



# alaska judicial council

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## Final Draft MEMORANDUM

**TO:** Judicial Council  
**FROM:** Staff  
**DATE:** April 25, 2014  
**RE:** Appellate Evaluation of Judges Eligible for Retention in 2014

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### 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,<sup>1</sup> 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,"<sup>2</sup> 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 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

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<sup>1</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>2</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.

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.<sup>3</sup> 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.

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 2014, all four of the superior court judges and seven of the nine district court judges have fewer than ten cases.

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<sup>3</sup> 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.

## II. Analysis of Appellate Affirmance Rates

### A. Superior Court Judges

For sixteen years, affirmance rates for superior court judges had remained at about 75%. In the previous and current retention periods, the overall affirmance rate crept upward to 77%. Criminal rates have ranged within eight percentage points, from 78%-85%, over twenty years. Civil rates have mostly ranged within six percentage points, from 67%-72% with one period (1996-2001) lower, at 61%. The last several retention cycles suggest that criminal affirmance rates were trending downward since the 1998-2003 period but have recently rebounded, and that civil affirmance rates have been trending upward since 1996 and have stabilized at 71%-72% for the past three retention cycles. Overall, the affirmance rate of all cases has remained remarkably stable at 75-77% over the twenty 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>2004-2009</b>	78%	72%	75%
<b>2006-2011</b>	81%	72%	77%
<b>2008-2013</b>	82%	71%	77%

Affirmance rates for superior court judges who are standing for retention in 2014 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.

<b>Judicial Affirmance Rates 2014 Superior Court Judges</b>						
Judge (Date of appointment)	Criminal Affirmance		Civil Affirmance		Overall	
	Number Reviewed	Rate	Number Reviewed	Rate	Number Reviewed	Rate
<b>First Judicial District</b>						
Menendez, Louis (5/23/11)	2	100%	0	n/a	2	100%
<b>Second Judicial District</b>						
Roetman, Paul (7/9/10)	0	n/a	0	n/a	0	n/a
<b>Third Judicial District</b>						
Guidi, Andrew (7/12/10)	2	50%	6	78%	8	71%
Miller, Gregory (1/3/11)	0	n/a	0	n/a	0	n/a
<b>Fourth Judicial District</b>						
(None)						
Mean affirmance rates of all superior court judges 2008 - 2013						
	841	82%	657	71%	1498	77%

*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, all of the superior court judges eligible for retention had fewer than ten cases.

**Judge Menendez:** Judge Menendez had two criminal cases reviewed and decided by the Court of Appeals since he was appointed in 2011. Both were sentence appeals; both were affirmed at 100%.

**Judge Roetman:** Judge Roetman had no appeals reviewed and decided since his appointment in 2010.

**Judge Guidi:** Judge Guidi had two criminal cases reviewed and decided. One was affirmed at 100% and the other was 0% affirmed, for an average of 50%. In the 100% case, the Court of Appeals found that superior court did not err by finding that the defendant's petition for post-conviction relief failed to raise any genuine issues of material fact that would warrant a hearing. In the 0% case, the superior court dismissed the defendant's petition for a writ of habeas corpus and instructed the defendant to refile the proper petition for post-conviction relief. The Court of Appeals held that the superior court erred by dismissing the defendant's petition and instead should have, *sua sponte*, converted it to the proper form.

Two of Judge Guidi's family law cases were appealed and decided since his appointment. One was affirmed at 100%. In that case, the court affirmed Judge Guidi's decision to decline jurisdiction in a divorce case where another state had jurisdiction over child custody and property division issues. The other case was affirmed at 67%. In that case the court affirmed Judge Guidi's custody and attorney's fees determinations but found that Judge Guidi had abused his discretion by not clearly stating the basis for the child support award.

In three of the general civil cases that were appealed and decided, the Supreme Court affirmed Judge Guidi's decisions 100%. The court reversed the fourth (0%). In that case, a plaintiff had filed, but not served, the complaint upon the defendant, so the original complaint was dismissed. When served with a later complaint, the defendant asserted a statute of limitations defense. The Supreme Court reversed Judge Guidi's grant of summary judgment for the defendant, holding that the statute of limitations did not require notice of the suit to the defendant for a suit to "commence." Justice Stowers dissented.

Overall, Judge Guidi was affirmed an average of 71% in six civil and two criminal cases.

**Judge Gregory Miller:** Judge Miller had no cases reviewed and decided since his appointment in 2011.

**B. District court judges**

The mean criminal affirmance rate for all district court judges from 2010-2013 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 fifteen 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%
<b>2006-2009</b>	84%
<b>2008-2011</b>	81%
<b>2010-2013</b>	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. As discussed above, judges having fewer than ten cases reviewed should not be compared with other judges.

<b>Judicial Affirmance Rates 2014 District Court Judges</b>		
	<b>Criminal Affirmance</b>	
Judge (Date of appointment)	Number Reviewed	Rate
<b>First Judicial District:</b>		
Miller, Kevin (8/30/99)	12	71%
<b>Second Judicial District:</b>		
(None)		
<b>Third Judicial District:</b>		
Chung, Jo-Ann (5/26/11)	1	100%
Clark, Brian (1/23/03)	4	100%
Estelle, William (6/11/02)	5	80%
Illsley, Sharon (6/14/07)	5	80%
Motyka, Gregory (7/26/91)	5	60%
Rhoades, Stephanie (9/20/92)	6	83%
Wolfe, John (11/01/04)	12	83%
<b>Fourth Judicial District:</b>		
Seekins, Ben (1/13/12)	0	n/a
<b>Mean criminal affirmance rate of all district court judges 2010- 2013</b>	118	79%

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

**First Judicial District:**

**Judge Kevin Miller:** Judge Kevin Miller had twelve cases reviewed and decided, for an affirmance rate of 71%. The mean overall of district court judges was 79%, so his was slightly below average.

**Third Judicial District:**

**Judge Chung:** Judge Chung had one case appealed; it was 100% affirmed. That case involved a sentence appeal for the defendant's failure to register as a sex offender. The Court of Appeals affirmed the sentence Judge Chung imposed.

**Judge Clark:** Judge Clark had four cases appealed and decided. All were 100% affirmed. In the first case, the Court of Appeals upheld Judge Clark's ruling that a breath test for operating a vehicle under the influence was a valid search incident to arrest because the hour delay between the arrest and the test was reasonable. In the second case, the court upheld Judge Clark's ruling denying a motion to suppress evidence and dismiss a case because the police had probable cause to stop the defendant for leaving the scene of an accident and for failing as a driver to exercise due care. In the third case, the court affirmed Judge Clark's denial of a motion to reconsider the denial of a motion to compel evidence from the Municipality of Anchorage, when the evidence was not relevant to any viable defense. In the fourth case, the court affirmed Judge Clark's ruling that there was sufficient evidence to convict a defendant of theft and attempting to negotiate a stolen check, and the subsequent sentences for the two offenses.

**Judge Estelle:** Judge Estelle had five cases appealed and decided for an average of 80%. Three cases were affirmed at 100%. The first was a criminal sentence appeal in which the Court of Appeals affirmed Judge Estelle's finding that the defendant was a worst offender and affirmed the sentence. The second case was a domestic violence case in which the Court of Appeals upheld Judge Estelle's rulings admitting prior evidence of domestic violence and declining to recall the jury for an additional instruction after they had already retired to consider its verdict. In the third case, the Court of Appeals affirmed 100% and upheld the district court's jurisdiction over the defendant when Judge Estelle had ordered the defendant, who was in custody on other charges, to be transported to the court for arraignment rather than issuing an arrest warrant or presenting him with a complaint. In the fourth case, the Court of Appeals reversed (0%) Judge Estelle's denial of a motion for acquittal by a defendant convicted for resisting arrest when the evidence showed that the defendant was not aware of the police's intent to arrest him.

**Judge Illsley:** Judge Illsley had four cases appealed and decided, for an average of 100%. First, the Court of Appeals upheld Judge Illsley's denial of a motion to suppress evidence based on an alleged illegal seizure of the defendant, finding the police stop was a valid community caretaker stop. Second, as above, the Court of Appeals affirmed Judge Illsley's denial of a motion to suppress evidence, finding that the police's stop of the defendant was a valid community caretaker stop. In the third case, the Court of Appeals affirmed a defendant's conviction for fourth degree assault and held that Judge Illsley had not erred by not instructing the jury on the lesser charge of disorderly conduct. In the fourth case, the Court of Appeals affirmed Judge Illsley's judgement of conviction

of the defendant for DUI, rejecting the defendant's claim that his right to consult an attorney had been violated when the police denied his request to call an attorney in the middle of the administration of the breath test.

**Judge Motyka:** Judge Motyka had five cases appealed and decided for an affirmance rate of 60%. Three cases were affirmed at 100%. In one, the Court of Appeals affirmed Judge Motyka's denial of a motion to suppress evidence, finding that the police's initial stop was proper after the officer observed the defendant littering. In the second, the Court of Appeals affirmed Judge Motyka's denial of a motion to suppress evidence, finding that irregularities in handling a blood sample went to the weight of the evidence, and not its admissibility. In the third, the court affirmed Judge Motyka's denial of a motion to suppress evidence of a DUI, finding that the police was justified in conducting a welfare check on a sleeping man in a running vehicle.

Two cases were reversed (0%). In one, the Court of Appeals reversed a defendant's convictions for shoplifting and failure to appear when it found that the defendant had not been brought to trial within the time allowed by Alaska's speedy trial rule, Criminal Rule 45. In the second, the Court of Appeals held that Judge Motyka erred by not submitting the defendant's criminal history to the jury when prior convictions were an element of the charged offense of "habitual minor consuming."

**Judge Rhoades:** Judge Rhoades had six cases appealed and decided, for an average of 83%. Five cases were affirmed at 100%. In the first, the Court of Appeals upheld the judgement of the district court when there had been sufficient evidence supporting the defendant's conviction for fourth-degree assault. In the second, the Court of Appeals affirmed Judge Rhoades's rulings holding that a municipal ordinance prohibiting driving while a license was revoked was not fatally inconsistent with a state statute, and that the defendant's request to continue his trial to hire private counsel was untimely when it was made the morning trial began. In the third, the court affirmed Judge Rhoades's denial of a petition for post-conviction relief when the defendant failed to present a *prima facie* case of ineffective assistance of counsel. In the fourth the Court of Appeals affirmed the defendant's conviction for DUI and sixth-degree misconduct involving a controlled substance even if Judge Rhoades's admission of hearsay evidence was error, finding that the error (if any) was harmless. In the fifth case, the court upheld Judge Rhoades's imposition of suspended jail time and the conditions of probation that included a no-contact order in a domestic violence case. In the sixth case, the court reversed (0%) Judge Rhoades's conviction of a defendant criminal contempt of court when the evidence showed that the defendant had not violated a valid court order.

**Judge Wolfe:** Judge Wolfe had twelve cases appealed and decided in his term, for an average of 83%. The mean overall of district court judges was 79%, so his was slightly above average.

#### **Fourth Judicial District:**

**Judge Seekins:** Judge Seekins had no cases appealed and decided since his appointment.