

**SCR**

**4**

**SENATE COMMITTEE REPORT**  
FIRST COMMITTEE OF REFERRAL

DATE: 3/29/93

FURTHER:

Date of 5-Day Notice: 8 April 1993  
(in accordance with Uniform Rule 23)

DATE TURNED INTO OFFICE: 12 April 1993

JUDICIARY Committee considered SCR 4

Relating to the Alaska Supreme Court's interpretation of Alaska Rule of Civil Procedure 82 and requesting that the court modify its interpretation of that rule.

and recommends:

replace with \_\_\_\_\_ CS \_\_\_\_\_ (\_\_\_\_\_)

attaches amendment(s)

adopts \_\_\_\_\_ Letter of Intent

further referral to the \_\_\_\_\_

same title  
 new title  
 technical title change  
(HB only)

do pass

do not pass

no recommendation

individual recommendations

**FISCAL NOTE INFORMATION**

Department	Date	Zero	Fiscal
Senate Judiciary	4/6/93	✓	

Department	Date	Zero	Fiscal

Appropriation No Fiscal Note

Governor's Bill with Previous Fiscal Notes (enter information above)

DO PASS:

OTHER RECOMMENDATIONS:

Rick Halford  
Greg Taylor

Suzanne K. Little no Rec  
[Signature]

Chris L. Taylor  
Chair: Signature and Recommendation

# FISCAL NOTE

STATE OF ALASKA  
1994 LEGISLATIVE SESSION

BILL NO. SCR 41

Revision Date: \_\_\_\_\_ Dept. Affected: None  
 Title: Relating To The Supreme Courts BRU: n/a  
Interpretation of Alaska Civil Rule 82 Component: n/a  
 Sponsor: Senator Taylor  
 Requestor: Senate Judiciary Committee COMPONENT SERIAL NO. ---

Expenditures/Revenues (Thousands of Dollars)

OPERATING EXPENDITURES	FY 95	FY 96	FY 97	FY 98	FY 99	FY 00
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
<b>TOTAL OPERATING</b>	<b>-0-</b>	<b>-0-</b>	<b>-0-</b>	<b>-0-</b>	<b>-0-</b>	<b>-0-</b>
<b>CAPITAL EXPENDITURES</b>	<b>-0-</b>	<b>-0-</b>	<b>-0-</b>	<b>-0-</b>	<b>-0-</b>	<b>-0-</b>
<b>CHANGE IN REVENUES ( )</b>	<b>-0-</b>	<b>-0-</b>	<b>-0-</b>	<b>-0-</b>	<b>-0-</b>	<b>-0-</b>

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1006 GF/MHTIA						
Other						
<b>TOTAL</b>	<b>-0-</b>	<b>-0-</b>	<b>-0-</b>	<b>-0-</b>	<b>-0-</b>	<b>-0-</b>

Estimate of any current year (FY94) cost: \$ ---

POSITIONS

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

Prepared by: Kevin Sullivan  
 Division: Senate Committee  
 Approved by: Senator Robin Taylor Chair  
 Agency: Senate Judiciary Committee

Phone: 415-3717  
 Date: 1-28-94

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*Senator Robin L. Taylor*

## SPONSOR STATEMENT

### SCR 4

The purpose of this Resolution is to petition the Supreme Court to review the special status afforded "public interest groups" in the award of attorneys fees under Rule 82 of the Alaska Rules of Civil Procedure.

For all Alaskans except "public interest groups," Rule 82 provides for partial repayment of attorneys fees to the prevailing party by the losing party. This rule designed to discourage frivolous litigation in Alaska and it tends to reduce the judicial case load as a result.

The exception to this rule is "public interest litigation." Based on the Supreme Court's exception for public interest litigants, Rule 82 in fact provides an economic incentive for various groups to sue because full attorneys fees are paid to the public interest group if it prevails and no attorneys fees are charged if it loses. (See attached Brief Legal History of Rule 82.)

This raises a number of public policy issues which, to this point, have not been examined by the Legislature:

- 1) What is the "public interest" that the Court is protecting with its Rule 82 exception? For example, is it really in the "public interest for environmental groups to sue to close down businesses in Alaska?
- 2) How much of a legal subsidy is realized by these groups and who pays for it? For example, if the Legislature funds a particular group through the Appropriations process (such as Alaska Legal Services), is that group obtaining additional funds from the State under Rule 82? If so, to what extent?

3) Is it good public policy to encourage litigation by the groups the Supreme Court has decided to favor? How much does the Supreme Court's policy cost the State of Alaska?

In reviewing these issues the Legislature should not violate the Constitutional separation of powers by crossing into the province of the Judiciary. However, by the same token, it is worth investigating whether the Judiciary is assuming the Legislative authority of public policy determination. Certain groups are being encouraged to litigate as the State is compelled by the Court to partially fund those groups with moneys from other Alaskans, including appropriated funds from the State.

In court order number 1118, the Supreme Court reviewed certain parts of Rule 82 and reenacted the rule effective July 15, 1993 (see attached rule change). It elected not to change the public interest litigation rules (ID. at S 2.).

In summary, under Rule 82 as currently interpreted by the Court, certain parties are encouraged with significant economic incentives to bring litigation against the State. The question of whether the interest of the public is truly being served by these "public interest" parties is also at issue. Finally, the State is being directed to subsidize these questionable "public interest" litigants at great expense to the public itself. Senate Concurrent Resolution 4 urges the Supreme Court to review these issues.

## BRIEF HISTORY OF PUBLIC INTEREST LITIGATION UNDER RULE 82

When the Alaska Supreme Court was established in 1960 and adopted rules under Article IV, Sec. 15, Alaska constitution, it adopted what has been known as the "English" rule with respect to the award of attorney fees and costs to successful litigants. The so-called "American" rule generally did not provide for the award of attorney fees and costs, except when specifically authorized in the statute creating the cause of action.

The "American" rule derives in part from the concepts of sovereign immunity so long upheld by the federal courts--that the federal government may not be sued unless Congress has specifically consented. Most, if not all, of the states started out with that rule. Over time, the rule has been eroded, both by the Congress and in the states, but probably no state has had the benefit of a rule such as Rule 82 that has general application in all cases and with all litigants, both private and governmental.

"Public interest" litigation, especially with respect to environmental issues, is of relatively recent origin. It has its roots, however, in the concept of the "private attorney general," best exemplified in the federal anti-trust legislation. This type of litigation began to be a chosen method of action with the passage of the Voting Rights Act of 1964 which contained a provision authorizing an award of attorney fees and costs to

successful litigants. 42 U.S.C. 2000a-3(b) provides: "In any action commenced pursuant to this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, and the United States shall be liable for costs the same as a private person."

In 1968, the U. S. Supreme Court, interpreting this provision, stated in Newman v. Piggy Park Enterprises, Inc., 390 U.S. 400, 19 L.Ed. 2d 1263, 88 S. Ct. 964 (1968), that:

If successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by involving the injunctive power of the federal courts. Congress therefore enacted the provision for counsel fees--not simply to penalize litigants who deliberately advance arguments they know to be untenable but, more broadly, to encourage individuals injured by racial discrimination to seek judicial relief under Title II.

It follows that one who succeeds in obtaining an injunction under that title should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust.

Although the Supreme Court in Piggy Park justified its holding in some respects by pointing out that a person litigating under the Act was entitled only to an injunction, not damages, and an award of attorney fees was particularly justified, therefore, the Alaska Supreme Court used the case to establish its own interpretation of Rule 82 as it applied to public interest litigants.

The Alaska Supreme Court had, in 1964, interpreted Alaska Civil Rule 82 to provide partial compensation for attorney fees and costs to prevailing litigants. Preferred General Agency of Alaska, Inc. v. Rafetto, 391 P.2d 951 (Alaska 1964). Much litigation followed about how much of the whole cost would be "partially" compensated. In 1973 the court had determined that partial could not be full compensation and held in Malvo v. J. C. Penney Company, Inc., 512 P. 2d 575, that it was an abuse of discretion for a court to award full attorney fees to prevailing parties unless the conduct of the losing party was egregious, holding that the purpose of Rule 82 was "to partially compensate a prevailing party for the costs and fees incurred where such compensation is justified and not to penalize a party for litigating a good faith claim. Malvo involved only private litigants.

In 1974 the Alaska Supreme Court first faced the "public interest litigant" issue in a case in which the public interest litigant lost. In reliance on Piggy Park, the court decided that

it would be an abuse of discretion to award attorneys' fees against a losing party "who has in good faith raised a question of genuine public interest before the courts." Gilbert v. State, 526 P.2d 1131 (1974). In Girves v. Kenai Peninsula Borough, 536 P.2d 1221 (Alaska 1975), the court reiterated its holding in Gilbert and reversed an award to the borough, stating again that public interest litigants should not be penalized by an award of attorney fees against them.

In 1977 the Alaska Supreme Court had before it a case involving a prevailing public interest litigant, Anchorage v. McCabe et al., 568 P. 2d 986 (1977). In that case the court held that, notwithstanding the "partial compensation" rule established in Malvo, "the trial court may, in its discretion, award full attorney's fees to public interest plaintiffs." In 1990, it finally arrived at the determination that public interest litigants must be awarded full attorney fees. Anchorage Daily News v. Anchorage School District, 803 P. 2d 402.

## IN THE SUPREME COURT FOR THE STATE OF ALASKA

ORDER NO. 1118

Amending Civil Rule 82 and Civil Rule 79 concerning award of attorney's fees and costs.

IT IS ORDERED:

1. Civil Rule 82 is repealed and reenacted to provide:

## (a) Allowance to Prevailing Party.

Except as otherwise provided by law or agreed to by the parties, the prevailing party in a civil case shall be awarded attorney's fees calculated under this rule.

## (b) Amount of Award.

(1) The court shall adhere to the following schedule in fixing the award of attorney's fees to a party recovering a money judgment in a case:

Judgment and, if Awarded, Prejudgment Interest	Contested With Trial	Contested Without Trial	Non- Contested
First \$ 25,000	20%	18%	10%
Next \$ 75,000	10%	8%	3%
Next \$400,000	10%	6%	2%
Over \$500,000	10%	2%	1%

(2) In cases in which the prevailing party recovers no money judgment, the court shall award the prevailing party in a case which goes to trial 30 percent of the prevailing party's actual attorney's fees which

ORDER NO. 1118

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Page 2

were necessarily incurred, and shall award the prevailing party in a case resolved without trial 20 percent of its actual attorney's fees which were necessarily incurred. The actual fees shall include fees for legal work customarily performed by an attorney but which was delegated to and performed by an investigator, paralegal or law clerk.

(3) The court may vary an attorney's fee award calculated under subparagraph (b)(1) or (2) of this rule if, upon consideration of the factors listed below, the court determines a variation is warranted:

- (A) the complexity of the litigation;
- (B) the length of trial;
- (C) the reasonableness of the attorneys' hourly rates and the number of hours expended;
- (D) the reasonableness of the number of attorneys used;
- (E) the attorneys' efforts to minimize fees;
- (F) the reasonableness of the claims and defenses pursued by each side;
- (G) vexatious or bad faith conduct;

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(H) the relationship between the amount of work performed and the significance of the matters at stake;

(I) the extent to which a given fee award may be so onerous to the non-prevailing party that it would deter similarly situated litigants from the voluntary use of the courts;

(J) the extent to which the fees incurred by the prevailing party suggest that they had been influenced by considerations apart from the case at bar, such as a desire to discourage claims by others against the prevailing party or its insurer; and

(K) other equitable factors deemed relevant.

If the court varies an award, the court shall explain the reasons for the variation.

**(c) Motions for Attorney's Fees.** A motion is required for an award of attorney's fees under this rule. The motion must be filed within 10 days after the date shown in the clerk's certificate of distribution on the judgment as defined by Civil Rule 58.1. Failure to move for attorney's fees within 10 days or such additional time as the court may allow, shall be construed as a waiver of the party's right to recover attorney's fees. A motion for attorney's fees in a default case exceeding \$50,000 must specify actual fees.

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(d) **Determination of Award.** Attorney's fees upon entry of judgment by default may be determined by the clerk. In all other matters the court shall determine attorney's fees.

(e) **Effect of Rule.** The allowance of attorney's fees by the court in conformance with this rule shall not be construed as fixing the fees between attorney and client.

2. By adopting these amendments to Civil Rule 82, the court intends no change in existing Alaska law regarding the award of attorney's fees for or against a public interest litigant, see, e.g., Anchorage Daily News v. Anchorage School Dist., 803 P.2d 402, 404 (Alaska 1990); City of Anchorage v. McCabe, 568 P.2d 986, 993-94 (Alaska 1977); Gilbert v. State, 526 P.2d 1131, 1136 (Alaska 1974), or in the law that an award of full attorney's fees is manifestly unreasonable in the absence of bad faith or vexatious conduct by the non-prevailing party. See, e.g., Malvo v. J.C. Pennev Co., 512 P.2d 575, 588 (Alaska 1973); Demoski v. New, 737 P.2d 780, 788 (Alaska 1987).

3. Civil Rule 79(b) is amended to provide:

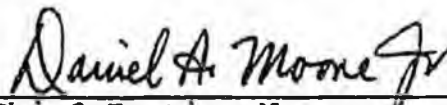
(b) **Items Allowed as Costs.** A party entitled to costs may be allowed premiums paid on the expenses of posting, undertakings, bonds or security stipulations, where the same have been furnished by reason of express requirement of law or on order of the court; the necessary expense of taking depositions for use at trial and producing exhibits; the expense of service and publication of summons or notices, and postage when the same are served by mail;

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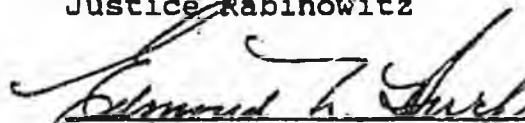
filing fees and other charges made by the clerk of the court and fees for transcripts required in the trial of a case in the superior court; and costs paid by the prevailing party's attorney for computerized legal research. In addition to the items allowed as costs by law and in these rules, a party shall be allowed any other expenses necessarily incurred in order to enable a party to secure some right accorded the party in the action or proceeding. Fees for investigators, paralegals or law clerks shall not be allowed as costs.

DATED: January 7, 1993

EFFECTIVE DATE: July 15, 1993

  
\_\_\_\_\_  
Chief Justice Moore

\_\_\_\_\_  
Justice Rabinowitz

  
\_\_\_\_\_  
Justice Burke

  
\_\_\_\_\_  
Justice Matthews

  
\_\_\_\_\_  
Justice Compton

RABINOWITZ, Justice dissenting.

I dissent from the court's adoption of the amendments to Civil Rule 82 called for in this order. In my view no compelling

case has been made demonstrating the need for these changes.<sup>1</sup> Further, my judicial hunch is that these amendments to Civil Rule 82, in particular the new provisions reflected in (b) (3) (A) through (K), will unnecessarily and dramatically increase litigation over attorney's fees awards both in our trial courts as well as in this court.<sup>2</sup>

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<sup>1</sup>In this regard I note that the Alaska Judicial Council is scheduled to conduct an in depth empirical study of the workings of Civil Rule 82. My preference is to await the results of the Council's study before deciding whether any of the current provisions of Rule 82 should be amended. Such a study should position this court to make a more informed assessment as to whether the current rule operates in a fashion which unjustly denies access to our courts. I further note that our Civil Rules Committee recently surveyed the Alaska Bar membership on discrete aspects of Civil Rule 82. A clear majority of those responding to the committee's questionnaire indicated: that Civil Rule 82 does not deter people of moderate means from filing valid claims; that the rule does not put excessive pressure on moderate income people to settle valid claims; and that the rule is needed to discourage frivolous litigation.

<sup>2</sup>Any attorney worth his or her salt will, pursuant to the expansive provisions of (b) (3) (A) through (K), request variations from the attorney's fees awards called for under either the monetary recovery schedule provisions of (b) (1), or the provisions of (b) (2) which apply where no money judgment is recovered by the prevailing party.

STATEMENT  
of  
James F. Clark

My name is James F. Clark. I am an attorney in private practice in Juneau. Many of my clients are companies whose business is the development of Alaska's natural resources--timber and mining. Those clients must have permits issued by state and federal agencies in order to operate. I appear today to speak in favor of the adoption of SCR 4.

When the legislature enacted legislation requiring permits before persons may engage in certain activities in connection with the development of natural resources, the legislature implicitly determined that those activities were in the public interest. The Alaska Supreme Court has, however, failed to take notice of these legislative Acts and accord those complying with the Acts the recognition that they are, in fact, acting in the public interest.

Large national special interest political organizations, as well as local special interest political organizations funded by these national organizations, have prevailed upon the Alaska Supreme Court to grant them a so-called "public interest" exception to Alaska Civil Rule 82. This exception permits them to litigate without cost, even when they lose, by awarding them full attorney fees when they prevail (something not even done for indigents) and when they lose, relieving them of the duty to pay attorney fees and costs to the prevailing party.

The "public interest" exception is no longer valid. So-called "public interest" litigants are in the business of litigating and they are well funded to do so. No longer can the Alaska Supreme Court base its exception on the notion that "public interest" litigants could not afford to protect their rights without it.

Generally, suits challenging permits issued by the state are brought against the state, not the permittee or permit applicant. Notwithstanding, permittees and permit applicants must participate in the lawsuits in order to insure that their interests

are fully protected. As the scope of regulation increases, more and more litigation will be brought in order to prevent economic development of Alaska's natural resources. This means both a direct loss to the state because the state must pay attorney fees to the prevailing party and is not fully compensated for its attorney fees when it prevails, but also because such litigation has a chilling effect on economic development. This also means fewer new jobs are created and substantially less wealth is created for the tax bases of our communities.

It is clear from the decisions rendered by the Alaska Supreme Court that it has a very narrow, lopsided, view of what the public interest is. I believe that adoption of SCR 4 is important because the court needs to reconsider its concept of the "public interest" and to begin to treat all litigants equally and fairly.