

SCOMM

101A:29

MEMORANDUM

TO: Brian Porter, Dick Cattanach, Bruce Pozzi
FROM: Roger F. Holmes
RE: Initiative
DATE: January 24, 1997

Jim Baldwin called me today concerning his review of the Initiative for the Lt. Governor. He expressed three concerns with the bill as drafted.

1. Section 11 deals with Expert Witnesses. He believes this interferes with the court rule making powers. I do not consider this provision to be too important. It probably can't be redrafted to eliminate his concerns.

2. Section 6 deals with Collateral Benefits. Jim is worried that the language in section (b) talking about introducing into evidence the amounts paid as collateral source may also violate the court's rule making powers. He thinks the provision can be redrafted to eliminate the offending provisions. I agree that it can be redrafted to get around his concerns.

3. Section 14 states: 'This Initiative applies to all causes of action accruing on or after the effective date of this Act. This Initiative does not apply to any action or recovery arising out of the "Exxon Valdez" oil spill of March 1989.' Jim believes the second sentence may make this special legislation which is prohibited. I agree with him. The second sentence is redundant. The Initiative does not apply to the "Exxon Valdez" litigation since those causes of action accrued in 1989. The Initiative only applies to causes of action accruing after it becomes law. The offending sentence was placed in the Initiative to preempt the scare tactics used by trial lawyers during the last legislative session.

Jim and I discussed several options. His opinion is done. He has discussed it with Bruce Botelho but has not sent it to Fran Ulmer. Jim will give us the option of simply withdrawing the Initiative now, fixing it and resubmitting it. I prefer to see him issue his opinion, have the Lt. Governor turn it down for these three reasons, then fix it and resubmit it. Once the AG's opinion is published and you comply with it, the AG's office becomes a defender of the Initiative.

I have the highest personal and professional respect for both Jim Baldwin and Bruce Botelho. I believe each is a straight shooter.

Jim,
Jim called
Cattanach &
left mess. "I agree"
in [unclear] tel

However, this is a high profile political issue. Withdrawing and fixing the Initiative on the basis of my off the record conversation with Jim leaves everyone open for another issue surfacing after the Initiative is resubmitted.

This is your call. I think it is far more cost effective and efficient to let the Lt. Governor reject the Initiative for stated reasons and fix the bill rather than litigating over it. Having said that I think you may be able to comply by pulling the expert witness provision and the Exxon Valdez language and rewriting the collateral source provision. Ohio just passed a comprehensive tort reform bill. Maybe we could look to that bill for some suggestions on the collateral source issue. If there is a rewrite of this provision Jim Sourant of Bryan's office should be involved.

Jim will hold off doing anything until the middle of next week. He expects to hear back from one of you or me.

(C) has permanently impaired cognitive capacity, is incapable of making independent, responsible decisions, and is permanently incapable of independently performing the activities of normal, daily living;

(D) is both deaf and blind; or

(E) has third degree burns over one half or more of the claimant's body.

(d) The limit under (b) or (c) of this section does not apply to noneconomic damages awarded by a court or jury against a person who, as proven by a preponderance of the evidence, was attempting to commit or committing a felony, if the person bringing the action was a victim of that offense and the offense substantially contributed to the injury or death. In this subsection, "victim" has the meaning given in AS 12.55.185.

(e) Multiple injuries sustained as a result of a single incident shall be treated as a single injury for purposes of this section.

Sec. 5. AS 09.17.020 is repealed and reenacted to read:

Sec. 09.17.020. PUNITIVE DAMAGES. (a) Punitive damages may not be awarded in an action, whether in tort, contract, or otherwise, unless supported by clear and convincing evidence of outrageous conduct, including acts done with malice or bad motives, or reckless indifference to the interest of another person.

(b) The amount of punitive damages awarded by a court or jury under (a) of this section may not exceed three times the amount of compensatory damages awarded or \$300,000, whichever amount is greater.

(c) The limit under (b) of this section does not apply to punitive damages awarded by a court or jury against a person who, as proven by a preponderance of the evidence, was attempting to commit or committing a felony if the person bringing the action was a victim of that offense and the offense substantially contributed to the injury or death. In this subsection, "victim" has the meaning given in AS 12.55.185.

(d) If a person receives an award of punitive damages, the court shall require that seventy five percent of the award be deposited into the general fund of the state. This subsection does not grant the state the right to file or join a civil action to recover punitive damages.

Sec. 6. AS 09.17.070 is repealed and reenacted to read:

Sec. 09.17.070. COLLATERAL BENEFITS. (a) A claimant in an action for personal injury or death may only recover damages that exceed amounts received by the claimant, or that with reasonable probability will be received in the future by the claimant, as compensation for the injuries from collateral sources, whether private, group, or governmental, and whether contributory or noncontributory, except when

(1) the collateral source is a federally funded program that by law must seek subrogation;

INITIATIVE

December 18, 1996

- (2) the collateral source has a right of subrogation under federal law;
- (3) the collateral source is the payment of a dependent child's medical bills by the injured child's parent which does not result from insurance coverage;
- (4) the benefit consists of death benefits paid under life insurance; or
- (5) the benefit consists of workers' compensation benefits received under AS 23.30.

(b) A person defending a claim may introduce into evidence an amount paid or payable as a benefit to the claimant as a result of the personal injury or death under Title 42 Chapter 7 of the United States Code (Social Security Act); a state or federal disability act; health, sickness, disability, accident, or income-disability insurance; insurance that provides health benefits or income-disability coverage; and a contract or agreement of a group, organization, partnership, or corporation, or other collateral source, to provide, pay for, or reimburse the cost of medical, hospital, dental, or other health care services, disability, or lost wages. However, evidence of a collateral source that is a federally funded program that by law must seek subrogation or that has a right of subrogation under federal law, or evidence of death benefits paid under life insurance, or evidence of workers' compensation benefits received under AS 23.30, may not be introduced under this subsection. If a person defending a claim elects to introduce evidence described in this subsection, the claimant may introduce evidence of the amount that the claimant has paid or contributed to secure the claimant's right to the collateral benefit, including the cost to the claimant resulting from depleted or exhausted coverage.

(c) A person who provides a collateral benefit admissible under (b) of this section may not recover any amount against the claimant as reimbursement for those benefits and may not be subrogated to the rights of a claimant against a person defending a claim.

Sec. 7. AS 09.17.080 is repealed and reenacted to read:

Sec. 09.17.080. ALLOCATION OF DAMAGES. (a) In all actions involving the fault of more than one person, including third-party defendants and persons who have been released, the court, unless otherwise agreed by all parties, shall instruct the jury to answer special interrogatories or, if there is not jury, shall make findings, indicating

(1) the amount of damages each claimant would be entitled to recover if contributory fault is disregarded; and

(2) the percentage of the total fault that is allocated to each claimant, defendant, third-party defendant, person who has been released from liability, or other person responsible for the damages to each claimant regardless of whether the other person, including an employer, is or could have been named as a party to the action.

(b) In determining the percentages of fault, the trier of fact shall consider both the nature of the conduct of each party at fault, and the extent of the causal relation between the conduct and the damages claimed. The trier of fact may determine that two or more persons are to be treated as a single party if their conduct was a cause of the damages claimed and the separate act or omission of each person cannot

is licensed in this state:

(2) "hospital" has the meaning given in AS 18.20.130 and includes a governmental owned or operated hospital;

(3) "independent contractor" means a licensed health care provider who is a member of a hospital's medical staff or who has otherwise been granted specified privileges to render health care services directly or indirectly to patients at the hospital, but who is not an employee or actual agent of the hospital in connection with the rendition of the health care services.

Sec. 10. AS 09.65.210 is repealed and reenacted to read:

Sec. 09.65.210 DAMAGES RESULTING FROM COMMISSION OF A FELONY. (a) A person who suffers personal injury or property damage may not recover damages for the personal injury or property damage if the injury occurred while the person was committing or attempting to commit a felony, or fleeing from the commission or attempted commission of a felony and the commission or attempted commission of the felony substantially contributed to the injury or property damage.

(b) The personal representative of a deceased person may not recover damages for the person's death if the court determines by clear and convincing evidence that the death occurred while the person was committing or attempting to commit a felony, or fleeing from the commission or attempted commission of a felony, and that the felony or attempted felony substantially contributed to the death.

Sec. 11. AS 09.17 is amended to add a new section to read

Sec. 09.17.090 EXPERT WITNESS QUALIFICATION. (a) Except as provided under (b) of this section, in an action based upon professional negligence, a person may not testify as an expert witness on the issue of the appropriate standard of care unless the witness is a professional who is licensed in this state, or is licensed in another state or country and

(1) is trained and experienced in the same discipline or school of practice as the defendant or in an area directly related to a matter at issue; and

(2) is certified by a board recognized by the state as having acknowledged expertise and training directly related to the particular field or matter at issue.

(b) The provisions of (a) of this section do not apply to a person who is testifying on the appropriate standard of care in a profession that is not licensed in this state, or another state or country, and who the court determines is qualified as an expert witness.

(c) "Professional negligence" means a negligent act or omission in rendering professional services:

Sec. 12. AS 09.55.548 is repealed.

Sec. 13. SEVERABILITY. If any provision of this Initiative, or the application of a provision of this Initiative to any person or circumstance is held invalid, the remainder of this Initiative and the application to other persons or circumstances shall not be affected.

Sec. 14. APPLICABILITY. This Initiative applies to all causes of action accruing on or after the effective date of this Act. This Initiative does not apply to any action or recovery arising out of the "Exxon Valdez" oil spill of March 1989.

Sec. 15. EFFECTIVE DATE OF THIS INITIATIVE. This Initiative takes effect ninety days after its certification by the lieutenant governor.

BISS & HOLMES
FACSIMILE TRANSMITTAL SLIP

DATE: January 24, 1997
TO: Representative Brian Porter's Office
ATTN: James D. Sourant, Esquire
FAX NO: 465-3834
FROM: BISS & HOLMES FAX #: (907) 243-6695
SENDER: Roger F. Holmes, Esq.
RE: Tort Reform FILE NO. 3625

MESSAGE:

Please see the attached from Mr. Roger Holmes. Thank you.

TOTAL PAGES TRANSMITTED (Including this page) 7

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MEMORANDUM

TO: James D. Sourant, Esq.
FROM: Roger F. Holmes
RE: HB 58
DATE: February 23, 1997

Here are the following documents: Baldwin's opinion on the Initiative which the State kicked back; my proposed redraft of the Initiative; my memo to Brian and Dick Cattanaach explaining the proposed redraft; my letter to Brian concerning the statute of repose. I am not sending a separate set to Brian.

① You asked about introducing the amendment to AS 18..23.070. I think it should be introduced to make that statute consistent with the proposed changes to title 9 in SSHB 58 Section 32. ✓

Please review the letter on the Statute of Repose. If it is acceptable I will send you the original. ✓

You, Brian and Dick Cattanaach should talk about the proposed redraft of the initiative. You especially need to know what is going on and have some input. Bruce Pozzi will return to the office on March 3 and would like to begin collecting signatures as soon as possible. The Chamber wants to have the Initiative back in the AG's hands well before the session winds down to force maximum pressure on the legislature and the governor to come up with a bill.

Ethan Berkowitz's legislative aid called me yesterday to say Ethan would like to support a bill this session on tort reform. ✓

MEMORANDUM

TO: Representative Brian Porter & Dick Cattanach
FROM: Roger F. Holmes
RE: Tort Reform Initiative
DATE: February 23, 1997

Enclosed please find a redraft of the Initiative. I have the following to add to this redraft which explains what I have done and what I have not done. The paragraphs in this memo correspond to the sections of the attached draft Initiative.

1. This is a new provision and is contained in Section 3 of Brian's sponsor substitute of HB58 (SSHB58). It becomes necessary because of the addition of the next section.
2. This is a new section and corresponds to SSHB58 Section 4. It comes from the Governor's Commission on Tort Reform. It's purpose is to reduce the statute of limitations for lawyers from six years to three years. It will reduce malpractice rates for lawyers. It may neutralize some Bar Association organized opposition. The change in this provision requires #1 above.
3. This is #1 in the original Initiative. I changed the definition of "hazardous substance" in section (b) (1) (A) to match a change in SSHB58. ✓
4. This section has been added and is a limitation on actions by minors in medical malpractice cases and is section 6 in SSHB58.
5. This is Section 2 from the original Initiative and has been amended to add sections (2) and (3) as per SSHB58 Section 7. Original Initiative Section 3 has been eliminated as it is now essentially contained in this Section.
6. This is Section 4 from the original Initiative. The only change is to renumber the paragraphs under (c) with numbers instead of letters. Brian has made some changes in this section in SSHB58, Section 8, by eliminating some of the exception categories. Please let me know if you want this changed to match. ✓

leave it
This is section 5 from the original Initiative. I have made a slight change in paragraph (d) to accommodate Baldwin's comments. The original language stated that the court shall

50%?
✓
require 75% to be deposited into the general fund. In order to forestall a trial lawyer challenge I omitted the reference to the court and simply stated that 75% must be deposited into the general fund. Brian has made some changes in this provision in Section 9 of SSHB58. Please let me know if you want those changes included.

8. *OK; to take out Baldwin's BKK*
This is original Initiative Section 6 that Baldwin said was impermissible. I eliminated paragraph (b) such that the court itself will now determine whether or not collateral source information is admissible during the trial or after the trial. If we decide to include this provision I should probably run it by Baldwin first. One reason for this provision was to get the information in front of a jury. It may be that the best thing to do here is simply eliminate this provision. Please advise. ✓

9. This is original Initiative Section 7. Baldwin suggested that I rewrite this to reflect an amendment rather than a repeal and reenactment. I did that (which is the way Brian also does it in SSHB58 Sections 16-18). In subsection (b) I eliminated some language that Brian's legislative aid told me they were going to delete. (However I can't see where they did delete it.) ✓

some
10. This is a new section which is identical to SSHB58 Section 23. This is the section reducing prejudgment interest. For reasons I can't recall you instructed me to leave this out of the original Initiative. Do you want it in or out? ✓

11. This is section 8 from the original Initiative. ✓

don't delete
12. This is section 9 from the original Initiative. Brian has a provision requiring \$500,000 insurance in SSHB58 Section 35 which is not contained in the Initiative. ✓

13. This is Section 10 from the original Initiative. It has been changed to accommodate acts committed while under the influence of alcohol or drugs which is now included in SSHB58 Section 36. It is a hybrid in that it does not match exactly the language in SSHB58.

14. This is original Initiative Section 13.

15. This is original Initiative Section 14. In response to the Baldwin memorandum I have removed the sentence referring to the "Exxon Valdez" oil spill recoveries. Instead, I have included the sentence "This Initiative does not apply to any action or recovery for which an action was filed in court prior to the effective date of this Act." I consider the sentence redundant and unnecessary (as I did the "Exxon Valdez" language) since the Initiative only applies to causes

of actions which accrue after the effective date of the Initiative.

16. This is original Initiative Section 15.

I have eliminated old Initiative Sections 11 and 12. Eleven is the expert witness qualifications section which Baldwin said is impermissible. I see no way to rewrite this section to gain his blessing. Section 12 is a repeal of the collateral source provision for medical malpractice actions. In light of the forced rewrite, and possible elimination, of the more general collateral source section it does not seem appropriate to strip health care providers of their more beneficial provision.

Please review the above and give me further direction. ✓

cc: Bruce Pozzi
Pamela La Bolle

AN ACT

An Act relating to civil actions in Alaska and providing for an effective date.

BE IT ENACTED BY THE PEOPLE OF THE STATE OF ALASKA:

Sec. 1. AS 09.10.050 is repealed and reenacted to read:

Sec. 09.10.050. **CERTAIN PROPERTY ACTIONS TO BE BROUGHT IN SIX YEARS.** Unless the action is commenced within six years, a person may not bring an action for waste or trespass upon real property.

Sec. 2. AS 09.10 is amended by adding a new section to read:

Sec. 09.10. 053. **CONTRACT ACTIONS TO BE BROUGHT IN THREE YEARS.** Unless the action is commenced within three years, a person may not bring an action upon a contract or liability, express or implied, except as provided in AS 09.10.040 or as otherwise provided by law.

Sec. 3. AS 09.10.055 is repealed and reenacted to read:

Sec. 09.10.055. **STATUTE OF REPOSE OF EIGHT YEARS.** (a) Notwithstanding the disability of minority described under AS 09.10.140(a), a person may not bring an action for personal injury, death, or property damage unless commenced within eight years of the earlier of the date of

(1) substantial completion of the construction alleged to have caused the personal injury, death, or property damage; however, the limitation of this paragraph does not apply to a claim resulting from an intentional or reckless disregard of specific project design plans and specifications or building codes; or

(2) the last act alleged to have caused the personal injury, death, or property damage.

(b) This section does not apply if

(1) the personal injury, death, or property damage resulted from

(A) prolonged exposure to a hazardous waste;

(B) an intentional act or gross negligence;

- (C) fraud or fraudulent misrepresentation;
 - (D) breach of an express warranty or guarantee; or
 - (E) a defective product; in this subparagraph, "product" means an object that has intrinsic value, is capable of delivery as an assembled whole or as a component part, and is introduced into trade or commerce; "product" includes an element or compound that if ingested by humans or if humans are exposed to, or are in contact with the element compound or product, poses a threat to human health;
 - (2) the facts that would give notice of a potential cause of action are intentionally concealed;
 - (3) a shorter period of time for bringing the action is imposed under another provision of law;
- or
- (4) a longer period of time for bringing the action was provided under a contract.
- (c) The limitation imposed under (a) of this section is tolled during any period in which there exists the undiscovered presence of a foreign body, that has no therapeutic or diagnostic purpose or effect, in the body of the injured person and the action is based on the presence of the foreign body.
- (d) In this section, "substantial completion" means the date when construction is sufficiently completed to allow the owner or a person authorized by the owner to occupy the improvement or to use the improvement in the manner for which it was intended.

Sec. 4. AS 09.10 is amended by adding a new section to read:

Sec. 09.10.065. LIMITATION OF ACTIONS AGAINST HEALTH CARE PROVIDERS. (a) Notwithstanding the disability of minority described under AS 09.10.140(a), an action based on professional negligence may not be brought against a health care provider if the injured person is, on the date of the alleged negligent act or omission, less than six years of age unless the action is commenced before the person's eighth birthday.

(b) The limitation imposed under (a) of this section is tolled during any period in which there exists

- (1) fraud, including fraud or collusion by a parent, guardian, insurer, or health care provider, resulting in the failure to bring an action on behalf of an injured minor;
- (2) intentional concealment of facts that would give notice of a potential action; or
- (3) the undiscovered presence of a foreign object that has no therapeutic or diagnostic purpose or effect in the body of the injured person and the action is based on the presence of the foreign object.

(C) In this section,

- (1) "health care provider" has the meaning given in AS 09.55.560;
- (2) "professional negligence" means a negligent act or omission by a health care provider in rendering professional services;
- (3) "professional services" means service provided by a health care provider that is within the scope of services for which the health care provider is licensed and that is not prohibited under the

health care provider's license or by a facility in which the health care provider practices.

Sec. 5. AS 09.10.070 is repealed and reenacted to read:

Sec. 09.10.070. ACTIONS FOR CERTAIN TORTS AND CERTAIN STATUTORY LIABILITIES TO BE BROUGHT IN TWO YEARS. Except as otherwise provided by law, a person may not bring an action (1) for libel, slander, assault, battery, seduction, or false imprisonment; (2) for personal injury or death or injury to the rights of another not arising on contract and not specifically provided otherwise; (3) for taking, detaining, or injuring personal property, including an action for its specific recovery; (4) upon a statute for a forfeiture or penalty to the state; or (5) upon a liability created by statute, other than a penalty or forfeiture; unless the action is commenced within two years.

Sec. 6. AS 09.17.010. is repealed and reenacted to read:

Sec.. 09.17.010. NONECONOMIC DAMAGES. (a) In an action to recover damages for personal injury or wrongful death, all damage claims for noneconomic losses shall be limited to compensation for pain, suffering, inconvenience, physical impairment, disfigurement, loss of enjoyment of life, loss of consortium, and other nonpecuniary damage.

(b) Except as provided under (c) of this section, the amount of damages awarded by a court or a jury under (a) of this section for all claims of a party to the action, including a loss of consortium claim, arising out of a single injury or death may not exceed \$300,000.

(c) In an action for personal injury, the damages awarded by a court or jury that are described under (a) of this section may not exceed \$500,000 when the claimant, as a result of the injury;

(1) is a hemiplegic, paraplegic, or quadriplegic and has permanent functional loss of one or more limbs resulting from injury to the spine or spinal cord;

(2) has lost both arms or both legs or an arm and a leg;

(3) has permanently impaired cognitive capacity, is incapable of making independent, responsible decisions, and is permanently incapable of independently performing the activities of normal, daily living;

(4) is both deaf and blind; or

(5) has third degree burns over one half or more of the claimant's body.

(d) The limit under (b) or (c) of this section does not apply to noneconomic damages awarded by a court or jury against a person who, as proven by a preponderance of the evidence, was attempting to commit or committing a felony, if the person bringing the action was a victim of that offense and the offense substantially contributed to the injury or death. In this subsection, "victim" has the meaning given in AS 12.55.185.

(e) Multiple injuries sustained as a result of a single incident shall be treated as a single injury

for purposes of this section.

Sec. 7. AS 09.17.020 is repealed and reenacted to read:

Sec. 09.17.020. PUNITIVE DAMAGES. (a) Punitive damages may not be awarded in an action, whether in tort, contract, or otherwise, unless supported by clear and convincing evidence of outrageous conduct, including acts done with malice or bad motives, or reckless indifference to the interest of another person.

(b) The amount of punitive damages awarded by a court or jury under (a) of this section may not exceed three times the amount of compensatory damages awarded or \$300,000, whichever amount is greater.

(c) The limit under (b) of this section does not apply to punitive damages awarded by a court or jury against a person who, as proven by a preponderance of the evidence, was attempting to commit or committing a felony if the person bringing the action was a victim of that offense and the offense substantially contributed to the injury or death. In this subsection, "victim" has the meaning given in AS 12.55.185.

(d) If a person receives an award of punitive damages, seventy-five percent of the award shall be deposited into the general fund of the state. This subsection does not grant the state the right to file or join a civil action to recover punitive damages.

Sec. 8. AS 09.17.070 is repealed and reenacted to read:

Sec. 09.17.070. COLLATERAL BENEFITS. (a) A claimant in an action for personal injury or death may only recover damages that exceed amounts received by the claimant, or that with reasonable probability will be received in the future by the claimant, as compensation for the injuries from collateral sources, whether private, group, or governmental, and whether contributory or noncontributory, except when

- (1) the collateral source is a federally funded program that by law must seek subrogation;
- (2) the collateral source has a right of subrogation under federal law;
- (3) the collateral source is the payment of a dependent child's medical bills by the injured child's parent which does not result from insurance coverage;
- (4) the benefit consists of death benefits paid under life insurance; or
- (5) the benefit consists of workers' compensation benefits received under AS 23.30.

(b) A person who provides a collateral benefit admissible under (b) of this section may not recover any amount against the claimant as reimbursement for those benefits and may not be subrogated to the rights of a claimant against a person defending a claim.

Sec. 9. AS 09.17.080 is amended to read:

Sec. 09.17.080. ALLOCATION OF DAMAGES. (a) In all actions involving the fault of more than one person [PARTY TO THE ACTION], including third-party defendants and persons who have been released [UNDER AS 09.16.040], the court, unless otherwise agreed by all parties, shall instruct the jury to answer special interrogatories or, if there is not jury, shall make findings, indicating

(1) the amount of damages each claimant would be entitled to recover if contributory fault is disregarded; and

(2) the percentage of the total fault [OF ALL OF THE PARTIES TO EACH CLAIM] that is allocated to each claimant, defendant, third-party defendant, [AND] person who has been released from liability, or other person responsible for the damages to each claimant regardless of whether the other person, including an employer, is or could have been named as a party to the action [UNDER AS 09.16.040].

(b) In determining the percentages of fault, the trier of fact shall consider both the nature of the conduct of each person [PARTY] at fault, and the extent of the causal relation between the conduct and the damages claimed. [THE TRIER OF FACT MAY DETERMINE THAT TWO OR MORE PERSONS ARE TO BE TREATED AS A SINGLE PARTY IF THEIR CONDUCT WAS A CAUSE OF THE DAMAGES CLAIMED AND THE SEPARATE ACT OR OMISSION OF EACH PERSON CANNOT BE DISTINGUISHED.]

(c) The court shall determine the award of damages to each claimant in accordance with the findings [, SUBJECT TO A REDUCTION UNDER AS 09.16.040,] and enter judgment against each party liable. The court also shall determine and state in the judgment each party's equitable share of the obligation to each claimant in accordance with the respective percentages of fault as determined under (a) of this section. An assessment of a percentage of fault against a person who is not a party may only be used as a measure for accurately determining the percentages of fault of a named party. Assessment of a percentage of fault against a person who is not a party does not subject that person to civil liability in that or another action and may not be used as evidence of civil liability in another action.

(d) The court shall enter judgment against each party liable on the basis of several liability in accordance with that party's percentage of fault.

Sec. 10. AS 09.30.070 (a) is amended to read:

Sec. 09.30.070 (a) PREJUDGMENT INTEREST. Notwithstanding AS 45.45.010, the [THE] rate of interest on judgments and decrees for the payment of money, including prejudgment interest, is three percentage points above the 12th Federal Reserve District discount rate in effect on January 2 of the year in which the judgment or decree is entered [10.5 PERCENT A YEAR], except that a judgment or decree founded on a contract in writing, providing for the payment of interest until paid at a specified rate not exceeding the legal rate of interest for that type of contract, bears interest at the

rate specified in the contract if the interest rate is set out in the judgment or decree.

Sec. 11. AS 09.30.070 is amended by adding a new subsection to read:

Sec. 09.30.070(c) PREJUDGMENT INTEREST. Prejudgment interest may not be awarded for future economic damages, future noneconomic damages, or for punitive damages.

Sec. 12. AS 09.65 is amended by adding a new section to read:

Sec. 09.65.096. CIVIL LIABILITY OF HOSPITALS FOR NONEMPLOYEES.

(a) A hospital is not liable for civil damages as a result of an act or omission by a health care provider who is not an employee or actual agent of the hospital if the hospital provides notice that the health care provider is an independent contractor. The notice required by this subsection must be posted conspicuously in all admitting areas of the hospital, published at least annually in a newspaper of general circulation in the area, and must be in substantially the following form:

Notice of Limited Liability

The following health care providers are independent contractors and are not employees of the hospital:

(List specific health care providers)

The hospital is responsible for exercising reasonable care in granting staff privileges to practice in the hospital, for reviewing those privileges on a regular basis, and for taking appropriate steps to revoke or restrict privileges in appropriate circumstances. The hospital is not otherwise liable for the acts or omissions of a health care provider who is an independent contractor.

(b) This section does not preclude liability for civil damages that are the proximate result of the hospital's own negligence or intentional misconduct.

(c) In this section,

(1) "health care provider" means a doctor of medicine, psychologist, osteopath, dentist, optometrist, chiropractor, optician, pharmacist, podiatrist, or certified registered nurse anesthetist, who is licensed in this state;

(2) "hospital" has the meaning given in AS 18.20.130 and includes a governmental owned or operated hospital;

(3) "independent contractor" means a licensed health care provider who is a member of a hospital's medical staff or who has otherwise been granted specified privileges to render health care services directly or indirectly to patients at the hospital, but who is not an employee or actual agent of the hospital in connection with the rendition of the health care services.

Sec. 13. AS 09.65.210 is repealed and reenacted to read:

Sec. 09.65.210 DAMAGES RESULTING FROM COMMISSION OF A FELONY OR WHILE UNDER THE INFLUENCE OF ALCOHOL OR DRUGS.

(a) A person who suffers personal injury, death or property damage or the person's personal representative under AS 09.55.570 or 09.55.580 may not recover damages for the personal injury, death or property damage if the injury, death or damage occurred while the person was

(1) committing or attempting to commit a felony, or fleeing from the commission or attempted commission of a felony and the commission or attempted commission of the felony substantially contributed to the injury, death or property damage whether or not the person was convicted on the felony.

(2) operating a vehicle, aircraft, or watercraft while under the influence of intoxicating liquor or any controlled substance which would constitute a violation of AS 28.35.030 if the conduct substantially contributed to the injury, death or property damage whether or not the person was convicted of such action.

(b) The conduct described in section (a) must be proved by the defendant in the civil trial by clear and convincing evidence.

Sec. 14. SEVERABILITY. If any provision of this Initiative, or the application of a provision of this Initiative to any person or circumstance is held invalid, the remainder of this Initiative and the application to other persons or circumstances shall not be affected.

Sec. 15. APPLICABILITY. This Initiative applies to all causes of action accruing on or after the effective date of this Act. This Initiative does not apply to any action or recovery for which an action was filed in court prior to the effective date of this Act.

Sec. 16. EFFECTIVE DATE OF THIS INITIATIVE. This Initiative takes effect ninety days after its certification by the lieutenant governor.

**Bruce Pozzi Public Relations**

821 N Street, Suite 203 Anchorage, Alaska 99501
Phone (907) 272-8880 Fax (907) 272-8282

RECEIVED
FEB 10 1997

**BISS & HOLMES
ATTORNEYS AT LAW**

To: Roger Holmes
From: Bruce Pozzi
Subject: Initiative Update
Date: February 8, 1997

Upon your return or sooner by phone if that is possible, you, Dick Cattanach and I should talk about this rejection from the Lt. Governor (and Attorney General) and what needs to be done to prepare a new Initiative (bill) in a very timely manner.

Officially, the State Chamber of Commerce will have withdrawn for resubmittal by the required date.

That means we must collect the sponsors all over again, but cannot do so until you have completed the new initiative that must accompany the application for sponsorships. That process will take me at least three to four weeks to complete.

Assuming you already know, from your conversations with Jim Baldwin what you need to do to the initiative, then perhaps it won't take you more than a week hopefully less upon your return.

If a phone call is possible let your assistant Bruce arrange it with me. Other wise I'll look forward to talking with you on your return, Feb. 21 or so.

The reason I'd be anxious to talk, if possible, by phone prior to your return, is that I must be out of town Feb. 24-27, a Monday through Thursday. And I'd much prefer if you were doing your "stuff" at that time.

Send your statements to Pamela La Bolle at the Alaska State Chamber of Commerce, 217 2nd St., Suite 201, Juneau, Ak. 99801

cc: D. Cattanach
P. La Bolle

FAX TRANSMITTAL SHEET



STATE OF ALASKA FRAN ULMER, LIEUTENANT GOVERNOR

Office of the Lieutenant Governor
P.O. Box 110015
Juneau, AK 99811-0015

Phone: (907) 465-3520
Fax: (907) 465-5400

Please deliver to: Bruce Pozzi
Location: Anchorage
Phone Number: (907) 272-8880
Fax Number: (907) 272-8282
Pages (including cover): 13
Comment: Tort Reform Initiative

Date: February 5, 1997
From: Carol Collins
Phone: (907) 465-4082
Fax: (907) 465-5400



FRAN ULMER
LIEUTENANT GOVERNOR
STATE OF ALASKA

February 3, 1997

Bruce Pozzi
200 Pacific View Drive
Anchorage, AK 99515

Dear Mr. Pozzi:

The purpose of this letter is to transmit to you a copy of the Attorney General's review of Initiative No. 96TORT. In the opinion, the attorney general advised me that the bill to be initiated is not in the required form, because some of the provisions of the initiative contains subject matter that is restricted by art. XI, sec. 7 of the Alaska Constitution. The Attorney General recommends that I deny certification of the application. However, before I take formal action on the recommendation of the Attorney General, I will extend the opportunity to you to withdraw the application. I believe that the sponsors of the initiative application should have the opportunity to determine whether the bill to be initiated can be amended to remove the provisions identified by the Attorney General.

If the initiative is not withdrawn by February 14, 1997, I intend to take final action on the application as required by AS 15.45.070. If you are aggrieved by the action, you will have 30 days to appeal to the Superior Court (AS 15.45.240). If you decide to withdraw the application, and resubmit it in a revised form, you will need to fully comply with the requirements of AS 15.45.010 - AS 15.45.040.

Should you have any questions, please do not hesitate to contact my office.

Sincerely,

Fran Ulmer
Lieutenant Governor

Enclosure

cc: Sandi Stout, Director, Division of Elections
Jim Baldwin, Assistant Attorney General, Dept. Of Law
Pamala La Bolle, Initiative Committee member
Edward B. Rasmuson, Initiative Committee member

MEMORANDUM

State of Alaska
Department of Law

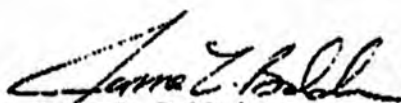
TO: Honorable Fran Ulmer
Lieutenant Governor
State of Alaska

DATE: February 3, 1997

FILE NO.: 663-96-0085

TEL. NO.: 465-2129

SUBJECT: Certification of Tort
Reform initiative

FROM: 
James L. Baldwin
Assistant Attorney General
Governmental Affairs - Juneau

OFFICE OF THE

FEB 3 1997

LIEUTENANT GOVERNOR

At your request, we have reviewed the initiative proposed by a committee consisting of Edward Rasmusson, A. Bruce Pozi, and Pamela E. La Bolle for "An Act relating to civil actions in Alaska (hereinafter "the initiative)." This review is in preparation for your decision under AS 15.45.070 to either certify the initiative application, or deny it. If the application is certified, petition booklets will be prepared and returned to the sponsors for circulation and subscription.

In reviewing the initiative, you must determine whether the bill to be initiated is in the proper form, as well as the application, and whether there is a sufficient number of qualified sponsors. The Division of Elections has determined that there is a sufficient number of qualified sponsors, and the application appears to be in the proper form. You have asked our opinion whether the proposed bill is in the proper form. A pre-election review for form must include an analysis whether the bill includes a subject which may not be enacted by initiative. Boucher v. Engstrom, 528 P.2d 456 (1974). The initiative may not be used

to dedicate revenues, make or repeal appropriations, create courts, define the jurisdiction of courts or prescribe their rules, or enact local or special legislation.

Alaska Const. art. XI, sec. 7.

The initiative proposes to enact or amend several statutory sections, including AS 09.10.55 regarding the statute of repose; sec. 09.10.070 and 09.10.75 regarding the statute of limitations; sec. 09.17.010 regarding limitations on non-economic damages; sec. 09.17.020 regarding punitive damages; sec. 09.17.070 regarding collateral benefits; sec. 09.17.080 regarding allocation of damages; sec. 09.30.070(c) regarding prejudgment interest; sec. 09.65.096 regarding civil liability of hospitals; sec. 09.65.210 regarding damages resulting from the commission of a felony; and sec. 09.17.090 regarding expert witness qualifications.

Although liberal construction of initiative proposals is the general rule, constitutional restrictions on the use of the initiative must also be broadly construed, and constitute "important

Hon. Fran Ulmer
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conditions on the initiative right that require strict compliance." Citizens Coalition v. McAlpine, 810 P.2d 162, 168 n. 14 (Alaska 1991); Alaskans for Legislative Reform v. State, 887 P.2d 960, 962 (Alaska 1994). We have researched several legal issues concerning the validity of this initiative.¹ At this stage of the initiative process, we are solely concerned with grounds for legal invalidity that are ripe for consideration before enactment. By this, we mean only alleged grounds for invalidity that fall within the restrictions set out in art. XI, sec. 7 of the Alaska Constitution.

Opponents of the initiative claim that the tort reform initiative contains a number of sections that constitute either procedural rules, or matters within the inherent rule making power of the court. In resolving this matter we must balance the often countervailing obligations to liberally construe initiatives so as to not unduly restrict their use and the obligation to carefully apply restrictions on the use of the initiative to protect the people against possible abuse. For the reasons set out below, we recommend that you deny certification of the initiative application because it appears that certain of the sections of the initiative prescribe court rules.

I. Prescription of Court Rules

In Citizens Coalition v. McAlpine, 810 P.2d 162 (Alaska 1991), the Court discussed the history and purpose of the constitutional prohibition on use of the initiative to prescribe court rules. The court concluded that the framers of the Alaska Constitution intended the restriction to remove certain "sensitive or sophisticated areas of legislation" from the sphere of the electorate. Id. at 170.² The effect of Citizens Coalition is to throw a broad net over the subject matter covered by the restriction. According to the court, there are two separate sources for rule-making power that are within the constitutional restriction on use of the initiative. First, under art. IV, sec. 15 of the Alaska

¹ We received memoranda from interested individuals in opposition to certification of the initiative. These include memoranda from Robert Wagstaff, Les Gara of Friedman, Rubin & White, and the law offices of Michael Schneider. These memoranda were provided to the sponsors and are kept in AG file no. 663-96-0085. The memoranda raise certain issues that are appropriate for a pre-election certification review under AS 15.45. However, some issues are appropriate to consider only after the initiative is enacted. Gara provided information intended to show that the initiative was unconstitutional, because the limit on non-economic damages contained in sec. 5 denied plaintiffs a right to trial by jury and equal protection. Wagstaff argued that the initiative would deny access to the courts and impair insurance contracts. While these memoranda may or may not raise valid legal issues, we decline to consider these matters as a part of a pre-election certification review.

² See, e.g., V. Fischer, Alaska's Constitutional Convention 80-81 (1975) (restrictions on direct legislation were meant to protect "critical areas" like the judicial system "against rash, discriminatory, and irresponsible acts").

Hon. Fran Ulmer
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Constitution, the court may prescribe rules governing "practice and procedure." Second, the court has "inherent" rule-making authority provided in the grant of judicial power in art. IV, sec. 1.

Opponents claim that at least four sections of the proposed initiative violate the prohibition against prescribing court rules. Sections 5, 6, and 7 allegedly violate the prohibition by adding court procedures to implement substantive rights created by the sections; and section 11 is claimed to violate the prohibition by prescribing a rule of evidence, a subject-matter inherently within the Court's rule-making authority. While we do not completely agree with the contentions of opponents, we believe the initiative does, in some respects, directly prescribe court rules, and for this reason must be rejected.

Each section is discussed separately below.

Section 7:

Sec. 7 of the proposed initiative, relating to allocation of damages, is set out using the "repeal and reenact" method. This technique makes it difficult to understand the true nature of the amendments to existing law, because all material in the section is set out as if it were a change to existing law. However, upon close inspection, it appears that much of sec. 7 is unchanged from existing law. The change in law proposed in sec. 7 would permit a jury to allocate a part of the fault for a tort to a person not a party to the action. The procedures set out in sec. 7 requiring the jury to answer certain interrogatories concerning the allocation of fault presently appears in law and would not be changed. These procedures are governed by existing court rules. Special verdicts and interrogatories are governed by Civil Rule 49; findings by the court are governed by Civil Rule 52; and entry of judgment is governed by Civil Rule 58. For this reason, we believe that the material contained in sec. 7 is consistent with existing law and court rules, and is not intended to prescribe new or amend existing court rules.³

³ Existing law, which contains the same procedural provisions, was originally enacted by the legislature in accordance with the procedure prescribed in Leege v. Martin, 379 P.2d 447 (Alaska 1963) for changing court rules, i.e., the bill was passed by a two-thirds majority, and stated that its purpose was to change court rules. Current AS 09.17.080, enacted in sec. 1 Ch. 139 SLA 1986, was passed as CCS SB 377 by over two-thirds majority of each house. See 1986 House Journal 3466-67; 1986 Senate Journal 2885-86. Section 5 and 7 Ch. 139 SLA 1986. We cannot be certain that a court would find that the reenactment of an existing court procedure amounts to an act "prescribing a court rule." If the initiative is resubmitted by the sponsors, we encourage them to draft the bill using the "repealing and reenacting" method with "restraint." See Manual of Legislative Drafting at 17 (Leg. Aff. Agency 1997). By doing this, the sponsor would avoid this alleged violation of the restriction.

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Section 5:

Section 5 of the proposed initiative also is claimed to violate the restriction against prescribing court rules. Section 5 seeks to amend AS 09.17.020, relating to punitive damage awards, by repealing current AS 09.17.020, and reenacting it in a substantially amended form to permit punitive damage only for "outrageous conduct, including acts done with malice or bad motives, or reckless indifference to the interest of another person." Sec. 5 would also cap the amount of damages at "three times the amount of compensatory damages awarded or \$300,000, whichever amount is greater." The procedural matter complained of involves proposed sec. 09.17.020(d) which provides:

(d) If a person receives an award of punitive damages, the court shall require that seventy five percent of the award be deposited into the general fund of the state. This subsection does not grant the state the right to file or join a civil action to recover punitive damages.

Section 5 of the proposed initiative (emphasis added).

The section does not specify the exact procedural mechanism to be used. Opponents claim that the initiative mandates the court to take some procedural action to effectuate the substantive right created by the section, i.e., the State's entitlement to seventy-five percent of punitive damage awards. They argue that the initiative impermissibly invades the rule-making power of the Court by "creat[ing] a right and then append[ing] procedures for the exercise of that right." citing Nolan v. Sea Airmotive, Inc., 627 P.2d 1035, 1043 (Alaska 1981). We do not agree. The initiative appears to leave the court free to implement any necessary procedures. The court is free to implement any necessary procedures. The court's rule making powers are not encroached upon if the procedures specified are "only incidental to the implementation of a substantive right." Winegardner v. Greater Anchorage Area Borough, 534 P.2d 541, 547 (Alaska 1975).

Section 11:

We agree with the argument of opponents that sec. 11 of the proposed initiative violates the prohibition against prescribing court rules. The subject-matter of sec. 11 is within the scope of the Court's rule-making power. The section would have the effect of enacting a statute that would be directly in conflict with an existing court rule of evidence by specifying qualifications for expert witnesses in professional malpractice cases. Sec. 11 proposes to amend AS 09.17 by adding a new section, sec. 09.17.090, to provide:

EXPERT WITNESS QUALIFICATION. (a) Except as provided under (b) of this section, in an action based upon professional negligence, a person may not testify as an expert witness on the issue of the appropriate standard

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of care unless the witness is a professional who is licensed in this state, or is licensed in another state or country and

(1) is trained and experienced in the same discipline or school of practice as the defendant or in an area directly related to a matter at issue; and

(2) is certified by a board recognized by the same state as having acknowledged expertise and training directly related to the particular field or matter at issue.

(b) The provisions of (a) of this section do not apply to a person who is testifying on the appropriate standard of care in a profession that is not licensed in this state, or another state or country, and who the court determines is qualified as an expert witness.

(c) "Professional negligence" means a negligent act or omission in rendering professional services.

Section 11 of the proposed initiative. This section conflicts with Evidence Rule 702(a) by specifying certain qualifications for expert witnesses in malpractice cases.⁴

Section 11 would effectively change Rule 702(a) by requiring a witness to be licensed and board certified in the same field or matter at issue in order to qualify as an expert witness. Rule 702(a) provides that a witness may qualify as an expert witness based on either "knowledge, skill, experience, training or education." It does not require licensing or board certification.

Section 11 involves the same subject-matter, and directly changes, an existing court rule. For purposes of this analysis, it is immaterial whether section 11 is classified as "procedural" or "substantive." If regarded as procedural, then it falls within the ambit of the Court's art. IV, sec. 15 rule-making power. If regarded as substantive, then Evidence Rule 702(a) must also be

⁴ Evidence Rule 702(a) provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

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regarded as substantive, and as an exercise of the Court's substantive rule-making authority under art. IV, sec. 1.⁵ Either way, section 11 impermissibly attempts to prescribe a court rule.

This conclusion is consistent with recognized treatises on civil and legislative procedure. See Joiner & Miller, Rules of Practice and Procedure: A Study of Judicial Rule Making, 55 Mich.L.Rev. 623, 651 (1957) ("Most rules of evidence involve only the orderly dispatch of judicial business and should be subject to court rule"); 3A Singer, Statutes and Statutory Construction, § 67.07 at 78 (5th ed.) (the rules of evidence are generally regarded as procedural); 9 Wright & Miller, Federal Practice and Procedure, § 2405 (rules of evidence are generally regarded as procedural for purposes of the Erie doctrine, and the Federal Rules of Evidence apply in diversity cases). When a new testimonial privilege for marital and family therapists was created in 1992, the legislature enacted a bill in accordance with the constitutional requirements for changing court rules. See sec. 12 ch. 129 SLA 1992.

This conclusion is also consistent with decisions of the Alaska Supreme Court and Court of Appeals, holding that legislative amendments to the rules of evidence must follow the constitutional procedure for amending "court rules" of practice and procedure under art. IV, sec. 15.

In Allred v. State, 554 P.2d 411 (Alaska 1976), the court recognized the existence of a psychotherapist-patient testimonial privilege, even though it was not provided by a court rule or statute. Following the Court's decision in Allred, the commentary to Rule 504 now states:

⁵ In Citizens Coalition v. McAlpine, supra, the Court noted that the distinction between "substantive" and "procedural" is not dispositive in determining whether an initiative violates the prohibition against prescribing "court rules" where the rule falls within the ambit of the Court's inherent rule-making authority under art. IV, sec. 1:

Appellants argue that a limit on contingent fees cannot be a rule of court because such a limit is a matter of "substance" and not "procedure." This argument would carry more force if the rule at issue here were one we might adopt under the authority of article IV, section 15 of the Alaska Constitution, which vests in the court the power to adopt rules of administration, practice, and procedure. We have found, however, that a limit on contingent fees invokes our powers under article IV, section 1. Consequently, the distinction between procedural and substantive rules, while still important, is not dispositive, because our judicial power includes the authority to regulate with greater substantive effect inside the limited ambit of the judicial system, than we could under our article IV, section 15 powers. Thomas v. State, 566 P.2d 630, 636-38 (Alaska 1977); cf. State v. Williams, 681 P.2d 313, 316 (Alaska 1984); Nolan v. Sea Air Motive, Inc., 627 P.2d 1035, 1042-43 (Alaska 1981).

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A psychotherapist-patient privilege was recognized in Allred v. State, 554 P.2d 411 (Alaska 1976), although the supreme court divided on the source of the privilege and its scope. Since the court has power under the Alaska Constitution to create testimonial privileges, the source of power to create Rule 504 is beyond question. . . .

Evidence Rules Commentary to Rule 504. In Walstad v. State, 818 P.2d 695 (Alaska App. 1991), the Court of Appeals noted that the psychotherapist-patient privilege and the communications to clergy privilege had been promulgated by the Supreme Court, in Evidence Rules 504 and 506, "pursuant to its constitutional authority to 'make and promulgate rules governing practice and procedure in civil and criminal cases'" under art. IV, sec. 15. Id. at 697. See also, Galbraith v. State, 693 P.2d 880 (Alaska App. 1985) (sec. 40 of ch. 143 SLA 1982 invalid because it changed Evidence Rule 901- Requirement of Authentication or Identification).

Section 6:

Section 6 of the initiative also violates the prohibition against prescribing court rules by prescribing a new rule of evidence. Sec. 6 proposes to amend AS 09.17.070 by requiring that amounts received from so-called collateral sources be taken into account by the jury when it determines an award of damages. Under existing law, amounts recovered from collateral sources are deducted from the award by the court after the jury has determined the amount of the award without knowledge that there may be an additional recovery. The attempt to prescribe a new rule of evidence is found in proposed sec. 09.17.070(b) and (c) which provide:

(b) A person defending a claim may introduce into evidence an amount paid or payable as a benefit to the claimant as a result of the personal injury or death under Title 42 Chapter 7 of the United States Code (Social Security Act); a state or federal disability act; health, sickness, disability, accident, or income-disability insurance; insurance that provides health benefits or income-disability coverage; and a contract or agreement of a group, organization, partnership, or corporation, or other collateral source, to provide, pay for, or reimburse the cost of medical, hospital, dental, or other health care services, disability, or lost wages. However, evidence of a collateral source that is a federally funded program that by law must seek subrogation or that has a right of subrogation under federal law, or evidence of death benefits paid under life insurance, or evidence of workers' compensation benefits received under AS 23.30, may not be introduced under this subsection. If a person defending a claim elects to introduce evidence described in this subsection, the claimant may introduce evidence of the amount that the claimant has paid or contributed to secure the claimant's right

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to the collateral benefit, including the cost to the claimant resulting from depleted or exhausted coverage.

(c) A person who provides a collateral benefit admissible under (b) of this section may not recover any amount against the claimant as reimbursement for those benefits and may not be subrogated to the rights of a claimant against a person defending a claim.

Sec. 6 of proposed initiative (emphasis added).

Subsection (b) provides that a person defending a claim for personal injury or death "may introduce into evidence" specified collateral benefits. The claimant, in turn, "may introduce evidence" of amounts paid or contributed to obtain the benefits. The first sentence in subsection (c), which refers to collateral benefits "admissible" under subsection (b), makes clear that subsection (b) provides for the introduction of such benefits into evidence during trial.

This represents a departure from the provisions of current AS 09.17.070. Existing AS 09.17.070 provides for the deduction of collateral benefits by the court at the conclusion of the case, after the fact finder has rendered its award, and after the court has awarded costs and attorneys fees.⁶

⁶ AS 09.17.070 provides:

Collateral benefits. (a) After the fact finder has rendered an award to a claimant, and after the court has awarded costs and attorney fees, a defendant may introduce evidence of amounts received or to be received by the claimant as compensation for the same injury from collateral sources that do not have a right of subrogation by law or contract.

(b) If the defendant elects to introduce evidence under (a) of this section, the claimant may introduce evidence of

(1) the amount that the actual attorney fees incurred by the claimant in obtaining the award exceed the amount of attorney fees awarded to the claimant by the court; and

(2) the amount that the claimant has paid or contributed to secure the right to an insurance benefit introduced by the defendant as evidence.

(c) If the total amount of collateral benefits introduced as evidence under (a) of this section exceeds the total amount that the claimant introduced as

(continued...)

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Although existing AS 09.17.070 refers to the introduction of evidence of collateral benefits, it is clear from the context that it relates only to the submission of proof of collateral benefits to the court for deduction from the total award after trial, and after the fact finder has rendered its award.⁷

Section 6 appears to prescribe a new rule of evidence, a matter clearly within the scope of the Supreme Court's art. IV, sec. 15 rule-making power. By providing for the admissibility of evidence of collateral benefits during trial, the section falls within the Court's procedural rule-making power to govern the admissibility of evidence. See the discussion on this issue pertaining to sec. 11 of the initiative at pp. 8 - 10 of this opinion.

There is an additional reason why the subject matter of sec. 6 comes within the restriction against prescribing a rule of court. Proposed sec. 6 would specify the admissibility of evidence of a type that should be left to the sound discretion of a court. This kind of evidence may cause a jury to be more apt to find for the defendant in close cases if it is known that the plaintiff has, or will, recover from sources other than the defendant.⁸ We believe that this type of provision

⁶ (...continued)

evidence under (b) of this section, the court shall deduct from the total award the amount by which the value of the non-subrogated sum awarded under (a) of this section exceeds the amount of payments under (b) of this section

AS 09.17.070 (emphasis added).

⁸ Evidence Rule 411 excludes evidence of liability insurance, in part for this reason. The Evidence Rules Commentary for Rule 411 states:

[T]he rule is designed to prevent a jury from deciding a close case on an improper basis-- i.e., whether or not a party is insured. There is a danger that insurance evidence might skew the decision-making process of the jury by making it regret a possibly wrong decision against an uninsured person much more than a similar decision under identical facts against a person whose insurance status is unknown, or by making the jury regret any erroneous decision against an insured party less than it would an erroneous decision against a person whose insurance status is unknown. This is not to suggest that a jury will intentionally make a mistake. It suggests only that in close cases someone must bear the risk of error, that the presence or absence of insurance is not regarded as an appropriate guide for allocating the risk, and that it is possible that a jury will misuse insurance evidence

(continued...)

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comes within the stated purpose of the framers of the constitutional prohibition who desired to foreclose use of the initiative to prescribe court rules. They wanted to protect "sensitive or sophisticated areas of legislation" from "emotional electoral dialogue and impulsive enactment by the general public." Citizens Coalition v. McAlpine, supra, 810 P.2d at 170.

II. Special Legislation

Opponents of the initiative also claim that sec. 14 constitutes special legislation. Sec. 14 reads as follows:

This initiative applies to all causes of action accruing on or after the effective of this Act. This initiative does not apply to any action or recovery arising out of the "Exxon Valdez" oil spill of March 1989.

Art. XI, sec. 7 restricts the initiative from being used to "enact local or special legislation." It is the singling out of a specific action or recovery for exclusion from the law to be enacted that is objectionable.⁹ Unfortunately, there have been no Alaska Supreme Court cases applying the restriction against special legislation by initiative.

Another provision in the Alaska Constitution limits the power of the legislature to enact special or local legislation. The prohibition against local or special legislation provides:

The legislature shall pass no local or special act if a general act can be made applicable. whether a general act can be made applicable shall be subject to judicial determination.

Alaska Const. art. II, sec. 19.

Section 19 has not been recently applied by the Alaska Supreme Court. In 1975, sec.19 was applied to invalidate a statute that mandated the creation of an Eagle River-Chugiak Borough. Abrams v. State, 534 P.2d 91 (Alaska 1975). In Abrams, the court recognized that a statute may affect only one of a few areas and yet relate to a matter of statewide concern or common interest.

* (...continued)

Evidence Rules Commentary to Rule 411.

⁹ We are not certain whether there are yet "unaccrued" claims related to the Exxon Valdez oil spill. Our uncertainty forces us to give credence to a claim that the restriction on special litigation must be applied to this section.

Hon. Fran Ulmer
Our File No. 663-96-0085

February 3, 1997
Page 11

In 1977, sec. 19 was again applied to validate a statute authorizing a trade of land between the federal government, the state, and a Native regional corporation. State v. Lewis, 559 P.2d 630 (Alaska 1977), cert. denied 432 U.S. 901 (1977). The court found that the land trade was unique, but of statewide concern. The Lewis court propounded a test to be used in determining whether a statute violates the special or local prohibition. It was substantially the same as the test used to determine the validity of non-suspect classifications challenged as violative of equal protection. The State merely had to show a rational basis, a good reason, to justify the special treatment.

In 1978, the Court articulated a unified equal protection analysis that avoids distinguishing between suspect and non-suspect classifications by using a sliding scale to weigh the interests involved in any classification. State v. Erickson, 574 P.2d 1 (Alaska 1978). The Court applies a single test that is flexible, and dependent on the importance of the rights involved. The more fundamental the right involved, the more compelling the interest the state must have for preferring one classmember over another. Commercial Fisheries Entry Commission v. Apokedak, 606 P.2d 1255 (Alaska 1980).

There has not been a case involving the local or special legislation prohibition since the unified equal protection test was adopted by the court. It remains to be seen how the court will apply an equal protection analysis to a statute claimed to violate sec. 19. The Exxon Valdez oil spill action is matter that has drawn substantial interest from the public, but that does not mean that it is a matter of statewide concern. The parties to that action are the only persons or entities who may stand to benefit from the provisions of sec. 14. This presents a close question of law, which should be resolved in favor of allowing a vote on the matter. We cannot help observing that the sponsors could easily avoid this issue by substituting a more generally worded applicability provision, and we encourage them to do so.¹⁰

Conclusion

If you decide to reject the initiative, you must give notice to all interested persons and groups who may be aggrieved by your decision. AS 15.45.240. This notice will set in motion a thirty day appeal period during which these persons must contest your action or be forever barred. McAlpine v. University, 762 P.2d 81, 86 (Alaska, 1988). We recommend that the sponsors remedy the defects discussed above by severing the offending provisions and reapplying for certification of the amended initiative.

JLB:clh

¹⁰ An clause that made certain provisions of the initiative applicable only to actions filed after a specified date would effectively accomplish the intended purpose.

BISS & HOLMES
FACSIMILE TRANSMITTAL SLIP

DATE: February 24, 1997
TO: Honorable Brian Porter's Office
ATTN: James D. Sourant, Esquire
FAX NO: 465-3834
FROM: BISS & HOLMES FAX #: (907) 243-6695
SENDER: Roger F. Holmes, Esq.
RE: Tort Reform FILE NO. 3625

MESSAGE:

Please see the attached from Mr. Roger Holmes. Thank you.

TOTAL PAGES TRANSMITTED (Including this page)

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APPENDIX

Alaska State Library
Alaska Historical Collections
Box 110571
AK 99511-0571

COMPLIMENTS OF THE
ALASKA STATE LIBRARY

BALLOT MEASURE NO. 2

**Initiative No. 87TOR2
Civil Liability**

BALLOT LANGUAGE

(As it will appear on the November 6, 1988
General Election Ballot)

This initiative changes the way damages can be collected from parties to lawsuits who share fault for injury to persons or property. The law now says that a party more than half responsible could be liable for the total judgement. Parties may collect from each other amounts paid over their share. Parties less than half responsible pay only up to twice their fault.

The initiative would make each party liable only for damages equal to his or her share of fault, and repeal the law concerning reimbursement from other parties.

Shall this initiative become law?

YES ☐

NO ☐

**LEGISLATIVE AFFAIRS
AGENCY SUMMARY**

This measure will affect lawsuits in which two or more persons are at fault.

The new law would tell the court to enter judgment against each person at fault, but only in an amount that represents that person's share of the fault.

Existing law now tells the court to enter judgment against each person at fault in an amount equal to the total liability of all persons at fault. Those at fault are required to share the total cost of the fault. The measure repeals that law.

The measure applies to suits based on acts occurring after its effective date.

**FULL TEXT OF PROPOSED
AMENDMENT**

What follows is the actual text of the amendment to Title 9 of the Alaska Statutes proposed by the initiative which would become law if the measure is passed by the voters. Capitalized words appearing in brackets are those in the current law which would be deleted. Words that are underlined would be added to the current law.

"Section 1. AS 09.17.080(d) is amended to read:

(d) The court shall enter judgment against each party liable on the basis of [JOINT AND] several liability [, EXCEPT THAT A PARTY WHO IS ALLOCATED LESS THAN 50 PERCENT OF THE TOTAL FAULT ALLOCATED TO ALL THE PARTIES MAY NOT BE JOINTLY LIABLE FOR MORE THAN TWICE THE PERCENTAGE OF FAULT ALLOCATED TO THAT PARTY] in accordance with that party's percentage of fault.

"Sec. 2. AS 09.16 is repealed.

"Sec. 3. Underlined material in this Act indicates text that is being added to the law and bracketed material in capital letters in this act indicates deletions from the law.

"Sec. 4. Sections 1-2 of this Act apply to all causes of action accruing after the effective date of this Act.

"Sec. 5. If any provision of this Act, or the application thereof to any person or circumstances is held invalid, the remainder of this Act and the application to other persons or circumstances shall not be affected thereby.

JK
a h a s

APPENDIX—Continued

Alaska State Library
Alaska Historical Collections
P O Box 110571
Juneau AK 99811-0571

BALLOT MEASURE NO. 2

STATEMENT IN SUPPORT

Supporters of this ballot measure believe it isn't fair to hold people responsible for things that aren't their fault. Yet, under current law, defendants found liable in a civil suit can be forced to pay damages equal to twice the amount of their fault. In other words, if you are 50 percent responsible for an injury you could be forced to pay 100 percent of the damages.

The current law - called joint and several liability - is simply unfair. It forces people to pay for damages caused by somebody else, and it contributes to inflated damage awards and encourages lawsuits based on who has money instead of who's at fault.

If Ballot Measure No. 2 is passed and you do something wrong, you pay for it. But you would not be forced to pay for something you didn't do - which could happen under present law.

This initiative will make the civil justice system more fair by assessing damages on the basis of a person's degree of fault, instead of on how much money or insurance he/she has. Thus, if you are found to be 20 percent responsible for someone's injury or property damage, you pay only 20 percent of the award.

Ballot Measure No. 2 will make the civil justice system more fair, while ensuring that people are held accountable for injuries or damage they cause.

Please vote YES on Ballot Measure No. 2.

Citizens' Coalition for Tort Reform
PO Box 201668
Anchorage, Alaska 99520

STATEMENT IN OPPOSITION

In Alaska, when drunk drivers, criminals, careless corporations or polluters harm a person or his property, that person has the right to seek repayment for the wrong done to him. Ballot Measure No. 2 drastically limits this basic right to protect ourselves and our property from such wrongdoers.

Here is how it works. If two drunk drivers hit a car and cripple a little girl, the child can seek payment from both drivers. But if one driver has no money, who should pay the child's lifetime doctor bills - the other drunk driver, who is insured, or the child and her parents?

In 1984, our legislature dealt with this problem. It said the drunk driver with insurance and the young girl who was injured should share the problem created by the drunk driver without insurance.

Ballot Measure No. 2 eliminates that sharing, and places the entire burden on the innocent victim. In the example of the drunk drivers, the crippled child would recover only half her medical bills. The injured child and her parents would have to pay the rest. Under Ballot Measure No. 2, the drunk driver's insurance company will not have to pay all the child's medical bills. The insurance companies win, and we lose. That's unfair.

Even under current law, the innocent victim loses when one of the wrongdoers can't pay. For instance, suppose a corporate polluter is 10% at fault, and a penniless company is 90% at fault. Today, the corporate polluter shares the problem by paying only 20%. The innocent victims of the polluters, such as homeowners and fishermen, share the problem because they cannot recover 80% of their loss. That may be unfair to victims, but Ballot Measure No. 2 is even worse. Ballot Measure No. 2 would eliminate the sharing, and penalize only the victims.

The insurance companies pushing Ballot Measure No. 2 are telling us wrongdoers should only pay their own share of the loss. That sounds good. But the insurance companies are not telling us what happens when one of the wrongdoers cannot pay anything. This is a common problem. Under Ballot Measure No. 2, the insurance company wins, and the victim loses.

Who benefits from Ballot Measure No. 2? The answer is simple: insurance companies. Who loses under Ballot Measure No. 2? The citizens of the State of Alaska. Will we pay less for insurance if the law is changed? No. Not even one insurance company has promised to lower its rates if Ballot Measure No. 2 passes. And you can bet it won't happen. Do not be misled by the insurance companies' propaganda. Vote NO on Ballot Measure No. 2.

Alaskans for Fairness
PO Box 103363
Anchorage, Alaska 99510

1987 INIT. NO. 2

STATE OF ALASKA
INITIATIVE NO. 87-2

1988



* Section 1. AS 09.17.080(d) is amended to read:

(d) The court shall enter judgment against each party liable on the basis of [JOINT AND] several liability [, EXCEPT THAT A PARTY WHO IS ALLOCATED LESS THAN 50 PERCENT OF THE TOTAL FAULT ALLOCATED TO ALL THE PARTIES MAY NOT BE JOINTLY LIABLE FOR MORE THAN TWICE THE PERCENTAGE OF FAULT ALLOCATED TO THAT PARTY] in accordance with that party's percentage of fault.

* Sec. 2. AS 09.16 is repealed.

* Sec. 3. Underlined material in this Act indicates text that is being added to the law, and bracketed material in capital letters in this Act indicates deletions from the law.

* Sec. 4. Sections 1 - 2 of this Act apply to all causes of action accruing after the effective date of this Act.

* Sec. 5. If any provision of this Act, or the application thereof to any person or circumstances is held invalid, the remainder of this Act and the application to other persons or circumstances shall not be affected thereby.

EXHIBIT 5
to 3 3



FRAN ULMER
LIEUTENANT GOVERNOR
STATE OF ALASKA

February 3, 1997

Bruce Pozzi
200 Pacific View Drive
Anchorage, AK 99515

Dear Mr. Pozzi:

The purpose of this letter is to transmit to you a copy of the Attorney General's review of Initiative No. 96TORT. In the opinion, the attorney general advised me that the bill to be initiated is not in the required form, because some of the provisions of the initiative contains subject matter that is restricted by art. XI, sec. 7 of the Alaska Constitution. The Attorney General recommends that I deny certification of the application. However, before I take formal action on the recommendation of the Attorney General, I will extend the opportunity to you to withdraw the application. I believe that the sponsors of the initiative application should have the opportunity to determine whether the bill to be initiated can be amended to remove the provisions identified by the Attorney General.

If the initiative is not withdrawn by February 14, 1997, I intend to take final action on the application as required by AS 15.45.070. If you are aggrieved by the action, you will have 30 days to appeal to the Superior Court (AS 15.45.240). If you decide to withdraw the application, and resubmit it in a revised form, you will need to fully comply with the requirements of AS 15.45.010 - AS 15.45.040.

Should you have any questions, please do not hesitate to contact my office.

Sincerely,

A handwritten signature of Fran Ulmer in dark ink.

Fran Ulmer
Lieutenant Governor

Enclosure

cc: Sandi Stout, Director, Division of Elections
Jim Baldwin, Assistant Attorney General, Dept. Of Law
Pamala La Bolle, Initiative Committee member ✓
Edward B. Rasmuson, Initiative Committee member

Mr. David
PO Box 84503

R Kramer

000-0000

Fairbanks AK 99708

Distribution Affiliation Reg Voter
60 01/2

Date POM Sent	Constituency	Bill Number	Response	Subject
Y	N	HB 68	Opposes	

I ADAMANTLY OPPOSE HB 68 WHICH TAKES AWAY THE OVERTIME PAY EXCEEDING 8 HOURS DAILY. PEOPLE HAVE FOUGHT HARD AND DIED IN THE STREETS TO GET WHERE WE ARE TODAY. I URGE YOU TO KILL HB 68.

short title VOLUNTARY FLEXIBLE WORK PLAN:

Mr. Thomas
1853 Alder St

P Conley

488-9263

North Pole AK 99705

Distribution Affiliation Reg Voter
60 01/2

Date POM Sent	Constituency	Bill Number	Response	Subject
Y	N	HB 68	Opposes	

PLEASE DO NOT PASS HB 68. THIS BILL COVERS A LOT MORE THAN FORT KNOX! ONCE DAY WE WILL BE FORCED TO FIGHT TO STOP THIS - YOU ARE GOING TO UNDO SOME VERY IMPORTANT WORKERS' RIGHTS. I WILL BE WATCHING TO SEE HOW YOU VOTE.

short title VOLUNTARY FLEXIBLE WORK PLAN:

Mr. Edmund
1122 Sunset Dr

P Brosnan

456-9377

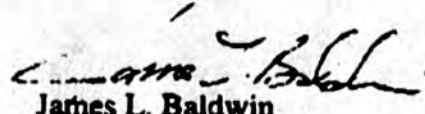
Fairbanks AK 99709

Distribution Affiliation Reg Voter
60 01/2

Date POM Sent	Constituency	Bill Number	Response	Subject
Y	N	HB 68	Opposes	

I OPPOSE HB 68. IT ENCOURAGES EMPLOYERS TO EXTEND SHIFTS TO 12 HOURS WHICH PEOPLE FOUGHT YEARS AGO TO SHORTEN THE SHIFT SO WORKERS COULD HAVE SOME SORT OF NORMALITY IN THEIR LIVES. NOBODY I HAVE TALKED TO WANTS TO WORK LONG SHIFTS UNLESS THEY ARE COMPENSATED WITH OVERTIME PAY.

short title VOLUNTARY FLEXIBLE WORK PLAN:

MEMORANDUM**State of Alaska
Department of Law****TO: Honorable Fran Ulmer
Lieutenant Governor
State of Alaska****DATE: February 3, 1997****FILE NO: 663-96-0085****TEL NO: 465-2129****SUBJECT: Certification of Tort
Reform initiative****FROM: 
James L. Baldwin
Assistant Attorney General
Governmental Affairs - Juneau**

At your request, we have reviewed the initiative proposed by a committee consisting of Edward Rasmusson, A. Bruce Pozi, and Pamela E. La Bolle for "An Act relating to civil actions in Alaska (hereinafter "the initiative")." This review is in preparation for your decision under AS 15.45.070 to either certify the initiative application, or deny it. If the application is certified, petition booklets will be prepared and returned to the sponsors for circulation and subscription.

In reviewing the initiative, you must determine whether the bill to be initiated is in the proper form, as well as the application, and whether there is a sufficient number of qualified sponsors. The Division of Elections has determined that there is a sufficient number of qualified sponsors, and the application appears to be in the proper form. You have asked our opinion whether the proposed bill is in the proper form. A pre-election review for form must include an analysis whether the bill includes a subject which may not be enacted by initiative. Boucher v. Engstrom, 528 P.2d 456 (1974). The initiative may not be used

to dedicate revenues, make or repeal appropriations, create courts, define the jurisdiction of courts or prescribe their rules, or enact local or special legislation.

Alaska Const. art. XI, sec. 7.

The initiative proposes to enact or amend several statutory sections, including AS 09.10.55 regarding the statute of repose; sec. 09.10.070 and 09.10.75 regarding the statute of limitations; sec. 09.17.010 regarding limitations on non-economic damages; sec. 09.17.020 regarding punitive damages; sec. 09.17.070 regarding collateral benefits; sec. 09.17.080 regarding allocation of damages; sec. 09.30.070(c) regarding prejudgment interest; sec. 09.65.096 regarding civil liability of hospitals; sec. 09.65.210 regarding damages resulting from the commission of a felony; and sec. 09.17.090 regarding expert witness qualifications.

Although liberal construction of initiative proposals is the general rule, constitutional restrictions on the use of the initiative must also be broadly construed, and constitute "important

Ms. Laura L Sarcone
1702 McKinley Ave

561-2448

Anchorage AK 99517

Distribution Affiliation Reg Voter
60 01/2

Date POM Sent	Constituency	Bill Number	Response	Subject
Y	N		None	TOBACCO

I STRONGLY FAVOR A \$1 INCREASE IN TOBACCO TAX.

short title

Mr. Lawrence Eardley
PO Box 81415

000-0000

Fairbanks AK 99708

Distribution Affiliation Reg Voter
60 01/2

Date POM Sent	Constituency	Bill Number	Response	Subject
Y	N	HB 68	Opposes	

I URGE YOU TO UPHOLD THE PRESENT LABOR LAWS OF THE STATE OF ALASKA WITH NO EXEMPTION GRANTED TO ANY ONE INDUSTRY.

short title VOLUNTARY FLEXIBLE WORK PLAN:

Mr Leonard Moffitt
PO Box 748

745-3384

Palmer AK 99645

Distribution Affiliation Reg Voter
60 01/2

Date POM Sent	Constituency	Bill Number	Response	Subject
Y	N	SB 60	Amend	

LADY SEATED IN A CHAIR WAS SHOT DEAD IN BACK OF HEAD BY GUEST IN COLD BLOOD. GIVEN NINE YEARS. ACQUAINTANCE AND POSSIBLE LOVER SHOT AN ATTORNEY TO DEATH, SAME JUDGE GAVE 88 YEARS SENTENCED. SHOWS THAT ONLY JURORS CAN ADMINISTER DEATH PENALTIES TO ELIMINATE JUDICIAL GANG CONFLICT OF INTEREST.

short title ADVISORY VOTE ON CAPITAL

Hon. Fran Ulmer
Our File No. 663-96-0085

February 3, 1997
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conditions on the initiative right that require strict compliance." Citizens Coalition v. McAlpine, 810 P.2d 162, 168 n. 14 (Alaska 1991); Alaskans for Legislative Reform v. State, 887 P.2d 960, 962 (Alaska 1994). We have researched several legal issues concerning the validity of this initiative.¹ At this stage of the initiative process, we are solely concerned with grounds for legal invalidity that are ripe for consideration before enactment. By this, we mean only alleged grounds for invalidity that fall within the restrictions set out in art. XI, sec. 7 of the Alaska Constitution.

Opponents of the initiative claim that the tort reform initiative contains a number of sections that constitute either procedural rules, or matters within the inherent rule making power of the court. In resolving this matter we must balance the often countervailing obligations to liberally construe initiatives so as to not unduly restrict their use and the obligation to carefully apply restrictions on the use of the initiative to protect the people against possible abuse. For the reasons set out below, we recommend that you deny certification of the initiative application because it appears that certain of the sections of the initiative prescribe court rules.

I. Prescription of Court Rules

In Citizens Coalition v. McAlpine, 810 P.2d 162 (Alaska 1991), the Court discussed the history and purpose of the constitutional prohibition on use of the initiative to prescribe court rules. The court concluded that the framers of the Alaska Constitution intended the restriction to remove certain "sensitive or sophisticated areas of legislation" from the sphere of the electorate. *Id.* at 170.² The effect of Citizens Coalition is to throw a broad net over the subject matter covered by the restriction. According to the court, there are two separate sources for rule-making power that are within the constitutional restriction on use of the initiative. First, under art. IV, sec. 15 of the Alaska

¹ We received memoranda from interested individuals in opposition to certification of the initiative. These include memoranda from Robert Wagstaff, Les Gara of Friedman, Rubin & White, and the law offices of Michael Schneider. These memoranda were provided to the sponsors and are kept in AG file no. 663-96-0085. The memoranda raise certain issues that are appropriate for a pre-election certification review under AS 15.45. However, some issues are appropriate to consider only after the initiative is enacted. Gara provided information intended to show that the initiative was unconstitutional, because the limit on non-economic damages contained in sec. 5 denied plaintiffs a right to trial by jury and equal protection. Wagstaff argued that the initiative would deny access to the courts and impair insurance contracts. While these memoranda may or may not raise valid legal issues, we decline to consider these matters as a part of a pre-election certification review.

² See, e.g., V. Fischer, Alaska's Constitutional Convention 80-81 (1975) (restrictions on direct legislation were meant to protect "critical areas" like the judicial system "against rash, discriminatory, and irresponsible acts").

Mr. Vern
790 Cessna Wy

Bouton

000-0000

Distribution Affiliation Reg Voter
57 01/2

Fairbanks AK 99712

Date POM Sent	Constituency	Bill Number	Response	Subject
Y	N	HB 68	Opposes	

I OPPOSE HB 68 AS IT AFFECTS ALL WORKERS IN THE STATE OF ALASKA IN A BAD WAY.

short title VOLUNTARY FLEXIBLE WORK PLAN:

Mr. Larry
PO Box 10636

W. Pardue

457-2617

Distribution Affiliation Reg Voter
57 01/2

Fairbanks AK 99710

Date POM Sent	Constituency	Bill Number	Response	Subject
Y	N	HB 68	Opposes	

OPPOSE HB 68 BECAUSE IT WILL AFFECT ALL WORKERS IN ALASKA AND LOWER LIVING STANDARDS. MEN FOUGHT AND DIED IN THE STREETS FOR A FORTY HOUR WEEK AND OVERTIME PERIOD.

short title VOLUNTARY FLEXIBLE WORK PLAN:

Mr. Royal
6301 Trappers Trail Rd

T Kiehl

561-1847

Distribution Affiliation Reg Voter
60 01/2

Anchorage AK 99516

Date POM Sent	Constituency	Bill Number	Response	Subject
Y	N		None	TOBACCO

PLEASE INCREASE THE TOBACCO TAX BY \$1 PER PACK.

short title

Hon. Fran Ulmer
Our File No. 663-96-0085

February 3, 1997
Page 3

Constitution, the court may prescribe rules governing "practice and procedure." Second, the court has "inherent" rule-making authority provided in the grant of judicial power in art. IV, sec. 1.

Opponents claim that at least four sections of the proposed initiative violate the prohibition against prescribing court rules. Sections 5, 6, and 7 allegedly violate the prohibition by adding court procedures to implement substantive rights created by the sections; and section 11 is claimed to violate the prohibition by prescribing a rule of evidence, a subject-matter inherently within the Court's rule-making authority. While we do not completely agree with the contentions of opponents, we believe the initiative does, in some respects, directly prescribe court rules, and for this reason must be rejected.

Each section is discussed separately below.

Section 7:

Sec. 7 of the proposed initiative, relating to allocation of damages, is set out using the "repeal and reenact" method. This technique makes it difficult to understand the true nature of the amendments to existing law, because all material in the section is set out as if it were a change to existing law. However, upon close inspection, it appears that much of sec. 7 is unchanged from existing law. The change in law proposed in sec. 7 would permit a jury to allocate a part of the fault for a tort to a person not a party to the action. The procedures set out in sec. 7 requiring the jury to answer certain interrogatories concerning the allocation of fault presently appears in law and would not be changed. These procedures are governed by existing court rules. Special verdicts and interrogatories are governed by Civil Rule 49; findings by the court are governed by Civil Rule 52; and entry of judgment is governed by Civil Rule 58. For this reason, we believe that the material contained in sec. 7 is consistent with existing law and court rules, and is not intended to prescribe new or amend existing court rules.³

³ Existing law, which contains the same procedural provisions, was originally enacted by the legislature in accordance with the procedure prescribed in Lege v. Martin, 379 P.2d 447 (Alaska 1963) for changing court rules, i.e., the bill was passed by a two-thirds majority, and stated that its purpose was to change court rules. Current AS 09.17.080, enacted in sec. 1 Ch. 139 SLA 1986, was passed as CCS SB 377 by over two-thirds majority of each house. See 1986 House Journal 3466-67; 1986 Senate Journal 2885-86. Section 5 and 7 Ch. 139 SLA 1986. We cannot be certain that a court would find that the reenactment of an existing court procedure amounts to an act "prescribing a court rule." If the initiative is resubmitted by the sponsors, we encourage them to draft the bill using the "repealing and reenacting" method with "restraint." See Manual of Legislative Drafting at 17 (Leg. Aff. Agency 1997). By doing this, the sponsor would avoid this alleged violation of the restriction.



Official Business

Alaska State Legislature

HOUSE AND SENATE FINANCE COMMITTEES

P.O. Box V
State Capitol
Juneau, Alaska 99811

MEMORANDUM

Date: January 29, 1997 ✓

To: All Legislators

From: Senator Drue Pearce, Co-Chair *[Signature]*
Senator Bert Sharp, Co-Chair *[Signature]*
Senate Finance Committee

Mark Hanley, Co-Chair *[Signature]*
Gene Therriault, Co-Chair *[Signature]*
House Finance Committee

Re: Department of Law - Executive Session Briefing on Oil and Gas
Litigation Efforts

The Attorney General and staff will provide interested members with an executive session briefing on the Department's oil and gas litigation efforts Thursday, February 6, at 4:00 p.m. in the House Finance Committee Room. As is customary, members will be asked to sign an agreement with the A.G. to assure the confidentiality of this information. We anticipate this meeting to last about one hour.

All members are invited and we particularly hope members of the Resource Committees and the House Oil and Gas Committee can attend.

cc: Attorney General Bruce Botelho
House Chief Clerk
Senate Secretary

13753

Hon. Fran Ulmer
Our File No. 663-96-0085

February 3, 1997
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Section 5:

Section 5 of the proposed initiative also is claimed to violate the restriction against prescribing court rules. Section 5 seeks to amend AS 09.17.020, relating to punitive damage awards, by repealing current AS 09.17.020, and reenacting it in a substantially amended form to permit punitive damage only for "outrageous conduct, including acts done with malice or bad motives, or reckless indifference to the interest of another person." Sec. 5 would also cap the amount of damages at "three times the amount of compensatory damages awarded or \$300,000, whichever amount is greater." The procedural matter complained of involves proposed sec. 09.17.020(d) which provides:

(d) If a person receives an award of punitive damages, the court shall require that seventy five percent of the award be deposited into the general fund of the state. This subsection does not grant the state the right to file or join a civil action to recover punitive damages.

Section 5 of the proposed initiative (emphasis added).

The section does not specify the exact procedural mechanism to be used. Opponents claim that the initiative mandates the court to take some procedural action to effectuate the substantive right created by the section, i.e., the State's entitlement to seventy-five percent of punitive damage awards. They argue that the initiative impermissibly invades the rule-making power of the Court by "creat[ing] a right and then append[ing] procedures for the exercise of that right." citing Nolan v. Sea Airmotive, Inc., 627 P.2d 1035, 1043 (Alaska 1981). We do not agree. The initiative appears to leave the court free to implement any necessary procedures. The court is free to implement any necessary procedures. The court's rule making powers are not encroached upon if the procedures specified are "only incidental to the implementation of a substantive right." Winegardner v. Greater Anchorage Area Borough, 534 P.2d 541, 547 (Alaska 1975).

Section 11:

We agree with the argument of opponents that sec. 11 of the proposed initiative violates the prohibition against prescribing court rules. The subject-matter of sec. 11 is within the scope of the Court's rule-making power. The section would have the effect of enacting a statute that would be directly in conflict with an existing court rule of evidence by specifying qualifications for expert witnesses in professional malpractice cases. Sec. 11 proposes to amend AS 09.17 by adding a new section, sec. 09.17.090, to provide:

EXPERT WITNESS QUALIFICATION. (a) Except as provided under
(b) of this section, in an action based upon professional negligence, a person may not testify as an expert witness on the issue of the appropriate standard

The Republican Party of Alaska

January 28, 1997

TO: All SCC Members

FROM: Linda McKay, RPA Office Manager

RE: SCC Meeting in Juneau

As many of you know the SCC meeting will be held in Juneau, April 5, 1997. We have looked into the following ticket prices and hotel accommodations.

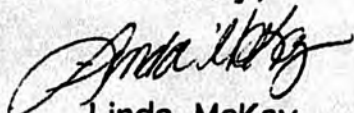
Alaska Airlines (1-800-445-4435) has given us a "V" Class price of \$110.00 one way from Anchorage to Juneau and a 5% discount fare of \$150.10 one way from Fairbanks to Juneau. Also, from Sitka to Juneau a 21 day advance fare of \$47.50 one way (rates subject to change and availability plus tax). It is up to each individual to make your own reservations. When you call them you will need the following information: MEETING ID NUMBER- CMR1952.

The Westmark Baranof (1-800-544-0790) has also given us a group rate of \$79.00 plus 12% bed tax for one or two people for those of you wanting to stay over night. Again, it is up to you to make your own reservations by 3/21/97. The rooms are being held under The Republican Party of Alaska.

We are at this time trying to plan a tour of the Capitol and also a dinner/dance through the Young Republicans. We will let you know more about these events as the time approaches for the meeting.

If you have any questions please do not hesitate to call me at 276-4467.

Sincerely,



Linda McKay
RPA Office Manager



Headquarters: 1001 West Fireweed Lane • Anchorage, AK 99503 • (907) 276-4467 • Fax 276-0425

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Our File No. 663-96-0085

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Page 5

of care unless the witness is a professional who is licensed in this state, or is licensed in another state or country and

(1) is trained and experienced in the same discipline or school of practice as the defendant or in an area directly related to a matter at issue; and

(2) is certified by a board recognized by the same state as having acknowledged expertise and training directly related to the particular field or matter at issue.

(b) The provisions of (a) of this section do not apply to a person who is testifying on the appropriate standard of care in a profession that is not licensed in this state, or another state or country, and who the court determines is qualified as an expert witness.

(c) "Professional negligence" means a negligent act or omission in rendering professional services.

Section 11 of the proposed initiative. This section conflicts with Evidence Rule 702(a) by specifying certain qualifications for expert witnesses in malpractice cases.⁴

Section 11 would effectively change Rule 702(a) by requiring a witness to be licensed and board certified in the same field or matter at issue in order to qualify as an expert witness. Rule 702(a) provides that a witness may qualify as an expert witness based on either "knowledge, skill, experience, training or education." It does not require licensing or board certification.

Section 11 involves the same subject-matter, and directly changes, an existing court rule. For purposes of this analysis, it is immaterial whether section 11 is classified as "procedural" or "substantive." If regarded as procedural, then it falls within the ambit of the Court's art. IV, sec. 15 rule-making power. If regarded as substantive, then Evidence Rule 702(a) must also be ✓

⁴ Evidence Rule 702(a) provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

<u>Name of Lobbyist</u>	<u>Contract/Salaried</u>	<u>Subject</u>	<u>Name of Client/Employer</u>	<u>Termination Date</u>
WESSELS, Paul D. PO Box 196612, MB6-4 Anchorage, AK 99519 907-564-4039	Salaried Employee	Oil/Gas	BP Exploration (Alaska) Inc.	
WEYRAUCH, Bruce B. 302 Gold Street Juneau, AK 99801 907-586-2210	Contract Lobbyist Contract Lobbyist Contract Lobbyist	Fisheries Marine Pilots Fisheries	AK Crab Coalition SE AK Pilot's Assn. Valdez Fisheries Development Assn.	
WILLIAMS, Thomas K. PO Box 196612 Anchorage, AK 99519 907-564-5955	Salaried Employee	Oil/Gas	BP Exploration (Alaska) Inc.	
YOULD, Eric P. 703 W Tudor Road, #200 Anchorage, AK 99503 907-561-6103	Salaried Employee	Electric Utilities	AK Rural Electric Cooperative Assn.	

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Our File No. 663-96-0085

February 3, 1997
Page 6

regarded as substantive, and as an exercise of the Court's substantive rule-making authority under art. IV, sec. 1.⁵ Either way, section 11 impermissibly attempts to prescribe a court rule.

This conclusion is consistent with recognized treatises on civil and legislative procedure. See Joiner & Miller, Rules of Practice and Procedure: A Study of Judicial Rule Making, 55 Mich.L.Rev. 623, 651 (1957) ("Most rules of evidence involve only the orderly dispatch of judicial business and should be subject to court rule"); 3A Singer, Statutes and Statutory Construction, § 67.07 at 78 (5th ed.) (the rules of evidence are generally regarded as procedural); 9 Wright & Miller, Federal Practice and Procedure, § 2405 (rules of evidence are generally regarded as procedural for purposes of the Erie doctrine, and the Federal Rules of Evidence apply in diversity cases). When a new testimonial privilege for marital and family therapists was created in 1992, the legislature enacted a bill in accordance with the constitutional requirements for changing court rules. See sec. 12 ch. 129 SLA 1992.

This conclusion is also consistent with decisions of the Alaska Supreme Court and Court of Appeals, holding that legislative amendments to the rules of evidence must follow the constitutional procedure for amending "court rules" of practice and procedure under art. IV, sec. 15.

In Allred v. State, 554 P.2d 411 (Alaska 1976), the court recognized the existence of a psychotherapist-patient testimonial privilege, even though it was not provided by a court rule or statute. Following the Court's decision in Allred, the commentary to Rule 504 now states:

⁵ In Citizens Coalition v. McAlpine, supra, the Court noted that the distinction between "substantive" and "procedural" is not dispositive in determining whether an initiative violates the prohibition against prescribing "court rules" where the rule falls within the ambit of the Court's inherent rule-making authority under art. IV, sec. 1:

Appellants argue that a limit on contingent fees cannot be a rule of court because such a limit is a matter of "substance" and not "procedure." This argument would carry more force if the rule at issue here were one we might adopt under the authority of article IV, section 15 of the Alaska Constitution, which vests in the court the power to adopt rules of administration, practice, and procedure. We have found, however, that a limit on contingent fees invokes our powers under article IV, section

1. Consequently, the distinction between procedural and substantive rules, while still important, is not dispositive, because our judicial power includes the authority to regulate with greater substantive effect inside the limited ambit of the judicial system, than we could under our article IV, section 15 powers. Thomas v. State, 566 P.2d 630, 636-38 (Alaska 1977); cf. State v. Williams, 681 P.2d 313, 316 (Alaska 1984); Nolan v. Sea Air motive, Inc., 627 P.2d 1035, 1042-43 (Alaska 1981).

Id. at 167 n. 10.

Name of Lobbyist	Contract/Salaried	SUBJECT	NAME OF CLIENT/EMPLOYER
SPRINGER, Heinrich 4041 B Street Anchorage, AK 99503 907-561-5354	Salaried Employee	Construction	Associated General Contractors
STILES, Robert B. 711 H Street #600 Anchorage, AK 99501 907-279-6868	Salaried Employee	Mining	DRven Corporation
STONE, David G. 3100 Channel Drive #2 Juneau, AK 99801 907-463-5704	Salaried Employee	Mining	Echo Bay Mines
STOOPS, Reed 240 Main Street #600 Juneau, AK 99801 907-463-3232	Contract Lobbyist Contract Lobbyist Contract Lobbyist Contract Lobbyist Contract Lobbyist Contract Lobbyist Contract Lobbyist	Entertainment Insurance Telecommunication Transportation Marine Highways Public Broadcasting Mining Mining	Motion Picture Assn. of America Aetna Life & Causalty General Communication Inc. Lynden, Inc. Port of Bellingham Alaska Public Broadcasting Kennecott Greens Creek Mine Fairbanks Gold
TESAR, Kate AK Services Group PO Box 22754 Juneau, AK 99802 907-463-5657	Contract Lobbyist Contract Lobbyist	Local Government Fisheries	City of Cordova Taku Fisheries
THIBODEAU, Robert 1616 Glacier Avenue Juneau, AK 99801 907-586-2138	No Compensation	Self	Robert Thibodeau
THOMAS, Bill PO Box 942 Haines, AK 99827 907-766-3365	Contract Lobbyist Contract Lobbyist Contract Lobbyist	Local Government Fisheries Utilities	North Slope Borough United SE Alaska Gillnetters Kito, Inc.

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A psychotherapist-patient privilege was recognized in Allred v. State, 554 P.2d 411 (Alaska 1976), although the supreme court divided on the source of the privilege and its scope. Since the court has power under the Alaska Constitution to create testimonial privileges, the source of power to create Rule 504 is beyond question. . . .

Evidence Rules Commentary to Rule 504. In Walstad v. State, 818 P.2d 695 (Alaska App. 1991), the Court of Appeals noted that the psychotherapist-patient privilege and the communications to clergy privilege had been promulgated by the Supreme Court, in Evidence Rules 504 and 506, "pursuant to its constitutional authority to 'make and promulgate rules governing practice and procedure in civil and criminal cases'" under art. IV, sec. 15. Id. at 697. See also, Galbraith v. State, 693 P.2d 880 (Alaska App. 1985) (sec. 40 of ch. 143 SLA 1982 invalid because it changed Evidence Rule 901- Requirement of Authentication or Identification).

Section 6:

Section 6 of the initiative also violates the prohibition against prescribing court rules by prescribing a new rule of evidence. Sec. 6 proposes to amend AS 09.17.070 by requiring that amounts received from so-called collateral sources be taken into account by the jury when it determines an award of damages. Under existing law, amounts recovered from collateral sources are deducted from the award by the court after the jury has determined the amount of the award without knowledge that there may be an additional recovery. The attempt to prescribe a new rule of evidence is found in proposed sec. 09.17.070(b) and (c) which provide:

(b) A person defending a claim may introduce into evidence an amount paid or payable as a benefit to the claimant as a result of the personal injury or death under Title 42 Chapter 7 of the United States Code (Social Security Act); a state or federal disability act; health, sickness, disability, accident, or income-disability insurance; insurance that provides health benefits or income-disability coverage; and a contract or agreement of a group, organization, partnership, or corporation, or other collateral source, to provide, pay for, or reimburse the cost of medical, hospital, dental, or other health care services, disability, or lost wages. However, evidence of a collateral source that is a federally funded program that by law must seek subrogation or that has a right of subrogation under federal law, or evidence of death benefits paid under life insurance, or evidence of workers' compensation benefits received under AS 23.30, may not be introduced under this subsection. If a person defending a claim elects to introduce evidence described in this subsection, the claimant may introduce evidence of the amount that the claimant has paid or contributed to secure the claimant's right

<u>Name of Lobbyist</u>	<u>Contract/Salaried</u>	<u>Subject</u>	<u>Name of Client/Employer</u>	<u>Termination Date</u>
RINGSTAD, Ann 757 Illinois Street Fairbanks, AK 99701 907-456-4122	Contract Lobbyist	Education	University of Alaska	
RINGSTAD, John 119 Second Street #B Juneau, AK 99801 907-463-5242	Salaried Employee	Oil/Gas	BP Exploration (Alaska) Inc.	
RITCHIE, Kevin 217 Second Street #200 Juneau, AK 99801 907-586-1385	Salaried Employee	Local Government	AK Municipal League	
ROSE, Carl F.N. 316 W 11th Street Juneau, AK 99801 907-586-1083	Salaried Employee	Education	Assn. of Alaska School Boards	
ROSS, Kimberly S. 1117 E. 35th #102 Anchorage, AK 99508 907-277-0071	Salaried Employee	Transportation	AK Air Carriers Assn.	
ROWE, James 4341 B Street #304 Anchorage, AK 99503 907-563-4000	Salaried Employee	Telecommunications	AK Telephone Assn.	
SALERNO, Angela M. 525 Main Street Juneau, AK 99801 907-463-4502	Salaried Employee	Social Welfare	National Assn/Social Workers/AK	
SCHOEPHOESTER, Nancy N. PO Box 100360 Anchorage, AK 99510 907-263-4655	Salaried Employee	Oil/Gas	ARCO Alaska, Inc.	

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to the collateral benefit, including the cost to the claimant resulting from depleted or exhausted coverage.

(c) A person who provides a collateral benefit admissible under (b) of this section may not recover any amount against the claimant as reimbursement for those benefits and may not be subrogated to the rights of a claimant against a person defending a claim.

Sec. 6 of proposed initiative (emphasis added).

Subsection (b) provides that a person defending a claim for personal injury or death "may introduce into evidence" specified collateral benefits. The claimant, in turn, "may introduce evidence" of amounts paid or contributed to obtain the benefits. The first sentence in subsection (c), which refers to collateral benefits "admissible" under subsection (b), makes clear that subsection (b) provides for the introduction of such benefits into evidence during trial.

This represents a departure from the provisions of current AS 09.17.070. Existing AS 09.17.070 provides for the deduction of collateral benefits by the court at the conclusion of the case, after the fact finder has rendered its award, and after the court has awarded costs and attorneys fees.⁶

⁶ AS 09.17.070 provides:

Collateral benefits. (a) After the fact finder has rendered an award to a claimant, and after the court has awarded costs and attorney fees, a defendant may introduce evidence of amounts received or to be received by the claimant as compensation for the same injury from collateral sources that do not have a right of subrogation by law or contract.

(b) If the defendant elects to introduce evidence under (a) of this section, the claimant may introduce evidence of

(1) the amount that the actual attorney fees incurred by the claimant in obtaining the award exceed the amount of attorney fees awarded to the claimant by the court; and

(2) the amount that the claimant has paid or contributed to secure the right to an insurance benefit introduced by the defendant as evidence.

(c) If the total amount of collateral benefits introduced as evidence under (a) of this section exceeds the total amount that the claimant introduced as

(continued...)

Name of Lobbyist	Contract/Salaried	Subject	Name of Client/Employer	Termination Date
PADDOCK, Dean PO Box 21951 Juneau, AK 99802 907-463-4970	Salaried Employee	Fisheries	Bristol Bay Driftnetters Assn., Inc.	
PARISH, David PO Box 111861 Anchorage, AK 99511 907-522-2600	Contract Lobbyist Contract Lobbyist Contract Lobbyist Contract Lobbyist Contract Lobbyist Contract Lobbyist	Public Broadcasting Transportation Oil/Gas Mining Resource Development Health Mining	AK Public Telecommunications, Inc. ERA Aviation Exxon Company USA Placer Dome US, Inc. Resource Development Council/AK American Heart Association USMX, Inc.	
PESKA, Garrey PO Box 240185 Douglas, AK 99824 907-364-2244	Contract Lobbyist	Health Care	AK State Hospital/Nursing Homes	
PHELPS, Jack E. 111 Stedman #200 Ketchikan, AK 99901 907-225-6114	Salaried Employee	Timber	AK Forest Association	
PORTMAN, Carl 121 Fireweed #250 Anchorage, AK 99503 907-276-0700	Salaried Employee	Resource Development	Resource Development Council/AK	
PUTNAM, Fate 319 Seward Street #3 Juneau, AK 99801 907-586-2813	Contract Lobbyist	Labor	AK State Employees Assn.	
QUESNEL, Paul 119 Second Street #B Juneau, AK 99801 907-463-5242	Salaried Employee	Oil/Gas	BP Exploration (Alaska) Inc.	

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Although existing AS 09.17.070 refers to the introduction of evidence of collateral benefits, it is clear from the context that it relates only to the submission of proof of collateral benefits to the court for deduction from the total award after trial, and after the fact finder has rendered its award.⁷

Section 6 appears to prescribe a new rule of evidence, a matter clearly within the scope of the Supreme Court's art. IV, sec. 15 rule-making power. By providing for the admissibility of evidence of collateral benefits during trial, the section falls within the Court's procedural rule-making power to govern the admissibility of evidence. See the discussion on this issue pertaining to sec.11 of the initiative at pp. 8 - 10 of this opinion.

There is an additional reason why the subject matter of sec. 6 comes within the restriction against prescribing a rule of court. Proposed sec.6 would specify the admissibility of evidence of a type that should be left to the sound discretion of a court. This kind of evidence may cause a jury to be more apt to find for the defendant in close cases if it is known that the plaintiff has, or will, recover from sources other than the defendant.⁸ We believe that this type of provision

⁶ (...continued)

evidence under (b) of this section, the court shall deduct from the total award the amount by which the value of the non-subrogated sum awarded under (a) of this section exceeds the amount of payments under (b) of this section

AS 09.17.070 (emphasis added).

⁸ Evidence Rule 411 excludes evidence of liability insurance, in part for this reason. The Evidence Rules Commentary for Rule 411 states:

[T]he rule is designed to prevent a jury from deciding a close case on an improper basis— i.e., whether or not a party is insured. There is a danger that insurance evidence might skew the decision-making process of the jury by making it regret a possibly wrong decision against an uninsured person much more than a similar decision under identical facts against a person whose insurance status is unknown, or by making the jury regret any erroneous decision against an insured party less than it would an erroneous decision against a person whose insurance status is unknown. This is not to suggest that a jury will intentionally make a mistake. It suggests only that in close cases someone must bear the risk of error, that the presence or absence of insurance is not regarded as an appropriate guide for allocating the risk, and that it is possible that a jury will misuse insurance evidence

(continued...)

Name of Lobbyist	Contract/Salaried	Subject	Name of Client/Employer	Termination Date
McCORCLE, James H. PO Box 22016 Juneau, AK 99802 907-586-2493	No Compensation	Senior Citizens	AARP	
McPHETRES, Stephen T. 326 4th Street #404 Juneau, AK 99801 907-586-9702	Salaried Employee	Education	AK Council of School Administrators	
McRAE, Jack C. PO Box 327, MS355 Seattle, WA 98111 907-670-5653	Salaried Employee	Insurance	Blue Cross of WA & AK	
MEINERS, Mary Lou 805 Goldbell Juneau, AK 99801 907-586-2568	No Compensation	Senior Citizens	AARP	
MENTZER, Beverly K. PO Box 2180 Houston, TX 77252 713-656-6145	Salaried Employee	Oil/Gas	Exxon Company USA	
MILLER, Alex 360 West Benson #200 Anchorage, AK 99503 907-562-2560	Contract Lobbyist Contract Lobbyist Contract Lobbyist Contract Lobbyist	Insurance Oil/Gas Telecommunications Wholesale Business	AK National Insurance BP Exploration (Alaska) Inc. General Communication Inc. Odom Corporation	
MILLER, Berne C. 124 West 5th Street Juneau, AK 99801 907-463-3445	Salaried Employee	Transportation	Southeast Conference	
MILLER, Charlie PO Box 102286 Anchorage, AK 99510	Contract Lobbyist Contract Lobbyist Contract Lobbyist	Insurance Health Care Wholesale Business	AK National Insurance Columbia AK Network/AK Regional Hosp. Odom Corporation	

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comes within the stated purpose of the framers of the constitutional prohibition who desired to foreclose use of the initiative to prescribe court rules. They wanted to protect "sensitive or sophisticated areas of legislation" from "emotional electoral dialogue and impulsive enactment by the general public." Citizens Coalition v. McAlpine, supra, 810 P.2d at 170.

II. Special Legislation

Opponents of the initiative also claim that sec. 14 constitutes special legislation. Sec. 14 reads as follows:

This initiative applies to all causes of action accruing on or after the effective of this Act. This initiative does not apply to any action or recovery arising out of the "Exxon Valdez" oil spill of March 1989.

Art. XI, sec. 7 restricts the initiative from being used to "enact local or special legislation." It is the singling out of a specific action or recovery for exclusion from the law to be enacted that is objectionable.⁹ Unfortunately, there have been no Alaska Supreme Court cases applying the restriction against special legislation by initiative.

Another provision in the Alaska Constitution limits the power of the legislature to enact special or local legislation. The prohibition against local or special legislation provides:

The legislature shall pass no local or special act if a general act can be made applicable. whether a general act can be made applicable shall be subject to judicial determination.

Alaska Const. art. II, sec. 19.

Section 19 has not been recently applied by the Alaska Supreme Court. In 1975, sec.19 was applied to invalidate a statute that mandated the creation of an Eagle River-Chugiak Borough. Abrams v. State, 534 P.2d 91 (Alaska 1975). In Abrams, the court recognized that a statute may affect only one of a few areas and yet relate to a matter of statewide concern or common interest.

⁸ (...continued)

Evidence Rules Commentary to Rule 411.

⁹ We are not certain whether there are yet "unaccrued" claims related to the Exxon Valdez oil spill. Our uncertainty forces us to give credence to a claim that the restriction on special litigation must be applied to this section.

Name of Lobbyist	Contract/Salaried	Subject	Name of Client/Employer	Termination Date
KUBLEY, Don 15945 Glacier Highway Juneau, AK 99801 907-789-9273	No Compensation No Compensation Contract Lobbyist No Compensation Contract Lobbyist Contract Lobbyist	Environment Business Local Government Tourism Local Government Transportation	AK Environmental Technologies AK International Marketing City of Kodiak Club Pacific Kodiak Island Borough Sampson Tug & Barge	
KYLE, Joe Pacific Associates 234 Gold Street Juneau, AK 99801 907-586-3107	Contract Lobbyist	Fisheries	APICDA Joint Ventures, Inc.	
LAUBER, Mignon Diane 321 Highland Drive Juneau, AK 99801 907-586-6366	Contract Lobbyist	Alcohol	Anheuser-Busch Company, Inc.	
LAUBER, Richard B. 321 Highland Drive Juneau, AK 99801 907-586-6366	Contract Lobbyist Salaried Employee	Alcohol Fisheries	Anheuser-Busch Company, Inc. Pacific Seafood Processors Assn.	
LA BOLLE, Pamela 217 Second Street #201 Juneau, AK 99801 907-586-2323	Salaried Employee	Business	AK State Chamber of Commerce	
LESSMEIER & WINTERS LESSMEIER, Michael WINTERS, Sheldon One Sealaska Plaza #303 Juneau, AK 99801 907-586-5912	Contract Lobbyist	Insurance	State Farm Insurance Company	
LOESCHER, Robert W. One Sealaska Plaza #400 Juneau, AK 99801 907-586-1512	Salaried Employee	Native Issues	Sealaska Corporation	

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In 1977, sec. 19 was again applied to validate a statute authorizing a trade of land between the federal government, the state, and a Native regional corporation. State v. Lewis, 559 P.2d 630 (Alaska 1977), cert. denied 432 U.S. 901 (1977). The court found that the land trade was unique, but of statewide concern. The Lewis court propounded a test to be used in determining whether a statute violates the special or local prohibition. It was substantially the same as the test used to determine the validity of non-suspect classifications challenged as violative of equal protection. The State merely had to show a rational basis, a good reason, to justify the special treatment.

In 1978, the Court articulated a unified equal protection analysis that avoids distinguishing between suspect and non-suspect classifications by using a sliding scale to weigh the interests involved in any classification. State v. Erickson, 574 P.2d 1 (Alaska 1978). The Court applies a single test that is flexible, and dependent on the importance of the rights involved. The more fundamental the right involved, the more compelling the interest the state must have for preferring one classmember over another. Commercial Fisheries Entry Commission v. Apokedak, 606 P.2d 1255 (Alaska 1980).

There has not been a case involving the local or special legislation prohibition since the unified equal protection test was adopted by the court. It remains to be seen how the court will apply an equal protection analysis to a statute claimed to violate sec. 19. The Exxon Valdez oil spill action is matter that has drawn substantial interest from the public, but that does not mean that it is a matter of statewide concern. The parties to that action are the only persons or entities who may stand to benefit from the provisions of sec. 14. This presents a close question of law, which should be resolved in favor of allowing a vote on the matter. We cannot help observing that the sponsors could easily avoid this issue by substituting a more generally worded applicability provision, and we encourage them to do so.¹⁰

Conclusion

If you decide to reject the initiative, you must give notice to all interested persons and groups who may be aggrieved by your decision. AS 15.45.240. This notice will set in motion a thirty day appeal period during which these persons must contest your action or be forever barred. McAlpine v. University, 762 P.2d 81, 86 (Alaska, 1988). We recommend that the sponsors remedy the defects discussed above by severing the offending provisions and reapplying for certification of the amended initiative.

JLB:clh

¹⁰ An clause that made certain provisions of the initiative applicable only to actions filed after a specified date would effectively accomplish the intended purpose.

Name of Lobbyist	Contract/Salaried	SUBJECT	Name of Client/Employer	Termination Date
HAYES, Joe (Continued)	Contract Lobbyist Contract Lobbyist Contract Lobbyist Contract Lobbyist Contract Lobbyist	Oil/Gas Local Boundaries Energy/Utilities Estate Planning Health Care	ARCO Alaska Inc. Chugach Alaska Corporation The Energy Group DA Davidson Trust Co. - AK Providence Health System	
HAYS, Ann Ziesmer 2702 Denali Anchorage, AK 99503 907-272-6571	Salaried Employee	Labor	IBEW Local 1547	
HEESCH, Jack R. PO Box 201608 Anchorage, AK 99520 907-586-1163	Contract Lobbyist Contract Lobbyist	Licensure of Chemical Dependency Counsellors Health Care	AK Commission for Chemical Dependency Professionals Certification AK Nurses Association	
HICKEY, Mark S. Hickey & Associates 211 Fourth Street #108 Juneau, AK 99801 907-586-2263	Contract Lobbyist Contract Lobbyist Contract Lobbyist Contract Lobbyist Contract Lobbyist Contract Lobbyist Contract Lobbyist Contract Lobbyist	Business Local Government Local Government Local Government Tobacco Tax Local Government Alaska Native Issues Oil/Gas	3M - Alaska City of Atka City of Akutan City of King Cove Coalition of Citizens to Protect Kids from Tobacco Lake & Peninsula Borough TDX Corporation Harbor Enterprises, Inc.	
HOUSE, Ann B. PO Box 23152 Juneau, AK 99802 907-586-3688	Contract Lobbyist	Construction	Wright Services	
HUGONIN, Lauree 130 Seward Street #501 Juneau, AK 99801 907-586-3650	Salaried Employee	Domestic Violence & Sexual Assault	AK Network on Domestic Violence & Sexual Assault	