

# MERIT SELECTION AND PERFORMANCE EVALUATION OF ALASKA'S JUDGES

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## ABSTRACT

*In this Article, the Author reviews "Selecting and Evaluating Alaska's Judges: 1984-2007," a 2008 report prepared by the Alaska Judicial Council that provides a statistical analysis of Alaska's judicial merit selection process from 1984 through 2007. The Author summarizes the most important information from the Report, including information on the practices of the Alaska Judicial Council, as well as the factors most closely associated with judicial applicants, judicial nominees, and appointed judges in Alaska's district courts, superior courts, and appellate courts. The Author also demonstrates how results from judicial retention elections provide evidence of the success of the merit selection process and the quality of appointed judges. The Article concludes by reviewing the Alaska Judicial Council's most valuable tools for deciding whether to nominate judicial applicants.*

## TABLE OF CONTENTS

INTRODUCTION .....	214
I. MERIT SELECTION, FROM APPLICANTS TO JUDGES.....	216
A. The Judicial Council and Vacancies .....	217
1. <i>The Council</i> .....	217
2. <i>Vacancies</i> .....	217
B. The Statutory Requirements for Judicial Applicants .....	219
C. Demographic Characteristics of the Applicants .....	219
1. <i>Age</i> .....	220
2. <i>Gender</i> .....	220
3. <i>Ethnicity</i> .....	221
4. <i>Income</i> .....	221
D. Standards for Determining Merit; Information	

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	Considered; Applicant and Nominee Characteristics .....	222
	1. <i>Qualities Considered</i> .....	223
	2. <i>Sources of Information</i> .....	225
	3. <i>Standards for Evaluating Information About the Applicant</i> .....	226
E.	Applicants' Legal Experience and Qualifications .....	227
	1. <i>Public Versus Private Sector Experience</i> .....	227
	2. <i>Specific Types of Employment</i> .....	227
	3. <i>Employment at Time of Application</i> .....	228
	4. <i>Type of Caseload Related to Applications, Nomination, and Appointment</i> .....	228
	5. <i>Trial Experience, Appearance in Court</i> .....	229
	6. <i>Writing Sample Evaluation</i> .....	229
F.	Bar Survey Ratings .....	230
II.	THE RETENTION PROCESS AND JUDICIAL PERFORMANCE EVALUATION .....	233
	A. Performance Evaluations .....	233
	B. Voter Action on Judges Standing for Retention .....	235
III.	WHAT THE COUNCIL HAS LEARNED .....	236

## INTRODUCTION

Alaska's merit selection system for judges has been discussed and analyzed from a variety of perspectives in recent years.<sup>1</sup> All of these discussions have focused on the procedures followed to select and retain Alaska's judges, with little information about how the process plays out. Who applies to be a judge in Alaska? What guides the Alaska Judicial Council's (the "Judicial Council" or the "Council") decisions, and what characteristics appear to be most closely associated with nomination and appointment? How are the characteristics of successful applicants related to performance in retention elections?

Information about the Judicial Council's process is valuable to those interested in applying for judicial positions. It also allows those who participate in the process to understand the importance of their contributions (for example, by responding to the Council's surveys, completing counsel questionnaire forms and reference letters, and

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1. See, e.g., Kelly Taylor, Note, *Silence At a Price? Judicial Questionnaires and the Independence of Alaska's Judiciary*, 25 ALASKA L. REV. 303 (2008); Susie Mason Dosik, Reply, *Alaska's Merit Selection for Judges*, 21 ALASKA L. REV. 305 (2004); Tillman J. Finley, Note, *Judicial Selection in Alaska: Justifications and Proposed Courses of Reform*, 20 ALASKA L. REV. 49 (2003).

voting in retention elections). The Council's analysis of the data that have been collected since 1984 gives a solid historical perspective, showing trends and changes over the past decades, as well as showing how the process maintains accountability in judicial selection and retention.

The Alaska Constitution requires the Judicial Council to administer the merit selection process,<sup>2</sup> and also mandates that the Council "shall conduct studies for improv[ing] . . . the administration of justice . . ."<sup>3</sup> Under that aegis, the Council reviewed the merit selection process in a 2008 report, *Selecting and Evaluating Alaska's Judges: 1984-2007* (the "Report").<sup>4</sup> This Article summarizes the most important data from the Report, including information about the Council's practices, the performance of Alaska's judges, and the applicant qualifications associated with nomination by the Council and appointment by the governor.

The Report documented changes in Bar member and judicial applicant characteristics from 1984-2007, using the time periods 1984-1988 and 2003-2007 for much of the analysis.<sup>5</sup> To understand how applicants differed from the Bar as a whole, the analysis relied on two additional data sets.<sup>6</sup> In 1989, the Council, the Alaska Bar Association, and local bar associations conducted a survey of in-state Bar members' demographic characteristics, practices, and opinions about Bar-related issues.<sup>7</sup> In 2007, the Council conducted another, more concise survey of Bar members.<sup>8</sup>

Alaska's delegates to the state's 1956 Constitutional Convention deliberated at length about the system that they would use to select judges. They chose to use the "Missouri Plan," with its provisions for

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2. ALASKA CONST. art. IV, §§ 5-8.

3. *Id.* at § 9.

4. ALASKA JUDICIAL COUNCIL, *SELECTING AND EVALUATING ALASKA'S JUDGES: 1984-2007* (2008), available at <http://www.ajc.state.ak.us/reports/JudgeProfile08.pdf>; see also ALASKA JUDICIAL COUNCIL, *FOSTERING JUDICIAL EXCELLENCE* (1999), available at <http://www.ajc.state.ak.us/reports/jgprofile.pdf>. The 2008 report, *SELECTING AND EVALUATING ALASKA'S JUDGES: 1984-2007*, and its predecessor, *FOSTERING JUDICIAL EXCELLENCE*, are part of the Council's work that fulfills this constitutional mandate.

5. See, e.g., ALASKA JUDICIAL COUNCIL, *SELECTING AND EVALUATING ALASKA'S JUDGES: 1984-2007*, *supra* note 4, at 5.

6. *Id.* at 8.

7. ALASKA BAR ASS'N ET AL., *ALASKA BAR MEMBERSHIP SURVEY* (1989), available at <http://www.ajc.state.ak.us/reports/barmem.pdf>. The Membership Survey was published jointly by the Judicial Council, the Alaska Bar Association, and the Alaska Court System, with the cooperation of the Juneau and Tanana Valley Bar Associations. *Id.* at 1.

8. Editorial, *Bar Demographics Change Since '89*, ALASKA BAR RAG (Anchorage, Alaska), Jan.-Mar. 2008, at 1.

merit selection and retention elections for public accountability.<sup>9</sup> The Judicial Council met in Juneau in May 1959 to establish its merit selection procedures.<sup>10</sup> The process included (a) notice to all members of the Bar; (b) a requirement that each applicant submit a nominating petition signed by the applicant and four other individuals;<sup>11</sup> (c) a preliminary screening by the Council members to identify qualified applicants; (d) a letter from the Council asking those qualified applicants to submit a detailed personal history; (e) an advisory poll that listed the names of qualified applicants and was sent to all members of the Bar; (f) investigation by the Council; and (g) the Council meeting and nominations.<sup>12</sup>

In 1975, the Alaska Legislature established a judicial performance evaluation program to provide information to voters in the judicial retention elections.<sup>13</sup> It asked the Council to carry out the evaluations and to ensure that the public was fully informed before each election.<sup>14</sup> Part II of this Article describes the retention process in more detail.

### I. MERIT SELECTION, FROM APPLICANTS TO JUDGES

Part A of this section discusses the Council's structure, the numbers and types of vacancies that occur, and how these factors have changed in the twenty-three years covered by the Report. Part B describes the qualities that the Council looks for in judicial applicants, as well as the standards that it applies to measure these qualities. Part C describes the demographic characteristics of applicants and shows how those are related to the likelihood of nomination and appointment. Part D focuses on the professional experiences of the applicants, how these are measured, and how they are related to nomination and appointment. Applicants' legal experience and qualifications are discussed in Part E, and Part F examines the importance of Bar survey ratings.

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9. See MARLA N. GREENSTEIN, HANDBOOK FOR JUDICIAL NOMINATING COMMISSIONERS 1 (2d ed. 2004). Missouri was the first state to adopt a merit selection plan. *Id.*

10. ALASKA JUDICIAL COUNCIL, MEETING MINUTES (May 19, 1959) (on file with the Alaska Judicial Council).

11. The four other individuals may be four attorneys, four laymen, or two attorneys and two laymen. *Id.* at 1.

12. *Id.* at 1-2.

13. See ALASKA JUDICIAL COUNCIL, FOSTERING JUDICIAL EXCELLENCE, *supra* note 4, at 11.

14. *Id.*

## A. The Judicial Council and Vacancies

### 1. The Council

The seven-member Alaska Judicial Council includes three non-attorneys appointed by the governor “subject to confirmation by a majority of the members of the legislature in joint session.”<sup>15</sup> There are also three attorney members appointed “by the governing body of the organized state bar.”<sup>16</sup> Each of these six members serves a staggered six-year term.<sup>17</sup> The chief justice of the supreme court serves as chair *ex officio*.<sup>18</sup>

The Alaska Constitution requires that “[a]ppointments shall be made with due consideration to area representation and without regard to political affiliation.”<sup>19</sup> In practice, this has meant that the Council typically has one non-attorney member and one attorney member from each of the (a) Southeast, (b) Southcentral, and (c) Interior and Northern areas of the state.<sup>20</sup> The Council’s membership has included former legislators, commissioners, a former state attorney general, and the clerk of the 1956 Constitutional Convention, as well as victims’ advocates, doctors, a chief of police, business owners, teachers, and newspaper publishers.<sup>21</sup>

### 2. Vacancies

Judicial vacancies occur when the legislature creates new positions, when judges resign, or when judges are not retained by the voters.<sup>22</sup> The

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15. ALASKA CONST. art. IV, § 8.

16. *Id.*

17. *Id.*

18. *Id.* The justices of the Alaska Supreme Court elect the chief justice from among themselves. *Id.* at § 2(b). Each chief justice serves a three-year term and cannot succeed himself or herself. *Id.* Thus, the Council has a new chair every three years.

19. *Id.* at § 8.

20. Dosik, *supra* note 1, at 312. Southeast is the First Judicial District, which includes the state capital of Juneau; Southcentral is the Third Judicial District, which includes Anchorage and extends to the end of the Aleutian Chain; and the Interior and Northern areas are the Second (Northern Alaska with Barrow, Nome, and Kotzebue) and Fourth (Interior Alaska with Fairbanks, Bethel, and the Yukon-Kuskokwim river drainages) Judicial Districts. See ALASKA STAT. § 22.10.010 (2008).

21. See ALASKA JUDICIAL COUNCIL, FOSTERING JUDICIAL EXCELLENCE, *supra* note 4, at 2-3; see also ALASKA JUDICIAL COUNCIL, JUDICIAL COUNCIL MEMBERSHIP (2009), available at <http://www.ajc.state.ak.us/Reference/roster.pdf>.

22. Non-retention is a rare occurrence. Between 1984 and 2008, all but one of the vacancies were created by judicial retirements or by the legislature establishing new positions. See ALASKA JUDICIAL COUNCIL, SELECTING AND EVALUATING ALASKA’S JUDGES: 1984-2007, *supra* note 4, at 36. The single non-retention occurred in 2006, after the Judicial Council recommended against

number of vacancies has increased substantially as the state has grown in size and as the population has matured. The number of applicants for each vacancy has also increased significantly in most parts of the state. For the Report, the unit of analysis was the application, defined as “one attorney applying for one position.”<sup>23</sup> Judicial Council records contained 951 applications from 461 individual attorneys.<sup>24</sup>

Both the number of vacancies per year and the number of applicants per vacancy increased during the time covered in the Report. From 1984 to 1988, the Council handled an average of 3.8 vacancies per year, with 6.2 applicants per vacancy.<sup>25</sup> From 2003–2007, the Council handled 7.2 vacancies each year, with an average of 10.6 applicants per vacancy.<sup>26</sup> The increases were not distributed evenly throughout the state. The average number of applicants in Anchorage and Palmer nearly doubled, while the average number in Fairbanks declined.<sup>27</sup> The applications increased at a greater rate for district court positions than for superior court judgeships.<sup>28</sup>

The Council nominated about the same percentage of applicants throughout the entire period reviewed, averaging about thirty-eight percent of all applicants.<sup>29</sup> The Alaska Constitution requires that “[t]he governor shall fill any vacancy . . . by appointing one of two or more persons nominated by the judicial council.”<sup>30</sup> Seventy-five percent of the time the Council has nominated more than the two required candidates.<sup>31</sup> When it nominated only two applicants, a review of the vacancies showed that many were from rural areas with fewer applicants.<sup>32</sup>

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retaining Judge David Landry of the Kenai District Court. ALASKA JUDICIAL COUNCIL, TWENTY-THIRD REPORT TO THE LEGISLATURE AND SUPREME COURT: 2005–2006 7 (2007), available at <http://www.ajc.state.ak.us/reports/23rdreport.pdf>. For a more detailed discussion of non-retention, see ALASKA JUDICIAL COUNCIL, TWENTY-FOURTH REPORT TO THE LEGISLATURE AND SUPREME COURT: 2007–2008 app. H (2009), available at <http://www.ajc.state.ak.us/reports/24threport.pdf>.

23. ALASKA JUDICIAL COUNCIL, SELECTING AND EVALUATING ALASKA’S JUDGES: 1984–2007, *supra* note 4, at 12 n.29.

24. *Id.*

25. *Id.* at 5.

26. *Id.*

27. *Id.* at 6.

28. *Id.*

29. *Id.* at 7.

30. ALASKA CONST. art. IV, § 5.

31. ALASKA JUDICIAL COUNCIL, SELECTING AND EVALUATING ALASKA’S JUDGES: 1984–2007, *supra* note 4, at 7.

32. *Id.*

## B. The Statutory Requirements for Judicial Applicants

The Alaska Constitution notes that “[s]upreme court justices and superior court judges shall be citizens of the United States and of the State, licensed to practice law in the State, and possessing any additional qualifications prescribed by law.”<sup>33</sup> Statutes mandate that all judges be residents of Alaska for the five years preceding their appointments and that they have engaged in the active practice of law for differing periods, depending on the position.<sup>34</sup>

A trend emerged from the data on Bar members’ ages, years of residency, and years of practice.<sup>35</sup> From 1984 to 1988, Bar members were relatively young and inexperienced, often having only recently arrived in Alaska with few years of practice to their credit. In contrast, the period from 2003 to 2007 saw the average age of Bar members increase from forty years to fifty-one years,<sup>36</sup> and the mean of the years of practice jump from 11.6 years to 20.6 years.<sup>37</sup> However, years of practice varied geographically and appeared to correlate with the likelihood of nomination and the court level.<sup>38</sup> Forty-six percent of district court nominees had at least sixteen years of practice, as did sixty-eight percent of superior court nominees and ninety-six percent of appellate court nominees.<sup>39</sup>

## C. Demographic Characteristics of the Applicants

There is some association between applicants’ likelihood of nomination and their age. It is likely that this association is more related

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33. ALASKA CONST. art. IV, § 4. Additional requirements for the different levels of courts are spelled out in Alaska law. See ALASKA STAT. §§ 22.05.070, 22.07.040, 22.10.090, and 22.15.160 (2008) (outlining the requirements for the supreme court, court of appeals, superior court, and district court, respectively).

34. See, e.g., ALASKA STAT. § 22.05.070 (2008). Supreme court justices and court of appeals judges are required to have eight years of active practice; superior court judges, five years; and district court judges, three years. *Id.*; ALASKA STAT. §§ 22.07.040, 22.10.090, 22.15.160(a) (2008). Alternatively, magistrates who have served for seven years may become district court judges without meeting the active practice requirement. ALASKA STAT. § 22.15.160(a) (2008); see also ALASKA STAT. § 22.15.160 (2008); ALASKA CT. R. ADMIN. 19.1.

35. ALASKA BAR ASS’N ET AL., *supra* note 7, at 6.

36. ALASKA JUDICIAL COUNCIL, SELECTING AND EVALUATING ALASKA’S JUDGES: 1984–2007, *supra* note 4, at 9.

37. *Id.* at 23.

38. See *id.* at 23–24.

39. *Id.* at 23. The ratio held true for applicants also. Forty percent of district court applicants, sixty-four percent of superior court applicants, and eighty-five percent of appellate court applicants had at least sixteen years of experience. *Id.* at 24 n.53.

to years of practice than it is to age.<sup>40</sup> There were no links between the gender or ethnicity of applicants and their chances of nomination. There also did not appear to be strong links between income and nomination. The links that did appear were probably related to applicants' length and type of practice, rather than to their income per se.

1. *Age*

In 1989, the average age of Bar members was forty years old; by 2007, it was fifty-one years.<sup>41</sup> The average ages of applicants also increased.<sup>42</sup> Applicants for the district courts increased in age from an average of thirty-seven years to an average of forty-seven years.<sup>43</sup> For the superior court, the average applicant age increased from forty-one years to fifty years.<sup>44</sup> The range of ages for nominees and appointees closely resembled that of applicants.<sup>45</sup>

2. *Gender*

In 1989, females comprised twenty-five percent of the Bar's membership but only fifteen percent of judicial applicants.<sup>46</sup> By 2007, thirty-five percent of Bar members were female, and twenty-eight percent of judicial applicants in 2003–2007 were female.<sup>47</sup>

The Council nominated female applicants at about the same rate as male applicants. In 2003–2007, the Council nominated thirty-six percent of the female applicants and thirty-eight percent of the males.<sup>48</sup> Appointments varied, however. In 1984–1988, nine percent of the nominees and twenty-six percent of the appointees were female.<sup>49</sup> In 2003–2007, twenty-seven percent of the nominees and sixteen percent of the appointees were female.<sup>50</sup>

Gender interacted with two other variables in ways that undoubtedly affected the rates of applications. First, female applicants and nominees for the trial court positions tended to be younger than

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40. *See supra* Part I.E.

41. ALASKA JUDICIAL COUNCIL, SELECTING AND EVALUATING ALASKA'S JUDGES: 1984–2007, *supra* note 4, at 9.

42. *See id.*

43. *Id.*

44. *Id.* There were too few applicants for the appellate courts (court of appeals and supreme court) to do statistical analysis of changes over time. *Id.* at 9 n.23. For the period reviewed, the average age of appellate applicants was fifty years. *Id.* at 9.

45. *Id.*

46. *Id.* at 10.

47. *Id.*

48. *Id.*

49. *Id.* at 11.

50. *Id.*



males.<sup>51</sup> Second, on a related issue, in 2007, more females failed to meet the statutory requirements for appointment to the bench.<sup>52</sup>

### 3. *Ethnicity*

Alaska has relatively few minority attorneys. As such, there were too few minority judicial applicants to conduct a statistical analysis.<sup>53</sup> Thirteen minority attorneys have applied for twenty-seven judicial vacancies since 1984.<sup>54</sup> Eight were nominated and four were appointed.<sup>55</sup>

### 4. *Income*

The Council asks judicial applicants for information about income from the three calendar years prior to their applications.<sup>56</sup> From 1984 through 2007, “most members of the [B]ar and most applicants for the district court earned less than a district court judge[’s salary].”<sup>57</sup> For the

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51. *Id.*

52. *See id.* at 10. Persons appointed to the district court must have three years of active practice experience. ALASKA STAT. § 22.15.160(a) (2008). In 2007, three percent of males and eight percent of females failed to satisfy this requirement. ALASKA JUDICIAL COUNCIL, SELECTING AND EVALUATING ALASKA’S JUDGES: 1984–2007, *supra* note 4, at 10. Persons appointed to the superior court must have five years of active practice experience. ALASKA STAT. § 22.10.090 (2008). In 2007, six percent of males and fifteen percent of females failed to satisfy this requirement. ALASKA JUDICIAL COUNCIL, SELECTING AND EVALUATING ALASKA’S JUDGES: 1984–2007, *supra* note 4, at 10. The statutory requirements for residency and practice of law are found at sections 22.05.070 (supreme court), 22.07.040 (court of appeals), 22.10.090 (superior court), and 22.15.160 (district court) of the Alaska Statutes.

53. ALASKA JUDICIAL COUNCIL, SELECTING AND EVALUATING ALASKA’S JUDGES: 1984–2007, *supra* note 4, at 12. In 2007, ninety-three percent of the Bar members were Caucasian, with less than two percent of Alaska Natives/American Indians, and less than one percent each of Blacks, Hispanics and Asian/Pacific Islanders. *Id.* At the end of 2007, there were two minority judges in Alaska. *Id.*

54. *Id.*

55. *Id.*

56. *Id.* at 20. The application form says: “Please estimate your total income for each of the three years immediately preceding the date of this application. This information is used to evaluate active practice of law and potential conflict of interest issues.” ALASKA JUDICIAL COUNCIL, APPLICATION FOR JUDICIAL APPOINTMENT 18 (2009), available at <http://www.ajc.state.ak.us/selection/applicationforms.htm> (follow “Current Judicial Application Form—can be downloaded in .pdf format” hyperlink). The form says that “total income” is “your ‘adjusted gross income’ as defined on your 1040 tax form, . . . not including income attributable to a spouse or other person.” *Id.* The income figures used in this analysis were the averages of the three years of income reported by each applicant. ALASKA JUDICIAL COUNCIL, SELECTING AND EVALUATING ALASKA’S JUDGES: 1984–2007, *supra* note 4, at 21 n.47.

57. *See* ALASKA JUDICIAL COUNCIL, SELECTING AND EVALUATING ALASKA’S JUDGES: 1984–2007, *supra* note 4, at 21 fig.3. Data from the Bar were self-reported, and probably included some attorneys who did not meet the residency and active practice requirements for eligibility to be appointed to the bench, as well as attorneys who may have been practicing part-time. *See id.* at 21 n.46.

most part, members of the Bar in general earned less than the salaries for superior court judges, but superior court applicants' incomes tracked superior court judges' salaries fairly closely.<sup>58</sup> Appellate court applicants' salaries tended to be similar to or higher than judicial salaries, especially for supreme court applicants.<sup>59</sup>

Bar members' and applicants' incomes also varied by gender.<sup>60</sup> In 2007, ten percent of men and twenty percent of women earned \$50,000 or less.<sup>61</sup> However, only four percent of women earned \$200,001 or more, while sixteen percent of men did so.<sup>62</sup> Female attorneys earning the highest salaries were less likely than male attorneys earning similar amounts to apply for judicial positions. Forty percent of male attorneys responding to the 2007 Bar membership survey said that they earned \$130,001 or more; twenty-two percent of the male applicants in the 2003–2007 group earned \$130,001 or more.<sup>63</sup> In contrast, fourteen percent of the female lawyers responding to the 2007 Bar membership survey said that they earned \$130,001 or more, but only one percent of the female applicants in the 2003–2007 group earned \$130,001 or more.<sup>64</sup>

#### **D. Standards For Determining Merit; Information Considered; Applicant and Nominee Characteristics**

After describing the statutory requirements and the demographic characteristics of the applicants, it is appropriate to consider the Council's standards for nomination and the applicant characteristics most directly related to the Council's standards.

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58. *Id.* at 22.

59. *Id.*

60. On this matter, the Report states:

The Council was not able to control for full or part-time work, and did not have the resources for a more complex analysis that could have shown the independent contribution of several variables to the income differences. Men and women differed by age, years of practice and types of practice; all of these variables probably contributed to the income differences, but may not have explained them entirely. In 1987, males significantly out-earned females in every type of practice, even when holding equal years of practice experience.

*Id.* at 11 n.27.

61. *Id.* at 11.

62. *Id.*

63. *Id.*

64. *Id.*

### 1. *Qualities Considered*

Council Bylaws<sup>65</sup> call for members to consider judicial applicants' "professional competence, including written and oral communication skills; integrity; fairness; temperament; judgment, including common sense; legal and life experience; and demonstrated commitment to public and community service."<sup>66</sup> Questions arise about how the Council defines these qualities and how they can be measured. To provide the public and applicants with detailed information, the Council spells out its procedures in print and on its website.<sup>67</sup>

To measure professional competence, for example, the Council looks for demonstrations of the applicant's knowledge of substantive and procedural aspects of the law.<sup>68</sup> These can come from counsel questionnaires,<sup>69</sup> reference and employment verification letters, educational background, a writing sample, and the Bar survey.<sup>70</sup> Ability to communicate, both orally and in writing, can be measured using the same sources.<sup>71</sup> The Council's interview with the applicant also emphasizes the presence or absence of the ability to communicate

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65. The Alaska Constitution says that the Judicial Council "shall act . . . according to rules which it adopts." ALASKA CONST. art. IV, § 8. The Council's bylaws can be found at its website, <http://www.ajc.state.ak.us/Reference/Bylaws09.pdf>.

66. ALASKA JUDICIAL COUNCIL, BYLAWS OF THE ALASKA JUDICIAL COUNCIL art. I, § 1 (2009), available at <http://www.ajc.state.ak.us/Reference/Bylaws09.pdf>. Article I, section 1 of the Bylaws sets out the Council's policies regarding judicial selection. *Id.*

67. See ALASKA JUDICIAL COUNCIL, PROCEDURES FOR NOMINATING JUDICIAL CANDIDATES 13-14 (2007), available at <http://www.ajc.state.ak.us/selection/Procedures/SelectionProcedures10-23-09.pdf>; see also ALASKA JUDICIAL COUNCIL, TWENTY-FOURTH REPORT TO THE LEGISLATURE AND SUPREME COURT: 2007-2008, *supra* note 22, at apps. D-13 to D-14. All of the Council's publications are available at the Council's website, <http://www.ajc.state.ak.us>.

68. ALASKA JUDICIAL COUNCIL, PROCEDURES FOR NOMINATING JUDICIAL CANDIDATES, *supra* note 67, at 13.

69. Applicants are asked to provide the names and addresses of attorneys and judges involved "in three of the applicant's cases in the past three years and three of the applicant's cases in the past three years that did not go to trial but in which the applicant did substantial work." *Id.* at 2. The Council sends a questionnaire to each of the named individuals asking for their observations about the applicant's legal ability and understanding of the law in that specific case, the applicant's temperament, diligence, and promptness, and the respondent's overall assessment of the applicant. See *id.* at 5. As a rule, the counsel questionnaires provide more detailed information than the surveys; the information is from people who have recently worked directly with the applicant in a professional capacity. See *id.*

70. See, e.g., *id.* at 2-3 (describing sources to which the Judicial Council refers when evaluating candidates).

71. See *id.* at 13.

effectively.<sup>72</sup> The Council also looks at the “amount and breadth of . . . legal experience, and the suitability of that experience for the position sought, including trial and other courtroom experience and administrative skills.”<sup>73</sup>

Evidence of an applicant’s integrity, impartiality, fairness, and similar character qualities may come from references, the Bar survey, and the interview. Public input, disciplinary records, criminal history, and the Council’s investigation shed light on these qualities as well.<sup>74</sup> The Council looks for a consistent history of honesty and high moral character, as well as for respect for duties arising under the codes of professional and judicial conduct.<sup>75</sup> Applicants must show their “ability to be impartial to all persons and groups of people and . . . a commitment to equal justice under the law.”<sup>76</sup>

When evaluating the temperament of an applicant, the Council considers “whether the applicant possesses compassion and humility; whether the applicant has a history of courtesy and civility in dealing with others; whether the applicant has shown an ability to maintain composure under stress; and, whether the applicant is able to control anger and maintain calmness and order.”<sup>77</sup> Evidence of these characteristics comes from the Council’s questionnaires that are completed by attorneys who have participated with the applicant in recent cases; from public comment; from the Bar survey; from discipline or other matters in which temperament might have been an issue; and from the interview.

An applicant’s good judgment and common sense are critical to success on the bench. Council members look for a sound balance between abstract knowledge and practical reality.<sup>78</sup> Has the applicant shown an ability to decide difficult problems promptly?<sup>79</sup> Do the

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72. Compare *id.* at 12 (“[I]nterview questions will focus on matters relevant to determining the applicant’s qualifications under the criteria set out . . . .”) with ALASKA JUDICIAL COUNCIL, BYLAWS OF THE ALASKA JUDICIAL COUNCIL, *supra* note 66, at art. I, § 1 (“The Judicial Council shall endeavor to nominate . . . those judges and members of the [B]ar who stand out as most qualified based upon the [C]ouncil’s consideration of their . . . professional competence, including written and oral communication skills . . .”).

73. ALASKA JUDICIAL COUNCIL, PROCEDURES FOR NOMINATING JUDICIAL CANDIDATES, *supra* note 67, at 14.

74. ALASKA JUDICIAL COUNCIL, TWENTY-FOURTH REPORT TO THE LEGISLATURE AND SUPREME COURT: 2007-2008, *supra* note 22, at apps. D-5, D-8, D-9.

75. ALASKA JUDICIAL COUNCIL, PROCEDURES FOR NOMINATING JUDICIAL CANDIDATES, *supra* note 67, at 14.

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

decisions make practical sense, while also fitting into the existing case law and statutes?<sup>80</sup> The applicant's ability to stay free of disciplinary issues involving timeliness, the experiences of the public and fellow Bar members, and references from former employers and colleagues all shed light on these characteristics.

The final qualities in the Council's list are life experience and commitment to public service.<sup>81</sup> Members look at the diversity of the applicant's personal and educational history, exposure to persons of different ethnic and cultural backgrounds, and demonstrated interests in areas outside the legal field.<sup>82</sup> They review the applicant's public service to schools, non-profits, and a wide range of community organizations.<sup>83</sup> Applicants provide some of this information on their applications.<sup>84</sup> Other knowledge comes from reference letters, information about pro bono service, public comment, and the interview.

## 2. Sources of Information

Sources of information include those supplied by the applicant, information obtained from public input (including references, public comment, unsolicited letters, public hearings), Bar input (surveys, references, counsel questionnaires), investigative materials, and interviews.<sup>85</sup>

Applicants complete a twenty-two-page written application form for the Council,<sup>86</sup> submit a writing sample,<sup>87</sup> and provide information and waivers that allow the Council to investigate criminal and credit history, Bar and judicial discipline, and other matters that could affect the applicants' qualifications.<sup>88</sup> The Council staff surveys Alaska Bar

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80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *See, e.g.,* ALASKA JUDICIAL COUNCIL, APPLICATION FOR JUDICIAL APPOINTMENT, *supra* note 56, at 7-8.

85. ALASKA JUDICIAL COUNCIL, PROCEDURES FOR NOMINATING JUDICIAL CANDIDATES, *supra* note 67, at 2-13. The Council's Bylaws make interviews of each candidate optional. ALASKA JUDICIAL COUNCIL, BYLAWS OF THE ALASKA JUDICIAL COUNCIL, *supra* note 66, at art. VII, § 3(C). However, in practice, the Council always interviews every applicant for every vacancy. ALASKA JUDICIAL COUNCIL, TWENTY-FOURTH REPORT TO THE LEGISLATURE AND SUPREME COURT: 2007-2008, *supra* note 22, at app. D-10. Often the Council will interview applicants for more than one vacancy at a single meeting. *Id.*

86. *See* ALASKA JUDICIAL COUNCIL, APPLICATION FOR JUDICIAL APPOINTMENT, *supra* note 56, at 1-22.

87. *See id.* at 14.

88. *See id.* at 20-21.

Association members;<sup>89</sup> reviews disciplinary, criminal, and credit history records;<sup>90</sup> asks attorneys involved in the applicant's recent cases for more detailed information;<sup>91</sup> contacts all former employers;<sup>92</sup> evaluates the writing sample;<sup>93</sup> and conducts other investigation as needed.<sup>94</sup>

Public input is sought at every step of the process. Names of those interested in a vacancy are released soon after the deadline for submitting applications, and the public is encouraged to comment.<sup>95</sup> Bar survey scores are released to the press and posted on the Council's website several weeks before the scheduled Council interviews.<sup>96</sup> A public hearing, usually in the location of the vacancy, is held at the time of the Council's interviews.<sup>97</sup> The public's comments about applicants' qualifications are an important part of the information used by the Council to choose its nominees. Applicants may ask to have their interviews open to the public, and the Council's vote is public.<sup>98</sup>

### 3. *Standards for Evaluating Information About the Applicant*

The Council evaluates applicants on these qualities using a "most qualified standard."<sup>99</sup> In the Constitutional Convention minutes regarding the Judiciary Committee, delegate Ralph Rivers said that merit selection would provide "an orderly screening process" in which the "Judicial Council will seek for the best available timber . . ."<sup>100</sup> The Bylaws specify that the Council will "nominate for judicial office . . .

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89. ALASKA JUDICIAL COUNCIL, PROCEDURES FOR NOMINATING JUDICIAL CANDIDATES, *supra* note 67, at 6.

90. *Id.* at 5.

91. *Id.*

92. *Id.*

93. *Id.* at 6.

94. *Id.* at 5.

95. *Id.* at 9.

96. *Id.* at 8.

97. *Id.* at 9.

98. *See id.* at 11, 16.

99. ALASKA JUDICIAL COUNCIL, BYLAWS OF THE ALASKA JUDICIAL COUNCIL, *supra* note 66, at art. VII, § 4. The Bylaws state that:

The Council shall select two or more candidates who stand out as the most qualified under the criteria set out in Article I, Section 1 of these bylaws, considering (a) other candidates who have applied; (b) the position applied for; and (c) the community in which the position is to be located. The names of the selected candidates shall be submitted to the governor in alphabetical order; but if the [C]ouncil's vote does not result in selecting at least two applicants who are sufficiently qualified, the [C]ouncil shall decline to submit any names and will re-advertise the position.

*Id.*

100. Alaska Constitutional Convention Minutes Concerning Judicial Selection and Retention 594, *available at* <http://www.ajc.state.ak.us/General/akcccon.htm>.

those judges and members of the [B]ar who stand out as most qualified based upon the council's consideration . . . ."<sup>101</sup>

### E. Applicants' Legal Experience and Qualifications

In a merit selection system, applicants' legal backgrounds are significant for assessing which applicants are most qualified. The Council analyzed applicants' experience both throughout their legal careers and in their positions at the time that they applied for judicial vacancies. The analysis looked in-depth at public as compared to private experience, the types of caseloads handled, and experience in court and at trial.

#### 1. *Public Versus Private Sector Experience*

More than two-thirds of judicial applicants from 1984–2007 had legal experience in both the public and private sectors.<sup>102</sup> About eight percent had only public sector experience, and about twenty percent had only private sector experience.<sup>103</sup> Applicants with both public and private experience were nominated and appointed at slightly higher rates than those at which they applied, as were applicants with only public sector experience.<sup>104</sup> Those with only private sector experience were nominated and appointed at lower rates than the rate at which they applied.<sup>105</sup>

#### 2. *Specific Types of Employment*

Were specific job experiences associated with a greater likelihood of nomination or appointment? The analysis showed that there were a few differences.<sup>106</sup> More than half of the applicants had worked either as public defense attorneys or as prosecutors, although few had worked as

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101. ALASKA JUDICIAL COUNCIL, BYLAWS OF THE ALASKA JUDICIAL COUNCIL, *supra* note 66, at art. I, § 1.

102. ALASKA JUDICIAL COUNCIL, SELECTING AND EVALUATING ALASKA'S JUDGES: 1984–2007, *supra* note 4, at 12. The Report defines "private sector experience" as "non-governmental work as an attorney," including working in "private practice law firms, corporate counsel, and public interest non-profits." *Id.* at 12 n.30. The Report also defines "public sector experience" as "work as a prosecutor, public defender, public advocate, attorney general, judge, or magistrate, as well as work for a University, [B]ar association, local, federal, and military work, and agency work that [does] not fit into the previously listed categories." *Id.*

103. *Id.*

104. *Id.* at 12–13.

105. *Id.* at 13. Between 1984–1988 and 2003–2007, the percentage of applicants with only private sector experience dropped from twenty-five percent to eighteen percent. *Id.* at 13 n.32.

106. *Id.* at 13.

both.<sup>107</sup> The Council nominated the same numbers of public defense attorneys and prosecutors.<sup>108</sup> However, governors appointed applicants with prosecution experience at higher rates than they were nominated, while appointing applicants with public defense experience at lower rates than they were nominated.<sup>109</sup>

### 3. *Employment at Time of Application*

Besides looking at past legal employment, the analysis looked at the jobs applicants held at the time that they applied for judgeships.<sup>110</sup> Throughout the period reviewed, 1984–2007, a majority of applicants held public sector positions at the time of their applications.<sup>111</sup> The percentage increased from fifty-five percent in 1984–1988 to sixty-two percent in 2003–2007.<sup>112</sup> Employment at the time of application was closely related to the court level to which attorneys applied.<sup>113</sup>

Employment in the Bar changed during the same period. The percentage of private practitioners in the Alaska Bar decreased substantially between 1989 and 2007, from sixty-seven percent to fifty-eight percent.<sup>114</sup> Attorneys with a focus in criminal defense increased from four percent of the Bar to six percent.<sup>115</sup> The percentage of Bar members who were prosecutors also went up, from five percent to six percent.<sup>116</sup> Prosecutors applied for judicial positions at a far higher rate than their representation in the Bar, while public defenders applied for judgeships at about the same rate that they appeared in Bar membership statistics.<sup>117</sup>

### 4. *Type of Caseload Related to Applications, Nomination, and Appointment*

District court applicants had relatively more criminal legal experience during the five years immediately preceding their applications, while superior court applicants tended to have more civil

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107. *Id.* at 13 n.33. One hundred twenty-five nominees had worked as public defenders or advocates; one hundred twenty-one had worked as prosecutors; and seventeen had been involved with both types of work. *Id.* at 13 n.33.

108. *Id.* at 13.

109. *Id.* at 14 tbl.1.

110. *Id.* at 14–16.

111. *Id.* at 14.

112. *Id.*

113. *See, e.g., id.* at 15 (“Private practitioners comprised 51% of superior court applicants but only 38% of district court applicants.”).

114. *Id.*

115. *Id.* at 16.

116. *Id.*

117. *Id.* at 15–16.



court experience.<sup>118</sup> Most applicants had a mix of civil and criminal legal experience, both throughout their legal careers and during the five years immediately preceding their applications.<sup>119</sup> Relatively few attorneys practiced exclusively criminal or civil law<sup>120</sup>—perhaps because in many smaller prosecutors’ and public defenders’ offices, attorneys may handle some cases categorized as civil (for example, children’s cases) in addition to their criminal work.

5. *Trial Experience, Appearance in Court*

Sixty-eight percent of applicants, nominees, and appointees had more than five trials in the five-year period immediately preceding their applications.<sup>121</sup> In addition, most applicants said that they appeared in court regularly during their five most recent years of practice.<sup>122</sup>

6. *Writing Sample Evaluation*

All applicants submitted a writing sample with the other materials considered by the Council.<sup>123</sup> In addition to the review of the sample by the Council members, Council staff evaluated each sample for clarity, organization, grammar, proofing, and other indicators of ability to communicate in writing.<sup>124</sup> Each sample received a score on a “one” to “five” scale, with “five” being excellent, and “one” being below acceptable.<sup>125</sup>

On average, applicants for higher courts tended to receive higher writing scores.<sup>126</sup> Higher writing scores were associated with a greater

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118. *Id.* at 17, 17 fig.2.

119. *Id.* at 17.

120. *Id.* at 17–18; *see also id.* at 17 fig.2.

121. *Id.* at 18.

122. *Id.*

123. *Id.* at 24. The application form sets the following guidelines for the writing sample:

Attach one example of a brief, memorandum of law, or legal opinion or similar example of legal writing (10–20 pages in length; 15–25 pages for appellate positions) prepared solely by you within the last five years. Please choose a sample that reflects your ability to do legal research and analysis. If you do not have a good sample of this length, include an excerpt from a longer writing. Make sure the sample contains sufficient facts to make it understandable. (Some reply briefs may not meet these requirements.) Please do not submit: (a) coauthored writing samples, (b) samples with confidential information unless redacted to remove such information, (c) longer writing samples.

ALASKA JUDICIAL COUNCIL, APPLICATION FOR JUDICIAL APPOINTMENT, *supra* note 56, at 34.

124. ALASKA JUDICIAL COUNCIL, SELECTING AND EVALUATING ALASKA’S JUDGES: 1984–2007, *supra* note 4, at 24.

125. *Id.*

126. *Id.*

chance of nomination and, to a lesser extent, appointment.<sup>127</sup> The distinctions among scores were the most noticeable in the superior court, where the mean scores were 3.7 for applicants, 4.0 for nominees, and 4.1 for appointees.<sup>128</sup> The distinctions were the least noticeable for the appellate courts, where the mean scores were 4.1 for applicants and 4.3 for nominees and appointees.<sup>129</sup>

## F. Bar Survey Ratings

The Bar survey is, in some ways, the most visible aspect of the judicial selection process, although it is weighed as only one factor among many by the Council. Every Bar member in Alaska, active and inactive, and every out-of-state active member receives copies of the survey for every applicant.<sup>130</sup> The Council makes the results of the surveys public several weeks before making its final decision for each vacancy.<sup>131</sup>

The survey is structured using standard survey practices and has been modified several times since the Council began administering it in 1980.<sup>132</sup> In addition to providing demographic data about their years of practice, location, type of practice, and gender, attorneys are asked about the timing and amount of their experience with each applicant they evaluate.<sup>133</sup> The criteria for evaluation include professional competence, integrity, fairness, judicial temperament, the suitability of the applicant's experience for a particular vacancy, and overall

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127. *Id.*

128. *Id.*

129. *Id.* The mean score for district court applicants was 3.5; for district court nominees and appointees, the mean score was 3.9. *Id.*

130. *Id.* at 25 n.55. The Council does not try to survey attorneys in Alaska who are not members of the Bar for two reasons: (a) there is not a systematic way to reach them; and, (b) if they are not members of the Alaska Bar, it is an indication that they do not practice in Alaska state courts. Alaska has a mandatory Bar only for those attorneys who wish to practice in the state courts. Numerous attorneys either practice in the federal courts or do work that does not require appearances in state courts.

131. *Id.* at 25.

132. *Id.* During the early 1960s, the Council itself administered a simple survey. *Id.* at 25 n.56. At some point, the Alaska Bar Association started conducting the survey, and continued to do so until early 1980. The Alaska Bar Association's survey asked only whether the applicant was "unqualified," "qualified," or "well-qualified." In mid-1980, the Council took over the survey process, and since that time has contracted with an independent organization to conduct the survey. The questions have changed somewhat over time, but have always focused on legal ability, integrity, impartiality, fairness, and temperament. Usually the survey has included a variable for an overall evaluation of performance. *Id.*

133. *Id.*

performance.<sup>134</sup> Attorneys use a “one” to “five” rating scale, with “one” being the lowest and “five” the highest.<sup>135</sup>

When analyzing the data, the Council only reviews the scores from attorneys with direct professional experience with the applicant.<sup>136</sup> Demographic data show how different groups—judges, attorneys with primarily civil or criminal practices, men as compared to women, and attorneys in different parts of the state—assess an applicant’s abilities.<sup>137</sup> This is helpful because acceptable overall ratings may mask significant support or concerns among specific groups of attorneys.<sup>138</sup> Demographics also help the Council to identify the effects of “bloc voting.”<sup>139</sup> Although survey respondents must affirm that they have completed their survey in conformity with their professional responsibilities, some ratings may be affected by groups of attorneys favoring one applicant over another for reasons other than merit.<sup>140</sup>

The second important aspect of the Bar survey is the comments that it asks respondents to make.<sup>141</sup> In a recent survey, about forty-two

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134. *Id.* at 25.

135. *Id.* at 25 n.57. The Report notes the following about the scoring procedures:

1=poor; 2=deficient; 3=acceptable; 4=good; 5=excellent. Each value also has a descriptive statement: 1 (poor) Seldom meets minimum standards of performance for this court; 2 (deficient) Does not always meet minimum standards of performance for this court; 3 (acceptable) Meets minimum standards of performance for this court; 4 (good) Often exceeds minimum standards of performance for this court; and 5 (excellent) Consistently exceeds minimum standards for this court. Respondents also may check “Insufficient knowledge to rate this judge on this criterion.”

*Id.*

136. See, e.g., ALASKA JUDICIAL COUNCIL, PROCEDURES FOR NOMINATING JUDICIAL CANDIDATES, *supra* note 67, app. C at 54–60. Survey respondents note whether their experience with the applicant is via “direct professional,” “reputation,” or “other social contacts.” ALASKA JUDICIAL COUNCIL, FOSTERING JUDICIAL EXCELLENCE, *supra* note 4, at 8. The ratings from attorneys whose evaluations are based on reputation or other social contacts are noted, but all of the analysis of scores is based only on the scores from those attorneys who indicated direct professional experience with the applicant. See *id.* “Direct professional experience” is defined as “direct contact with the applicant’s professional work.” *Id.* This includes working with or against the attorney on a legal matter (i.e., a case, arbitration, negotiation . . . ). ALASKA JUDICIAL COUNCIL, PROCEDURES FOR NOMINATING JUDICIAL CANDIDATES, *supra* note 67, app. B at 47.

137. ALASKA JUDICIAL COUNCIL, SELECTING AND EVALUATING ALASKA’S JUDGES: 1984–2007, *supra* note 4, at 25.

138. *Id.*

139. *Id.* at 26.

140. *Id.*

141. *Id.*

percent of the respondents commented about at least one applicant.<sup>142</sup> The Council provides an opportunity for attorneys to sign their comments, noting that while comments are given to applicants, they are edited to remove all references to the respondent or mention of facts that could identify the respondent to the applicant.<sup>143</sup> About seventy percent of respondents sign their comments.<sup>144</sup> Unsigned comments are not considered unless they are corroborated, independently substantiated, or acknowledged by the applicant.<sup>145</sup>

Although the Council does not use the Bar survey to rank judicial applicants, higher Bar survey scores are generally associated with a greater likelihood of nomination.<sup>146</sup> Applicants who received overall ratings of 3.5 or higher from other Bar members were more likely to be nominated than those with lower ratings; applicants with ratings of 4.0 or higher were the most likely to be nominated and appointed.<sup>147</sup> Nominees, as a group, had noticeably higher mean scores than applicants on all of the variables on the Bar survey, but there were no significant differences in scores between nominees and appointees.<sup>148</sup> Appointees' Bar survey scores were also significantly related to their scores on performance evaluations at the time of judicial retention elections.<sup>149</sup>

The mean scores for applicants, nominees, and appointees differed by court level and by year.<sup>150</sup> Applicants for district and superior courts averaged 3.5 on their overall performance scores, while those for appellate courts averaged 3.7.<sup>151</sup> District court nominees received an average score of 3.8, nominees for superior court averaged 3.9, and

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142. E-mail from Ginger Mongeau, Data Manager, Behavioral Health and Research Services, University of Alaska Anchorage, to Teresa W. Carns, Senior Staff Associate, Alaska Judicial Council (Sept. 24, 2009) (on file with author).

143. ALASKA JUDICIAL COUNCIL, SELECTING AND EVALUATING ALASKA'S JUDGES: 1984-2007, *supra* note 4, at 26.

144. E-mail from Ginger Mongeau, *supra* note 142.

145. ALASKA JUDICIAL COUNCIL, SELECTING AND EVALUATING ALASKA'S JUDGES: 1984-2007, *supra* note 4, at 26. Signed Bar survey comments and counsel questionnaires were among the most valued information for the Council. *Id.* Because of the procedures regarding unsigned comments, Council members placed unsigned survey comments low on the list of useful information sources. *Id.* at 29.

146. *Id.*

147. *Id.* at 27.

148. *Id.* at 28.

149. *Id.* at 35; *see infra* Part II.F.

150. Alaska Judicial Council, SELECTING AND EVALUATING ALASKA'S JUDGES: 1984-2007, *supra* note 4, at 29.

151. *Id.* at 28.

appellate court nominees averaged 4.0; the average scores for appointees were similar.<sup>152</sup>

## II. THE RETENTION PROCESS AND JUDICIAL PERFORMANCE EVALUATION

One test of the quality and success of the merit selection process comes during periodic retention evaluations. If the merit selection process has performed well, judges should, in theory, receive good evaluations and high percentages of “Yes” votes from the electorate.<sup>153</sup> The Council analyzed data from the retention evaluations completed since 1976, the first year of the program.<sup>154</sup> The two main areas reviewed were the performance evaluation outcomes and the percentages of retention “Yes” votes received by judges standing in retention elections.<sup>155</sup>

### A. Performance Evaluations

Performance evaluations of judges rely on intensive investigations. The Council evaluates peremptory challenges to judges, recusals by judges, financial and conflict of interest forms filed with the courts and the Alaska Public Offices Commission, and appellate affirmance rates.<sup>156</sup> The Council surveys several statewide groups that have professional experience with judges: jurors who sat in trials with the judge during the prior two years; court employees; social workers, guardians *ad litem*, and Court Appointed Special Advocates (CASAs);<sup>157</sup> peace and probation officers; and attorneys.<sup>158</sup> Judges complete a questionnaire about their work during previous terms; this questionnaire includes lists of cases that they handled and the names of attorneys on those cases.<sup>159</sup> The Council solicits public comments through newspapers and other media,

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152. *Id.*

153. *Id.* at 31.

154. ALASKA JUDICIAL COUNCIL, FOSTERING JUDICIAL EXCELLENCE, *supra* note 4, at 11.

155. ALASKA JUDICIAL COUNCIL, SELECTING AND EVALUATING ALASKA’S JUDGES: 1984–2007, *supra* note 4, at 31 tbl.6.

156. Taylor, *supra* note 1, at 341.

157. ALASKA JUDICIAL COUNCIL, SELECTING AND EVALUATING ALASKA’S JUDGES: 1984–2007, *supra* note 4, at 33. CASAs volunteer to assist in Child in Need of Aid cases. *Id.* at 33 n.64. They are trained and supervised by the Office of Public Advocacy. *Id.*

158. *Id.* at 33.

159. ALASKA JUDICIAL COUNCIL, FOSTERING JUDICIAL EXCELLENCE, *supra* note 4, at 13. The counsel questionnaires are very similar to those used during the selection process.

and conducts a statewide public hearing a few months before it makes its retention recommendations.<sup>160</sup>

After reviewing all of the information collected, the Council may investigate further or invite judges to meet with the Council in person.<sup>161</sup> The Council then votes on whether to recommend that voters retain each judge.<sup>162</sup> Although Alaska law makes recommendations optional, the Council has always made recommendations for judges standing for retention.<sup>163</sup>

For sixty-five percent of the judges included in the discussion of retention evaluations, the Council had enough data to look at the associations between a judge's characteristics at the time of application and that judge's scores in retention evaluations.<sup>164</sup> The comparisons showed that "[h]igh [B]ar survey scores during the selection process correlated well with high performance evaluation scores at retention."<sup>165</sup> Furthermore, "sixty-nine percent of the applicants who were rated 4.3 or higher on the selection survey also were rated 4.3 or higher on their retention surveys."<sup>166</sup> Additionally, "[t]he other thirty-one percent with high selection survey marks were rated between 4.0 and 4.2 on retention evaluations."<sup>167</sup> Writing sample evaluations from the selection process had a close correlation with the overall scores given by attorneys in retention evaluations.<sup>168</sup> The judges with retention scores of less than 3.5 all received writing sample evaluations of "acceptable"; none of their writing samples were considered "good" or "excellent."<sup>169</sup> Among judges with retention evaluation scores of 4.0 or above, almost every writing sample had been rated "good" or "excellent."<sup>170</sup>

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160. ALASKA JUDICIAL COUNCIL, FOSTERING JUDICIAL EXCELLENCE, *supra* note 4, at 13.

161. *Id.* Much of the information, including comments on the surveys and counsel questionnaires, is shared with the judges, although it is edited to ensure the anonymity of respondents. See ALASKA JUDICIAL COUNCIL, PROCEDURES FOR NOMINATING JUDICIAL CANDIDATES, *supra* note 67, at 5. Court employee comments are not shared with judges.

162. ALASKA JUDICIAL COUNCIL, FOSTERING JUDICIAL EXCELLENCE, *supra* note 4, at 13.

163. ALASKA JUDICIAL COUNCIL, SELECTING AND EVALUATING ALASKA'S JUDGES: 1984-2007, *supra* note 4, at 36 n.74.

164. *Id.* at 34. Of the retention evaluations reported here, 144 out of 223 were for judges for whom the Council had selection information. *Id.* at 34 n.72. The remaining seventy-nine retention evaluations occurred for judges who had been appointed before 1984, for whom no selection information was available. *Id.*

165. *Id.* at 35.

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

## B. Voter Action on Judges Standing for Retention

Alaskan judges periodically stand for retention in general elections.<sup>171</sup> When voting whether to retain a judge, people may choose “Yes” or “No.”<sup>172</sup> District and superior court judges are voted on by residents of their judicial districts, while court of appeals judges and supreme court justices face a statewide vote.<sup>173</sup> There is some correlation between judicial performance and the percentage of “Yes” votes received, though other factors affect elections.<sup>174</sup>

The most useful way to analyze the data is to look at the percentages of “Yes” votes obtained by individual judges. In the biennial elections from 1984–2006, the percentage of “Yes” votes typically fell between sixty-four and sixty-nine percent, but they varied by district.<sup>175</sup> Judges in the First Judicial District averaged seventy-three percent “Yes” votes.<sup>176</sup> The judges in the Second Judicial District averaged seventy percent “Yes” votes.<sup>177</sup> Their colleagues in the Fourth Judicial District averaged sixty-nine percent “Yes” votes.<sup>178</sup> Finally, both the Third Judicial District judges and the appellate judges and justices received an average of sixty-five percent “Yes” votes.<sup>179</sup> The Council has suggested that in the First and Second Judicial Districts, the smaller populations allow closer relationships between judges and voters.<sup>180</sup> Yet, since each judicial district averaged at least sixty-five percent “Yes” votes in 1984–2006,<sup>181</sup> voters appear generally to approve of judges’ performance.<sup>182</sup>

The Council analyzes the information available from each retention election after the vote totals have been certified by the Lieutenant

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171. *Id.* at 31. By statute, the service period prior to a judge’s first retention election is shorter than the service periods prior to subsequent retention elections. *Id.* at 31 n.63. Eligible district court judges stand for retention in the first general election occurring more than two years after their appointment; if retained, a district court judge will serve four more years. *Id.* Superior court judges, court of appeals judges, and supreme court justices stand for retention in the first general election occurring more than three years after their appointment; if retained, they will serve additional terms of six, eight, and ten years, respectively. *Id.*

172. *Id.* at 31.

173. *Id.*

174. *Id.*

175. *Id.* at 31 tbl.5.

176. *Id.* at 32.

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.* at 31 tbl.6.

182. *Id.* at 32.

Governor's office.<sup>183</sup> The purpose is to discern voting patterns, to be alert to public concerns, and to assess the usefulness of the Council's recommendations.<sup>184</sup> "Voter participation in judicial races is compared to voter turnout for the [biennial] U.S. House race"<sup>185</sup> and for the quadrennial gubernatorial race.<sup>186</sup> Typically, "ninety-eight to ninety-nine percent of all people voting participate in those races."<sup>187</sup> In statewide appellate retention elections, eighty-four percent to eighty-seven percent of all voters participate.<sup>188</sup> In 2006, voting rates in trial court retention elections were similar.<sup>189</sup>

### III. WHAT THE COUNCIL HAS LEARNED

In the fifty years since statehood, the Council has refined and expanded its tools for nominating candidates for judicial positions. Among the more recently adopted tools are the use of counsel questionnaires, the signed comments on the Bar surveys, applicants' awareness of comments, electronic distribution of surveys, and the staff evaluation of the writing sample submitted by attorneys with their applications.<sup>190</sup>

- *Counsel questionnaires.* At statehood, Alaska's Bar was small enough that most members were acquainted with each other, even if they lived hundreds of miles away from one other. By the early 1980s, this was no longer the case. To address the need for feedback from attorneys with recent, direct, professional experience with each applicant, the Council began to ask for a list of three recent trials and at least three recent non-tried cases, with the names and addresses of each attorney and judge involved in the cases.<sup>191</sup> The questionnaire sent to attorneys and judges includes questions about the applicant's legal ability, temperament, diligence, and overall performance in the cases.<sup>192</sup> Typically, six to twelve questionnaires are

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183. *Id.* at 36.

184. *Id.*

185. *Id.* Alaska's population entitles it to a single House seat; it also has two U.S. Senators. *Id.* at 36 n.76.

186. *Id.* at 36.

187. *Id.*

188. *Id.*

189. *Id.*

190. *See, e.g., id.* at 8, 25-26, 25 n.55.

191. ALASKA JUDICIAL COUNCIL, PROCEDURES FOR NOMINATING JUDICIAL CANDIDATES, *supra* note 67, app. A at 32.

192. *See id.* app. A at 31-33.



returned for each applicant, often with detailed discussions of the respondent's experiences with the applicant.

- *Signed comments on the Bar survey.* Bar survey respondents have always had the opportunity to make comments about applicants. The Council has encouraged individuals to sign their comments,<sup>193</sup> noting that this gives them greater credibility with the Council members.<sup>194</sup> Recently the Council began to publicize its practice of not considering unsigned comments unless they were corroborated by other evidence, acknowledged by the applicant, or independently substantiated.<sup>195</sup> At present, about seventy percent of all respondents sign their comments.<sup>196</sup> The request for signatures may have deterred some respondents, but it does not seem to have created an insurmountable barrier for most.
- *Applicants' awareness of comments.* Applicants have always been given their survey scores before the scores are made public. The Council also provides applicants with as much information about the comments as possible, while retaining the commenters' anonymity. This allows applicants to respond to the comments, either in writing or during their interviews.
- *Electronic distribution of surveys.* In 2004, the Council began to offer Bar members the opportunity to respond to the surveys via the Internet.<sup>197</sup> The process saves money for the Council<sup>198</sup> and is quicker and easier for most Bar members.<sup>199</sup> In 2009, nearly eighty percent of the survey responses were electronic.<sup>200</sup>

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193. *Id.* at 6.

194. *See* ALASKA JUDICIAL COUNCIL, SELECTING AND EVALUATING ALASKA'S JUDGES: 1984-2007, *supra* note 4, at 26.

195. ALASKA JUDICIAL COUNCIL, TWENTY-FOURTH REPORT TO THE LEGISLATURE AND SUPREME COURT: 2007-2008, *supra* note 22, at app. D-22. The statement about "Anonymity," which appears on the comments page for each applicant on each Bar survey, says: "The council does not consider unsigned comments unless they are corroborated, independently substantiated, or acknowledged by the applicant." *Id.*

196. E-mail from Ginger Mongeau, *supra* note 142.

197. ALASKA JUDICIAL COUNCIL, TWENTY-FOURTH REPORT TO THE LEGISLATURE AND SUPREME COURT: 2007-2008, *supra* note 22, at 4-5.

198. *Id.* at 5.

199. *See id.*

200. *Id.*

- *Writing sample evaluation.* Attorneys have submitted writing samples with their applications for at least the past thirty-four years.<sup>201</sup> The Council staff has evaluated the samples for writing ability—basic grammar, sentence structure, organization, use of language, and proofing—since the mid-1980s.<sup>202</sup> Writing ability has proven to be a useful measure of the likelihood that an applicant will be nominated and, if appointed, do well on the bench.<sup>203</sup> The Council hypothesizes that the skills measured—the ability to organize complex materials and communicate them clearly—are associated with other qualities of a capable judge.<sup>204</sup>

The Council found that most of Alaska’s judges were highly rated when they ran for retention election.<sup>205</sup> Voters also supported judges strongly when they appeared on the ballot.<sup>206</sup> The quality of both applicants and judges appears to have continued to improve, suggesting that the merit selection process adopted at statehood has served Alaska well.<sup>207</sup> The Council’s bylaws require a review of the selection procedures at least every third year,<sup>208</sup> although changes typically occur more often. Regular reassessments allow continual improvement in selection and retention procedures. The merit selection system, as it has evolved in Alaska, is well-suited to adapting to new needs, while maintaining the highest standards for the selection and evaluation of judges.

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201. See Letter from Michael Rubinstein to Terry Gardiner (Dec. 5, 1975) (on file with the Alaska Judicial Council) (“[E]ach judicial applicant is at this time being asked to submit samples of legal writing. . .”).

202. See ALASKA JUDICIAL COUNCIL, SELECTING AND EVALUATING ALASKA’S JUDGES: 1984–2007, *supra* note 4, at 24.

203. See ALASKA JUDICIAL COUNCIL, FOSTERING JUDICIAL EXCELLENCE, *supra* note 4, at 73.

204. See *id.* at 70.

205. ALASKA JUDICIAL COUNCIL, SELECTING AND EVALUATING ALASKA’S JUDGES: 1984–2007, *supra* note 4, at 37.

206. *Id.*

207. *Id.*

208. ALASKA JUDICIAL COUNCIL, BYLAWS OF THE ALASKA JUDICIAL COUNCIL, *supra* note 66, at art. VII, § 6.