



# alaska judicial council

1029 W. Third Avenue, Suite 201, Anchorage, Alaska 99501-1969  
http://www.ajc.state.ak.us

(907) 279-2526 FAX (907) 276-5046  
E-mail: postmaster@ajc.state.ak.us

EXECUTIVE DIRECTOR  
Larry Cohn

NON-ATTORNEY MEMBERS  
Bill Gordon  
Charles M. Kopp  
Christena Williams

ATTORNEY MEMBERS  
James H. Cannon  
Kevin Fitzgerald  
Louis James Menendez

CHAIR, EX OFFICIO  
Dana Fabe  
Chief Justice  
Supreme Court

## MEMORANDUM

**TO:** Judicial Council

**FROM:** Staff

**DATE:** May 8, 2008

**RE:** Appellate Evaluation of Judges Eligible for Retention in 2008

### **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.<sup>1</sup> After the case has been scored, another staff member enters information about the case into a database. The data fields include case type,<sup>2</sup> judge, 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 to make sure the database is as complete as possible. Staff then analyzes each retention judge's "civil," "criminal,"<sup>3</sup> and overall (combined) affirmance rates. Staff also calculates civil, criminal, and overall affirmance rates all the judges in the database for the retention period. 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 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 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 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 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 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

---

<sup>1</sup> 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.

<sup>2</sup> 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.

<sup>3</sup> "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.

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 Supreme Court and Court of Appeals and unpublished Memorandum Opinion and Judgments (MO&Js) from the Supreme Court and the 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. 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. We have excluded administrative appeals from this analysis for the past several retention cycles. Our database indicates that superior court judges' decisions in administrative appeals are affirmed at about 78%, which is about eight points higher than other civil cases.

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. In 2008, almost all the judges standing for retention are new judges who have fewer than ten cases.

## II. Analysis of Appellate Affirmance Rates

### A. Superior Court Judges

In general, affirmance rates for superior court judges have remained at about 75%. Criminal rates have ranged within six percentage points over fourteen years. Civil rates have mostly ranged within three percentage points, from 67%-70% with one period (1996-2001) lower, at 61%. Overall, the affirmance rate of all cases has remained remarkably stable at 75-76% over the fourteen years that have been analyzed.

<b>Overall Affirmance Rates Superior Court Judges</b>			
<b>Years</b>	<b>Criminal</b>	<b>Civil</b>	<b>Overall</b>
<b>1994-1999</b>	85%	67%	75%
<b>1996-2001</b>	81%	61%	75%
<b>1998-2003</b>	82%	67%	75%
<b>2000-2005</b>	80%	70%	76%
<b>2002-2007</b>	79%	70%	75%
<b>1994-2007</b>	81%	67%	75%

Affirmance rates for Superior Court judges who are standing for retention in 2008 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 2008 Superior Court Judges						
Judge	Criminal Affirmance		Civil Affirmance		Overall	
	Number Reviewed	Rate	Number Reviewed	Rate	Number Reviewed	Rate
<b>Collins</b>	16	78%	20	80%	36	79%
<b>Downes</b>	3	100%	2	100%	5	100%
<b>Stowers</b>	1	0%	5	80%	6	67%
<b>Mean affirmance rates of all superior court judges 2002 - 2007</b>	876	79%	725	70%	1601	75%

Note: Data within 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. 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; both were new judges.

**Judge Downes** - Judge Downes was appointed in 2005 and serves the Fourth Judicial District in Fairbanks. From 2005 to 2007 he had five cases, including three criminal and two civil cases, appealed and decided. He was affirmed in every case, for an overall affirmance rate of 100%.

**Judge Stowers** - Judge Stowers was appointed in 2004 and serves the Third Judicial District in Anchorage. From 2004 to 2007 he had six cases appealed and decided. His overall affirmance rate in those cases was 67%. Five were civil cases and one was a criminal case. The criminal case was 0% affirmed. In that case, the Court of Appeals reversed Judge Stowers's determination to disallow good-time credit after a criminal offender had successfully appealed.

Four of his civil cases were 100% affirmed. One of them was 0% affirmed. In that case, three orders were appealed: a property division order, a child support order and an attorney's fees order. All three were vacated and remanded for further proceedings. The Supreme Court vacated the property division order, holding that Judge Stowers impermissibly transmuted only part of the parties' home to the marital estate and valued it at the time of separation rather than the time of trial. The court found that some of Judge Stowers's property findings were correct but vacated the entire division and remanded it for new valuation and division. The Supreme Court also held that Judge Stowers's award of pre-marital child support to the mother violated the father's right to due process because the claim was first raised during trial, which was too late for the father to defend against it.

The Supreme Court vacated the award of attorney's fees because of its other holdings and remanded that issue for new consideration in light of the parties' conduct.

**B. District court judges**

The mean criminal affirmance rate for all district court judges from 2004-2008 was 85%. 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 ten years.

<b>Criminal Affirmance Rates District Court Judges</b>	
<b>Years</b>	<b>Mean</b>
<b>1998-2001</b>	81%
<b>2000-2003</b>	77%
<b>2002-2005</b>	77%
<b>2004-2007</b>	85%

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. Only one judge had more than ten cases. That judge, Judge Funk, had a 100% affirmance rate. Other judges' cases are discussed after the table.

<b>Judicial Affirmance Rates 2008 District Court Judges</b>		
<b>Judge</b>	<b>Criminal Affirmance</b>	
<b>2008 Judges:</b>	<b>Number Reviewed</b>	<b>Rate</b>
<b>Cummings</b>	0	n/a
<b>Funk</b>	10	100%
<b>Hanley</b>	0	n/a
<b>Levy</b>	2	50%
<b>Murphy, Margaret</b>	1	100%
<b>Schally</b>	1	100%
<b>Swiderski</b>	1	100%
<b>Mean criminal affirmance rate of all district court judges 2004-2007</b>	130	85%

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

**Judge Funk** - Judge Funk had ten criminal appeals decided during this retention period. These were all affirmed. Eight of these were driving under the influence cases, one was a driving while license revoked case and one was an assault case.

**Judge Levy**- Judge Levy had two cases considered and published by the Court of Appeals during his first term. One was affirmed at 100%. The other was affirmed at 0%. In that case, the Court of Appeals held that Judge Levy should have granted a motion to suppress evidence due to an illegal traffic stop. The court ruled that a prior verbal domestic dispute did not provide an objective basis that a crime had occurred, or was about to occur, that would have justified the stop.

**Judge Margaret Murphy**<sup>4</sup> - Judge Murphy had one case considered and published during her term. That case related to her work as a magistrate in Bethel, before she was appointed to the district court in Homer. In that case – a guiding without a license case – she was 100% affirmed.

**Judge Schally** - Judge Schally had one criminal case decided and published by the Court of Appeals from 2004-2007. In that case, which regarded his decision not to strike portions of a presentence report from California before sentencing, he was 100% affirmed.

**Judge Swiderski** - Judge Swiderski had one case, which he shared with two other judges. Each judge was 100% affirmed. The Court of Appeals held that Judge Swiderski's, and the other judges', inquiry into a defendant's competence to defend himself was adequate for the defendant to knowingly waive his right to counsel.

---

<sup>4</sup> Judge Margaret Murphy, who serves the Third Judicial District in Homer, should not be confused with Judge Sigurd Murphy, who serves the Third Judicial District in Anchorage.