

CS FOR SENATE BILL NO. 119(L&C)

IN THE LEGISLATURE OF THE STATE OF ALASKA

NINETEENTH LEGISLATURE - SECOND SESSION

BY THE SENATE LABOR AND COMMERCE COMMITTEE

Offered: 2/23/96

Referred: JUD, FIN

Sponsor(s): SENATOR LEMAN

A BILL

FOR AN ACT ENTITLED

1 "An Act requiring conciliation panel review before filing a civil action against an
2 architect, engineer, or land surveyor; amending Rule 402, Alaska Rules of
3 Evidence; and providing for an effective date."

4 **BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:**

5 * **Section 1.** AS 08.48.111 is amended to read:

6 Sec. 08.48.111. POWER TO REVOKE, SUSPEND, OR REISSUE
7 CERTIFICATE. The board may suspend, refuse to renew, or revoke the certificate of
8 or reprimand a registrant or corporation who is found guilty of (1) fraud or deceit in
9 obtaining a certificate; (2) gross negligence, incompetence, or misconduct in the practice
10 of architecture, engineering, or land surveying; or (3) a violation of AS 09.55.750(d), this
11 chapter, a regulation adopted under this chapter, or the code of ethics or professional
12 conduct as adopted by the board. The code of ethics or professional conduct shall be
13 distributed in writing to every registrant and applicant for registration under this chapter.
14 This publication and distribution of the code of ethics or professional conduct constitutes

1 due notice to all registrants. The board may revise and amend its code and, upon doing
2 so, shall immediately notify each registrant in writing of the revisions or amendments.
3 The board may, upon petition of the registrant or corporation, reissue a certificate if a
4 majority of the members of the board vote in favor of the reissuance.

5 * **Sec. 2.** AS 09.55 is amended by adding new sections to read:

6 **ARTICLE 9. MALPRACTICE CLAIM AGAINST DESIGN PROFESSIONAL.**

7 Sec. 09.55.700. **MANDATORY CONCILIATION PANEL REVIEW;**
8 **JUDICIAL DETERMINATION OF EXCEPTIONS.** (a) Except as provided under (b)
9 of this section, a person who has a claim against a design professional for civil damages
10 resulting from professional negligence shall, before filing the claim with the court,
11 submit the claim for review by the design professional conciliation panel.

12 (b) A claim is not required to be submitted to the panel if the design professional
13 against whom the claim is asserted agrees, within seven days after receiving notice of
14 the claim as required under AS 09.55.710(a), to waive review by the panel. If a claim
15 is asserted against more than one design professional and one or more design
16 professionals refuse to waive panel review, panel review may not be waived and the
17 claim shall proceed as provided under AS 09.55.700 - 09.55.810.

18 Sec. 09.55.710. **FILING OF CLAIM; DESIGN PROFESSIONAL**
19 **CONCILIATION PANEL.** (a) A claim required to be reviewed by a panel under
20 AS 09.55.700(a) shall be submitted to the department in writing with the fee required by
21 (b) of this section. The claimant shall set out facts upon which the claim is based, and
22 shall include the names of all design professionals against whom the claim is made who
23 are known to the claimant. Within 10 days after receiving a claim, the department shall
24 provide notice of the claim and of the deposit requirement under (b) of this section to
25 all design professionals against whom the claim is made. The notice must include a
26 date, at least 10 but not more than 20 days after mailing the notice, within which a
27 design professional against whom a claim is made may file a written response to the
28 claim.

29 (b) A claim may not be accepted by the department for filing unless the claimant
30 deposits \$450 with the department when the claim is filed. The design professional shall
31 deposit \$450 with the department not later than the date specified under (a) of this
32 section for filing a written response to the claim. If the design professional fails to

1 deposit the funds required by this subsection, the claimant may proceed with a civil
2 action in the appropriate court. If a claim is withdrawn or otherwise terminated without
3 participation by a panel, the department shall return all money collected to the respective
4 parties.

5 (c) Not more than 15 days after the date for receiving the response from the
6 design professional under (a) of this section, the department shall form a design
7 professional conciliation panel to consider the claim. A panel shall consist of one
8 individual acting as the chair, selected from among individuals who are familiar with and
9 experienced in the tort claims settlement process, one attorney licensed in this state and
10 experienced in trial practice, and one design professional. The chair shall be appointed
11 by the department. The attorney panel member shall be appointed by the chair from a
12 list of not less than 20 attorneys experienced in trial practice submitted annually to the
13 department by the Alaska Supreme Court. The design professional member shall be
14 appointed by the chair from a list of not less than 20 design professionals submitted
15 annually by the State Board of Registration for Architects, Engineers and Land Surveyors
16 established under AS 08.48. After a panel renders its decision or the claim is otherwise
17 disposed of, the panel shall be disbanded.

18 (d) The chair shall preside at the meetings of the panel. Panel members shall
19 be compensated at the rate of \$300 per claim and per diem and travel expenses
20 authorized for boards and commissions under AS 39.20.180. Panel member
21 compensation is due when the decision of the panel is submitted to the department. The
22 department shall pay panel members from funds collected from the claimant and
23 defendant.

24 (e) Office and meeting space, office equipment, and office supplies for the panel
25 shall be furnished by the department.

26 (f) The board shall prepare a list of design professionals, along with their
27 respective specialties, who shall then be considered consultants to the panel in their
28 respective fields. Panel members may also consult with other legal, technical, and
29 insurance specialists. A consultant called by the panel to appear before the panel shall
30 be paid per diem and travel expenses authorized for boards and commissions under
31 AS 39.20.180. Per diem and travel costs for a consultant shall be paid by the department
32 from funds provided under AS 09.55.710(b) or 09.55.750(d).

1 Sec. 09.55.720. REVIEW BY PANEL; VOLUNTARY TERMINATION. (a)
2 Within five business days after the panel is formed, the panel shall give notice of the
3 hearing, by certified mail, to all design professionals and others who are parties to the
4 claim. Notice of the hearing must include (1) a date and time, at least 15 but not more
5 than 30 days following the date the notice is mailed, for a hearing by the panel; (2) a
6 description of the nature and purpose of the panel’s proceedings; and (3) the location of
7 the place for the hearing. The time and location originally set out in the notice may be
8 changed by the chair on due notice to all parties for good cause, provided that a party
9 requesting the rescheduling of the hearing within seven days of the scheduled date may
10 be required by the panel chair to compensate the panel in an additional amount equal to
11 the fee panel members receive under AS 09.55.710(d).

12 (b) At any time, by mutual consent of the parties involved, the department,
13 before the appointment of the chair, or the chair after the chair’s appointment, may
14 terminate the proceedings and the claimant may proceed in the appropriate court.

15 Sec. 09.55.730. PANEL HEARING PROCEDURES. (a) A person, other than
16 the panel, witnesses, consultants called by the panel, and the persons listed in
17 AS 09.55.740, may not be present at a panel hearing except with the permission of the
18 chair. The panel may, in its discretion, conduct an inquiry of a party, witness, or
19 consultant without the presence of a party.

20 (b) A panel hearing shall be informal. The panel may record its proceedings for
21 the use of the panel, but the record may not be made available to the parties and is not
22 admissible in any other action or proceeding, except that a record of a statement made
23 at a panel hearing is admissible as provided under AS 09.55.750. The panel may receive
24 oral or documentary evidence. Questioning of parties, witnesses, and consultants may
25 be conducted by the panel, and the panel may, in its discretion, permit a party or counsel
26 for a party to question other parties, witnesses, or consultants. The panel may designate
27 who, among the parties, shall have the burden of going forward with the evidence with
28 respect to the issues it may consider. Unless otherwise designated by the panel, when
29 a design professional’s records have been provided for the claimant’s review, the burden
30 of going forward with the evidence shall initially rest with the claimant at the
31 commencement of a hearing.

32 (c) The panel has the power to require by subpoena the appearance and

1 testimony of witnesses and the production of documentary evidence. When subpoena
2 power is utilized, notice shall be given to all parties. The testimony of witnesses may
3 be taken either orally before the panel or by deposition. In cases of refusal to obey a
4 subpoena issued by the panel, the panel may invoke the aid of the appropriate court. A
5 member of the panel or the commissioner may sign subpoenas. A member of the panel
6 may administer oaths and affirmations, examine witnesses, and receive evidence. The
7 panel shall attempt to secure the voluntary appearance, testimony, and cooperation of
8 parties, witnesses, and consultants without coercion.

9 (d) At the panel hearing, and in arriving at its opinion, the panel shall consider
10 statements or testimony of witnesses, construction documents, inspection reports,
11 calculations, and other records kept in the usual course of the practice of the design
12 professional without the necessity for other identification or authentication. Statements
13 of fact or opinion on a subject contained in a published treatise, periodical, book, or
14 pamphlet, or statements of experts may be considered by a panel without the necessity
15 of the experts appearing at the hearing. The panel may, upon the application of a party
16 or upon its own decision, appoint as a consultant an impartial and qualified design
17 professional or other professional person or expert to testify before the panel or to
18 conduct necessary professional or expert examination of the claimant or relevant
19 evidentiary matter and to report to or testify as a witness. A panel consultant may not
20 be compensated or reimbursed except for per diem and travel expenses authorized for
21 boards and commissions under AS 39.20.180. Consultant per diem and travel expenses
22 shall be paid by the department from funds provided under AS 09.55.710(b) or
23 09.55.750(d). The parties may conduct discovery.

24 (e) During a panel hearing and at any time before the release of an advisory
25 decision under AS 09.55.750, the panel may encourage the parties to voluntarily settle
26 or otherwise dispose of the case.

27 Sec. 09.55.740. REQUIRED PANEL ATTENDANCE. Unless excluded or
28 excused by the panel, the following persons shall attend hearings before the panel:

- 29 (1) the party or parties making the claim;
30 (2) any design professional against whom the claim is made or a
31 representative of the design professional, other than counsel, authorized to act for the
32 design professional; and

1 (3) counsel representing the parties, if any.

2 Sec. 09.55.750. PANEL DECISIONS; ADDITIONAL PAYMENTS. (a) Except
3 as provided under (c) of this section, within 15 days after the completion of a hearing,
4 a panel shall file a written advisory decision on the claim with the commissioner. The
5 commissioner shall mail copies to all parties concerned, counsel of the parties concerned,
6 the board, and the representative of each design professional's liability insurance carrier
7 authorized to act for the carrier. The panel shall state its conclusions in writing. The
8 panel may not decide the issue of damages.

9 (b) Each member of the panel shall sign the decision, and the decision may
10 include concurring or dissenting opinions. The decision must contain one of the
11 following conclusions:

12 (1) the evidence does not indicate that the design professional failed to
13 comply with the applicable standard of care;

14 (2) the evidence does indicate that the design professional failed to
15 comply with the applicable standard of care and that failure is the proximate cause of the
16 alleged damages;

17 (3) the evidence indicates that the design professional failed to comply
18 with the applicable standard of care, but the failure is not a proximate cause of the
19 alleged damages; or

20 (4) the evidence indicates that there is a material issue of fact, not
21 requiring an expert opinion, bearing on liability that should be considered by a court or
22 jury.

23 (c) The advisory decision required by this section need not be filed if the claim
24 is settled or disposed of before the decision is written or filed.

25 (d) Before filing an advisory decision as required under (a) of this section, the
26 chair of the panel shall determine if sufficient funds have been deposited with the
27 department to pay all expenses allowed under AS 09.55.710 and 09.55.730. If funds on
28 deposit are insufficient, the parties to the conciliation proceeding shall contribute
29 sufficient funds to pay all panel expenses as provided under (e) of this section. A party
30 shall deposit the required funds within 10 days after receiving notice of the deposit
31 requirement. A panel decision may not be released until the department has sufficient
32 funds to pay all panel expenses.

1 (e) If the decision of the panel contains the conclusion described
2 (1) under (b)(1) of this section, the claimant shall deposit all additional
3 funds required under (d) of this section;

4 (2) under (b)(2) of this section, the design professional shall deposit all
5 additional funds required under (d) of this section; and

6 (3) under (b)(3) or (4) of this section, the parties to the conciliation
7 proceeding shall, in equal shares, deposit additional funds required under (d) of this
8 section.

9 (f) A design professional who fails to deposit funds as required under (e) of this
10 section has committed misconduct in the practice for which the design professional is
11 licensed, and the department shall provide notice of the misconduct to the board.

12 (g) If a claimant fails to deposit funds as required under (e) of this section, the
13 department shall impose a civil penalty of \$1,000 against the claimant.

14 Sec. 09.55.760. SUBSEQUENT LITIGATION; EXCLUDED EVIDENCE. A
15 claimant may institute litigation based on a claim heard by a panel in an appropriate
16 court only after a party to the design professional conciliation panel hearing rejects the
17 decision of the panel. A statement made in the course of the hearing of the panel is
18 admissible in a subsequent civil action to the extent allowed under the Alaska Rules of
19 Evidence. A decision, conclusion, finding, or recommendation of the panel may not be
20 admitted into evidence in a subsequent civil action, nor may a party to the panel hearing,
21 or the counsel or other representative of a party, refer to or comment on a decision,
22 conclusion, finding, or recommendation of the panel in an opening statement, an
23 argument, or at any other time, to the court or jury, except that a decision, conclusion,
24 finding, or recommendation may be admissible under AS 09.55.790.

25 Sec. 09.55.770. PANEL MEMBER IMMUNITY. A member of a panel is not
26 liable for civil damages for action taken or for a decision, conclusion, finding, or
27 recommendation made by the member while acting as a member of a panel.

28 Sec. 09.55.780. STATUTE OF LIMITATIONS TOLLED; LACK OF A
29 DECISION IN SIX MONTHS. Notwithstanding any other provision of law, the filing
30 of a claim with the department tolls any applicable statute of limitation until 30 days
31 after the date the decision of the panel is mailed or delivered to the parties. However,
32 the applicable statute of limitations may not be tolled for more than six months. If a

1 decision by the panel is not reached within six months after the claim is filed, the
2 applicable statute of limitations shall resume running and the party filing the claim may
3 commence a suit based on the claim in the appropriate court.

4 Sec. 09.55.790. DUTY TO COOPERATE; ASSESSMENT OF COSTS AND
5 FEES. (a) It is the duty of a person who files a claim with the panel and of a design
6 professional against whom a claim is made to cooperate with the panel for the purpose
7 of achieving a prompt, fair, and just disposition or settlement of a claim, provided that
8 the cooperation may not prejudice the substantive rights of the person.

9 (b) On application of the department, the court may award as a civil penalty
10 against a party all or a portion of the costs and expenses of the panel attributable to a
11 claim involving the person if the court finds that the person failed to cooperate with the
12 panel.

13 Sec. 09.55.800. ANNUAL REPORT. The department shall prepare annually,
14 20 days before the convening of a regular legislative session, a report containing the
15 department's evaluation of the operation and effects of AS 09.55.700 - 09.55.810. The
16 department shall notify the legislature that the report is available. The report must
17 include a summary of claims brought before a panel and the disposition of those claims.

18 Sec. 09.55.810. DEFINITIONS. In AS 09.55.700 - 09.55.810,

19 (1) "board" means the State Board of Registration for Architects,
20 Engineers and Land Surveyors;

21 (2) "commissioner" means the commissioner of commerce and economic
22 development;

23 (3) "department" means the Department of Commerce and Economic
24 Development;

25 (4) "design professional" means an architect, engineer, or land surveyor
26 licensed under AS 08.48;

27 (5) "panel" means the design professional conciliation panel;

28 (6) "professional negligence" means a negligent act or omission by a
29 design professional in providing professional services;

30 (7) "professional services" means services provided by a design
31 professional that are within the scope of the services for which the design professional
32 is licensed as an architect, engineer, or land surveyor.

1 * **Sec. 3.** AS 09.55.760, enacted by sec. 2 of this Act, has the effect of amending Rule 402,
2 Alaska Rules of Evidence, by providing that a decision, conclusion, finding, or recommendation
3 of the panel is not admissible in a subsequent civil action.

4 * **Sec. 4.** This Act applies to causes of action that accrue on or after the effective date of this
5 Act.

6 * **Sec. 5.** This Act takes effect July 1, 1996.