



alaska judicial council

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MEMORANDUM

TO: Judicial Council

FROM: Staff

DATE: June 11, 2002

RE: Appellate Evaluation of Judges Eligible for Retention in 2002

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. That staff member first makes a determination about how many issues were on appeal and then decides whether the appellate court "affirmed" or "reversed" each of the trial judge's decisions. After noting the case type, another staff member records the information into a database for later analysis.

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 vary depending on the complexity of a given case.

Second, each issue is weighted equally, regardless of its impact 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, and which takes into account these factors. For this retention period, however, issues have been weighted equally as has been the Council's practice in prior evaluations.

Third, some types of cases are affirmed more often than other 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. Unlike most civil appeals, most criminal appeals are brought at public expense. The cost of raising an issue on appeal is more of a factor in determining whether an issue is raised in a civil appeal than it is in a criminal appeal. 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, 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. The staff's analysis of appellate affirmance rates does not include any cases appealed 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 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. We find that affirmance rates for judges having fewer than ten cases reviewed on appeal is 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, however, are not considered by staff as a reliable indicator of performance.

Finally, during the relevant time period for superior court judges (1996-2001), the make-up of both the Supreme Court and the Court of Appeals changed. Chief Justice Dana Fabe was appointed in 1996 when Justice Danny Moore retired. Justice Alex Bryner was elevated from the Alaska Court of Appeals to the Supreme Court in 1997 when Justice Jay Rabinowitz retired, leaving a vacancy in the Court of Appeals. That vacancy was filled by Judge David Stewart. Finally, Justice Walter “Bud” Carpeneti was appointed in 1998 when Justice Allen Compton retired. These changes could have had an effect on affirmance rates, so care should be taken when comparing the judges up for retention in 2002 to affirmance rates for other years.

II. Analysis of Appellate Records

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.

Judge	Criminal Affirmance		Civil Affirmance		Overall	
	Number Reviewed	Rate	Number Reviewed	Rate	Number Reviewed	Rate
Card	55	70%	31	48%	86	62%
Collins	11	91%	0	n/a	11	91%
Pengilly	36	90%	17	65%	53	81%
Savell	49	80%	26	54%	75	71%
Thompson	30	93%	19	90%	49	92%
Average of judges in 2000 with over 10 cases	25	85%	21	65%	45	75%
Average of judges in 2002 with over 10 cases	36	81%	93	61%	55	75% ¹

Of the superior court 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. All five superior court judges had more than ten criminal cases reviewed. Only Judge Collins had fewer than ten civil cases reviewed.

Criminal affirmance rates for 2002 judges ranged from 70% to 93%. This spread is similar to, but skewed downward from, that of the 2000 judges, where criminal affirmance rates ranged from 72% to 97%. For this year's retention judges, civil affirmance rates ranged from 48% to 90%. That range was ten percent broader than in the 2000 election when civil affirmance rates ranged from 52% to 83%. Average affirmance rates appear to have declined by about four percent. The averages for 2002 judges having more than ten cases reviewed were 81% for criminal cases and 61% for civil cases. The averages for 2000 for judges having more than ten cases reviewed were 85% for criminal cases and 65% for civil cases. Despite this four percent difference, "overall" averages were the same for 2000 and 2002 at 75% because more criminal cases, with higher affirmance rates, were reviewed in 2002.

¹ The "overall" rate in 2002 is the same as in 2000, even though each category's average is lower, because more criminal cases, with higher respective affirmance rates, were reviewed in 2002.

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. Only one judge had average reversal rates ten percent below the average rates. No clear error or abuse of discretion trends appeared upon review of that judge's reversed decisions.

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, only one superior court judge had fewer than ten cases in any category. Because that judge had no civil cases reviewed, this individualized case-by-case review could not be performed.

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 except Judge Murphy had over ten civil cases appealed to the Supreme Court. Judge Murphy's civil appellate affirmance rate is discussed below. As discussed above, 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.

Judge	Criminal Affirmance	
	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%
Averages of judges with over ten cases for judges up for retention in 2002	19	81%
Averages of judges with over ten cases for judges up for retention in 2000	11	86%

Of the district court judges eligible to stand for retention this year who had ten or more appealed criminal cases, none appears to have a significant problem with appellate reversals. Five of the nine judges had more than ten cases. These judges were affirmed between 75% and 92% of the time. This range is slightly lower than in 2000 when affirmance rates ranged from 81% to 94%. Like superior court averages, the district court average affirmance rate was lower for the 2002 judges than for the 2000 judges. The average affirmance rate of a district court judges in 2000 was 86%. The average affirmance rate of a district court judges in 2002 was 81%. District court judges had, on average, eight more appellate cases reviewed during this election term.

Four judges had fewer than ten criminal cases reviewed:

Judge Adams: The Court of Appeals reviewed two criminal cases decided by Judge Adams and affirmed all issues in those cases.

Judge Froehlich: The Court of Appeals reviewed three criminal cases decided by Judge Froehlich. In those cases it affirmed two cases at 100%. In the other case the court reversed both

then-Judge Carpeneti and Judge Froehlich for deciding to revoke the defendant's probation for sending allegedly threatening and coercive letters. The court of appeals reviewed the letters and, while recognizing the issue was "close," determined that the letters did not fulfill the elements of either assault or coercion.

Judge Miller: The Court of Appeals reviewed only one criminal case decided by Judge Miller. It affirmed at 100%.

Judge Neville: The Court of Appeals reviewed five criminal cases decided by Judge Neville. In four of those cases it affirmed all issues. In one it reversed, holding that Judge Neville abused her discretion in not admitting evidence of the victim's prior assaults on the defendant when the defendant had sufficiently raised an issue about whether he acted in self-defense.

None of the judges with fewer than ten appellate decisions appears to have any problem with appellate reversals.

III. Specific Issues

During the 2000 retention election analysis, appellate judges specifically discussed issues in appellate decisions about two judges' performances. Staff noted no such issues for any of the judges eligible for retention in 2002.