial council

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MEMORANDUM

TO: Judicial Council
FROM: Staff
DATE: July 19, 2018
RE: Appellate Evaluation of Judges Eligible for Retention in 2018

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 in 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

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.

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 independently 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.

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.

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

Generally, the trends of civil, criminal and overall affirmance rates have been stable or moderately upward since the Council began reviewing them in 1994. Criminal affirmance rates have ranged within eight percentage points, from 78%-85%, over the past twenty-four years. Criminal affirmance rates dipped in the early 2000's but then climbed and have stabilized at around 81-82% since the 2006-2011 period. Civil affirmance rates mostly ranged within six percentage points, from 67%-72%, until the 2010-2015 retention period, with one period (1996-2001) lower, at 61%. In the past two retention cycles the civil affirmance rate has trended upward to 76%. Overall, the affirmance rate of all cases was stable at about 75% until 2006 – 2011 period, when the rates began a moderate 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%
2012-2017	81%	76%	79%

Affirmance rates for superior court judges who are standing for retention in 2018 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 2018 Superior Court Judges						
	Criminal Affirmance		Civil Affirmance		Overall	
	Number Reviewed	Rate	Number Reviewed	Rate	Number Reviewed	Rate
First Judicial District						
Carey, William Barker	16	84%	12	83%	28	83%
Second Judicial District						
Greene, Angela	--		--		--	
Third Judicial District						
Cole, Steve	13	92%	7	29%	20	70%
Corey, Michael D.	1	100%	1	50%	2	75%
Morse, William F.	5	80%	28	68%	33	70%
Walker, Herman G., Jr.	--		1	50%	1	50%
Wolverton, Michael L.	59	79%	1	0%	60	77%
Summary						
Lyle, Paul R.	14	84%	15	87%	29	85%
McConahy, Michael P.	15	80%	23	82%	38	81%
Number and mean affirmance rates, superior court judges 2012 - 2017	123	82%	87	73%	210	78%

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, two of the superior court judges eligible for retention – Judge Michael D. Corey and Judge Herman G. Walker, Jr. -- had fewer than ten cases. They were judges newly appointed to the superior court. Judge Walker had one case appealed and decided during the review period. Judge Corey had two.

Judge Michael D. Corey:

Pomeroy v. State – This case presented the petitioner’s fourth petition for post-conviction relief. The Court of Appeals affirmed at 100% Judge Corey’s denial of the petition on the grounds it was untimely, successive, and raised claims that were, or could have been, raised in prior proceedings.

Lee-Magana v. Carpenter – The appeal involved two petitions for long-term domestic violence protective orders. The woman successfully defended a petition against her and successfully petitioned for an order against her ex-boyfriend. She moved for attorney’s fees based on work for both petitions. Judge Corey denied both motions. The Supreme Court upheld the denial of fees for the defense against her ex-boyfriend’s petition because the statute did not allow fees for a respondent, but reversed the denial of fees to her as the prevailing petitioner because the statute permitted fees and there was no evidence to support their denial.

Judge Herman G. Walker, Jr.

State of Alaska, Dep’t of Health and Human Services, Office of Children’s Services v. Doe, et al. – In this tort case brought by a former child in OCS custody. The plaintiffs requested that OCS disclose confidential records regarding other children (the plaintiff’s adoptive siblings and non-siblings placed in the same home) who had been in OCS custody to show patterns of negligence. OCS argued against disclosure of records of the siblings and non-siblings, citing privacy concerns, prejudice, and unfair burdens on OCS resources. Judge Walker ordered disclosure of all the records without addressing OCS’s concerns or its request for *in camera* review. OCS petitioned for an immediate review by the Supreme Court. The Supreme Court resolved the petition by upholding the discovery of the sibling files (the siblings had consented to the discovery, so there were no privacy concerns) but directing the superior court to revisit the portions of its discovery order regarding OCS files on the non-sibling, non-parties and requiring the superior court to conduct an inquiry which balanced the plaintiff’s interest in the records and the privacy interests of the non-party subjects of the records. The Supreme Court also directed the superior court to express its reasoning in writing when determining whether to conduct an *in camera* review of the records before any release.

B. District court judges

The mean criminal affirmance rate for all district court judges from 2014-2017 was 79%. 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 nineteen 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%
2014-2017	79%

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		
2018 District Court Judges		
	Criminal Affirmance	
	Number Reviewed	Rate
First Judicial District		
Miller, Kevin	5	100%
Swanson, Kirsten	--	--
Third Judicial District		
Chung, Jo-Ann M.	7	86%
Clark, Brian K.	6	100%
Estelle, William L.	7	86%
Illsley, Sharon A. S.	8	88%
Wolfe, John W.	17	83%
Fourth Judicial District		
Seekins, Ben	2	50%
Number and mean affirmance rates, district court judges 2014 – 2017	54	83%

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, only one district court judge, Judge John W. Wolfe, had more than ten cases.

Judge Kevin Miller – Judge Miller had six cases reviewed and decided. Five were affirmed at 100%. One case was reversed, but not due to any decision by Judge Miller but because the Alaska Supreme Court had announced a new constitutional rule relating to *ex post facto* laws after the defendant was convicted. That case was not considered in Judge Miller's affirmance rate.

Judge Kirstin Swanson – Judge Swanson had no cases appealed and decided since her appointment.

Judge Jo-Ann Chung – Judge Chung had seven cases appealed and decided. Six were affirmed at 100%. One was reversed (0% affirmed).

Hillman v. State – Judge Chung presided over a trial of a defendant charged with promoting contraband in the second degree for bringing contraband into a correctional facility. The defendant argued that the statute was not intended to apply to her because she was already incarcerated inside a correctional facility. The court of appeals agreed and reversed her conviction. (The defendant was not tried under another section that prohibited possession of contraband.)

Judge Brian K. Clark – Judge Clark had six cases appealed and decided. All were affirmed at 100%.

Judge William L. Estelle – Judge Estelle had seven cases appealed and decided. Five were affirmed at 100%. Two were affirmed at 50%.

McCord v. State – The defendant argued that the district court violated her Sixth Amendment right of confrontation by allowing the State to prove that the defendant had intoxicating drugs in her blood through hearsay testimony. The Court of Appeals agreed that her Sixth Amendment rights had been violated and reversed her conviction. The defendant also argued that her motion for acquittal should have been granted, thus prohibiting her retrial. The Court of Appeals affirmed Judge Estelle's denial of that motion.

Pederson v. State – The defendant raised numerous claims of error relating to initial search warrants, bail, pre-trial proceedings, and his trial on appeal. The Court of Appeals affirmed all of Judge Estelle's decisions relating to the pretrial and trial and upheld the defendant's conviction. The court, however, reversed Judge Estelle's sentence, holding that it was an illegal sentence because it was longer than the presumptive sentencing statute allowed without an aggravating factor. (Judge Estelle had found an aggravating factor but it applied only to a lesser offense.) The Court of Appeals directed the superior court to resentence the defendant, permitting resentencing on all counts, so that the initial composite sentence might be legally lodged.

Judge Sharon A.S. Illsley – Judge Illsley had eight cases appealed and decided. Seven were affirmed at 100%. One was reversed (0% affirmed).

State v. Ruzika – Judge Illsley ruled that a search of the defendant was inadmissible and granted the defendant’s motion to suppress the evidence of his drug possession. The state appealed. The Court of Appeals found that the defendant had admitted to possession of drugs, thus giving the officer probable cause for arrest and the search, even though the officer had not found the defendant to be driving impaired. The Court of Appeals reversed and remanded for further proceedings.

Judge Ben Seekins – Judge Seekins had two cases appealed and decided. One was affirmed at 100%. One was reversed (0% affirmed).

State v. Spencer – Judge Seekins ruled that a police stop of an individual on an ATV was not legal because the police did not have probable cause, and dismissed the individual’s charge for DUI. The state appealed. The Court of Appeals reversed and remanded, deciding that probable cause was not required; the lower standard of reasonable suspicion applied to stops for field sobriety tests.