

SB

123

SFIN

FILE

SENATE FINANCE COMMITTEE REPORT

DATE: 4/12/99

FURTHER:

2/22/00

DATE TURNED IN TO OFFICE: 22 Feb 00

Finance Committee considered

SENATE BILL NO. 123

"An Act relating to public interest litigants and to attorney fees; and amending Rule 82, Alaska Rules of Civil Procedure."

and recommends:

- be replaced with _____ CS. *Ernst Heming (FIN)*
- adopt previous _____ CS. *CS*
- attached amendment(s)
- adopt Letter of Intent by _____ Committee
- further referral to the _____ Committee

- Senate Bill:**
- same title
 - new title
- House Bill:**
- same title
 - technical title
 - new: SCR# _____

SIGNING DO PASS	DP	OTHER RECOMMENDATIONS	NR	DNP	AM
<i>Steve King</i>	✓	<i>Al Adams</i>	X		
<i>John King</i>	✓	<i>Langley</i>	✓		
<i>W. Peter King</i>	✓				
<i>Daniel Donkey</i>					
Co-Chair <i>[Signature]</i>	✓	Co-Chair:			
Co-Chair <i>Paul Parnell</i>	✓	Co-Chair:			

NEW FISCAL NOTE(S):

Department Date Zero Fiscal

PREVIOUS FISCAL NOTE(S):*

Department Date Zero Fiscal

<i>Cart</i>	<i>4/9/99</i>	✓	

APPROPRIATION -- no fiscal note

*include fiscal notes accompanying Governor's bill

REPORTED OUT OF
2/22/00

FISCAL NOTE

STATE OF ALASKA
 2000 LEGISLATIVE SESSION

BILL NO. SE 123

Revision Date _____ Dept. Affected Alaska Court System
 Title Public Interest Litigants BRU Alaska Court System
 Component Trial Courts
 Sponsor Senate Finance Committee
 Requester Senate Judiciary Committee Component Serial No. 769

Expenditures/Revenues (Thousands of Dollars)

OPERATING EXPENDITURES	FY2001	FY2002	FY2003	FY2004	FY2005	FY2006
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES						
-----------------------------	--	--	--	--	--	--

CHANGE IN REVENUES ()						
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FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	0.0	0.0	0.0	0.0	0.0	0.0
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY99) cost: None

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)
 No fiscal impact anticipated.

Prepared by: Doug Woolver, Administrative Attorney Phone: 264-8265
 Agency: Alaska Court System Date/Time: 1/14/00 8:49 AM
 Approved by: Stephanie J. Cole, Administrative Director Date: 1/14/2000
 Agency: Alaska Court System

1-LS0636V
Luckhaupt
1/19/00

adopted

CS FOR SENATE BILL NO. 123(FIN)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-FIRST LEGISLATURE - SECOND SESSION

BY THE SENATE FINANCE COMMITTEE

**Offered:
Referred:**

Sponsor(s): SENATE FINANCE COMMITTEE

A BILL

FOR AN ACT ENTITLED

1 "An Act relating to public interest litigants and to attorney fees; and amending
2 Rule 82, Alaska Rules of Civil Procedure."

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

4 * **Section 1.** AS 09.60.010 is amended to read:

5 **Sec. 09.60.010. Costs and attorney fees allowed prevailing party.** The
6 supreme court shall determine by rule or order the costs, if any, that may be allowed
7 a prevailing party in a civil action. Unless specifically authorized by statute or by
8 agreement between the parties, attorney fees may not be awarded to a party in a civil
9 action for personal injury, death, or property damage related to or arising out of fault,
10 as defined in AS 09.17.900, unless the civil action is contested without trial, or fully
11 contested as determined by the court. Attorney fees may only be awarded to or
12 against a public interest litigant as provided in Rule 82(g), Alaska Rules of Civil
13 Procedure, on the effective date of this Act.

14 * **Sec. 2.** Rule 82, Alaska Rules of Civil Procedure, is amended by adding a new

1 subsection to read:

2 (g) **Attorney's Fees for Public Interest Litigants.** Attorney's fees shall be
3 awarded to or against a public interest litigant in the same manner as attorney's fees
4 may be awarded to or against a non-public interest litigant under (b) of this section.

5 * **Sec. 3.** Section 1 of this Act takes effect only if sec. 2 of this Act receives the two-thirds
6 majority vote of each house required by art. IV, sec. 15, Constitution of the State of Alaska.

1-LS0636M
Luckhaupt
1/31/00

CS FOR SENATE BILL NO. 123(FIN)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-FIRST LEGISLATURE - SECOND SESSION

BY THE SENATE FINANCE COMMITTEE

Offered:
Referred:

Sponsor(s): SENATE FINANCE COMMITTEE

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7 a prevailing party in a civil action. Unless specifically authorized by statute or by
8 agreement between the parties, attorney fees may not be awarded to a party in a civil
9 action for personal injury, death, or property damage related to or arising out of fault,
10 as defined in AS 09.17.900, unless the civil action is contested without trial, or fully
11 contested as determined by the court. Attorney fees may only be awarded to or
12 against a public interest litigant as provided in Rule 82(g), Alaska Rules of Civil
13 Procedure, on the effective date of this Act.

14 * Sec. 2. Rule 82, Alaska Rules of Civil Procedure, is amended by adding a new

Amend #1

1 subsection to read:

2 (g) **Attorney's Fees for Public Interest Litigants.** Attorney's fees shall be
 3 awarded to a public interest litigant in the same manner as attorney's fees may be
 4 awarded to a non-public interest litigant under (b) of this rule except that the court
 5 shall apportion the fees by issue and may award fees only for an issue upon which the
 6 public interest litigant was the prevailing party and only for the fees incurred in
 7 presenting that issue unless the court finds exceptional circumstances to be present that
 8 require an award of fees under (b) of this rule without apportionment by issue. If the
 9 court finds an issue presented by a public interest litigant to be frivolous, the court
 10 shall award attorney's fees under (b) of this rule against the public interest litigant for
 11 that particular issue to the party prevailing on that issue.

12 * Sec. 3. Section 1 of this Act takes effect only if sec. 2 of this Act receives the two-thirds
 13 majority vote of each house required by art. IV, sec. 15, Constitution of the State of Alaska.

Amend #1 SD

Reasonable compromise

delete Sec. 2 from Version "I" (Working Draft) ^{adopted}
 insert Sec. 2 from Version "M"

L

SENATE FINANCE COMMITTEE
2000 COMMITTEE ACTION

Bill Number	<i>SB 123</i>
Amendment	<i># 1</i>
Motion	
<u>Motion by</u>	<i>D</i>
<u>Objection</u>	<i>Sen. Parnell</i>
<u>Objection by</u>	
<u>Removed</u>	
<u>Second Objection by</u>	
<u>Committee Member</u>	<u>Vote</u>
Senator Loren Lemar	
Senator Al Adams	
Senator Gary Wilken	
Senator Pate Kelly	
Senator Lyda Green	
Senator Randy Phillips	
Senator Dave Donley	
Co-Chair Sean Parnell	
Co-Chair John Torgerson	
<u>Tally</u>	
Yea	0
Nay	0
Absent	0
<u>MOTION:</u> <i>Termination amend.</i>	

*Delete Section 2 of ver. I.
 insert 2 of ver. II.*

SENATE FINANCE
COMMITTEE

1-LS0636K.3

Amendment Number: #2

Luckhaupt

Bill Number: SB 123

2/17/00

Sponsor: Donley Date: 2/2/00

Logged In By: C. Mindy

AMENDMENT "ORIGINAL"

OFFERED IN THE SENATE

BY SENATOR DONLEY

TO: CSSB 123(FIN), Draft Version "I"

1 Page 1, following line 13:

2 Insert a new bill section to read:

3 "* Sec. 2. Rule 82(b), Alaska Rules of Civil Procedure, is amended by adding a new
4 paragraph to read:

5 (5) If the court chooses to vary an award of attorney's fees under
6 (b)(3) of this rule by increasing the award beyond the amounts provided in (b)(1) or
7 (2) of this rule, then the court shall apportion the attorney's fees by issue and may
8 only award the increased fees for an issue the party prevailed upon unless the court
9 finds exceptional circumstances to be present that require an increased award of fees
10 without apportionment by issue."

11 Renumber the following bill sections accordingly.

12 Page 2, line 5:

13 Delete "sec. 2 of this Act receives"

14 Insert "secs. 2 and 3 of this Act receive"

SENATE FINANCE COMMITTEE
2000 COMMITTEE ACTION

Bill Number	SB 123
Amendment	#2
Motion	
<u>Motion by</u>	Sen. Donley
<u>Objection</u>	
<u>Objection by</u>	?
<u>Removed</u>	
<u>Second Objection by</u>	
<u>Committee Member</u>	<u>Vote</u>
Senator Gary Wilken	
Senator Pete Kelly	
Senator Lyda Green	
Senator Randy Phillips	
Senator Dave Donley	
Senator Loren Lemar	
Senator Al Adams	
Co-Chair Sean Parnell	
Co-Chair John Torgerson	
<u>Tally</u>	
Yea	0
Nay	0
Absent	0
<u>MOTION</u>	Referred

SENATE FINANCE COMMITTEE
2000 COMMITTEE ACTION

Bill Number	SB 123
Amendment	CS Version
Motion	CC adopt as Workdraft
Motion by	CCP
Objection	LA...
Objection by	
Removed	
Second Objection by	
Committee Member	Vote
Senator Pete Kelly	
Senator Lyda Green	
Senator Randy Phillips	
Senator Dave Donley	
Senator Loren Leman	
Senator Al Adams	
Senator Gary Wilken	
Co-Chair Sean Parnell	
Co-Chair John Torgerson	
Tally	
Yea	0
Nay	0
Absent	0
MOTION	VERSION I

Working Doc.

no obj.

CS FOR SENATE BILL NO. 123()

IN THE LEGISLATURE OF THE STATE OF ALASKA
TWENTY-FIRST LEGISLATURE - SECOND SESSION

BY

Offered:
Referred:

Sponsor(s): THE SENATE FINANCE COMMITTEE

A BILL

FOR AN ACT ENTITLED

1 "An Act relating to public interest litigants and to attorney fees and costs; and
2 amending Rules 79 and 82, Alaska Rules of Civil Procedure."

3 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

4 * Section 1. AS 09.60.010 is amended to read:

5 Sec. 09.60.010. Costs and attorney fees allowed prevailing party. The
6 supreme court shall determine by rule or order the costs, if any, that may be allowed
7 a prevailing party in a civil action. Unless specifically authorized by statute or by
8 agreement between the parties, attorney fees may not be awarded to a party in a civil
9 action for personal injury, death, or property damage related to or arising out of fault,
10 as defined in AS 09.17.900, unless the civil action is contested without trial, or fully
11 contested as determined by the court. Attorney fees and costs may only be awarded
12 to or against a public interest litigant on the same basis as provided in Rules 79
13 and 82, Alaska Rules of Civil Procedure, on the effective date of this Act.

14 * Sec. 2. Rule 79, Alaska Rules of Civil Procedure, is amended by adding a new

1 subsection to read:

2 (i) **Apportionment of Costs for Public Interest Litigants.** When awarding
 3 costs to a public interest litigant, the court shall apportion the costs by issues presented
 4 in the pleadings and may award costs only for an issue upon which the public interest
 5 litigant was the prevailing party and only for the costs incurred in presenting that
 6 particular issue. If the court finds that an issue presented by a public interest litigant
 7 upon which the litigant was not the prevailing party was not well grounded in fact, or
 8 was not warranted by existing law or a good faith argument for the extension,
 9 modification, or reversal of existing law, the court may award costs to the party
 10 prevailing on that issue.

11 * **Sec. 3.** Rule 82, Alaska Rules of Civil Procedure, is amended by adding a new
 12 subsection to read:

13 (g) **Apportionment of Attorney's Fees for Public Interest Litigants.** When
 14 awarding attorney's fees to a public interest litigant, the court shall apportion the fees
 15 by issues presented in the pleadings and may award fees only for an issue upon which
 16 the public interest litigant was the prevailing party and only for the fees incurred in
 17 presenting that particular issue. In a case that goes to trial, the court shall award a
 18 prevailing public interest litigant not more than 50 percent of the litigant's reasonable
 19 actual attorney's fees that were necessarily incurred on issues upon which the litigant
 20 was the prevailing party and shall, in a case resolved without trial, award the
 21 prevailing public interest litigant not more than 25 percent of the litigant's reasonable
 22 actual attorney's fees that were necessarily incurred on each issue upon which the
 23 litigant was the prevailing party. If the court finds that an issue presented by a public
 24 interest litigant upon which the litigant was not the prevailing party was not well
 25 grounded in fact, or was not warranted by existing law or a good faith argument for
 26 the extension, modification, or reversal of existing law, the court may award attorney's
 27 fees under (b) of this rule to the party prevailing on that issue.

28 * **Sec. 4.** Section 1 of this Act takes effect only if secs. 2 and 3 of this Act receive the
 29 two-thirds majority vote of each house required by art. IV, sec. 15, Constitution of the State
 30 of Alaska.



Official Business

Alaska State Senate

Senate Finance Committee

Mail Stop 3100
State Capitol
Juneau, Alaska 99801-1182

SPONSOR STATEMENT SENATE BILL 123

“An Act relating to public interest litigants and attorney fees; and amending Rule 82, Alaska Rules of Civil Procedure”

SB 123 makes public interest litigants subject to Court Civil Rule 82 regarding judgments for attorneys fees. Court Civil Rule 82 limits attorney's fees recovery by prevailing litigants to 20 percent of the litigant's reasonable actual attorney's fees incurred on a case resolved without trial and 30 percent for those cases that go to trial.

Additionally, SB 123 prevents legal fees being awarded to a litigant for claims on which they did not prevail. Such awards serve to promote spurious lawsuits, since plaintiffs know they will receive compensation for all costs even if they only win on one of several points. This problem was created by the recent Alaska Supreme Court Decision Dansereau V. Ulmer 955 P.2d 916 1998. Prior to Dansereau V. Ulmer lawyer fees for public interest litigants were only awarded for issues on which they prevailed. Dansereau V. Ulmer sets a precedent that allows courts to award the lawyer fees for all contested points even if the public interest litigants only prevailed on one point.

SB 123 seeks to prevent awards of lawyer fees of \$150 or more an hour to litigating organizations that have staff attorney's on salary for \$30 - \$40 per hour. When organizations are awarded such unnecessarily high lawyer fees they are able to utilize the embellished award to not only pay their in house lawyers but to also finance political and advocacy operations. It is wrong that the current system is being exploited in this way.

The Senate Finance Committee introduced SB 123 to make “public interest litigants” equally accountable for their lawsuits and to protect the state from having to pay excessive lawyer fees for frivolous public litigant cases.



Official Business

Alaska State Senate

Senate Finance Committee

Mail Stop 3100
State Capitol
Juneau, Alaska 99801-1182

SPONSOR STATEMENT

SENATE BILL 123

"An Act relating to public interest litigants and attorney fees; and amending Rule 82, Alaska Rules of Civil Procedure"

Through Alaska Supreme Court decisions, a doctrine known as the *Public Interest Litigant Doctrine* (PILD) has been established. This doctrine is not codified in law or set out in any court procedure. The courts apparently created the PILD as social policy to encourage private plaintiffs to advocate for issues that are deemed by the court to be "in the public interest."

Civil Rule 82 sets out a formula for the reimbursement of attorney fees to be collected by a prevailing party in a legal action. Court Civil Rule 82 limits attorney's fees recovery by prevailing litigants to 20 percent of the litigant's reasonable actual attorney's fees incurred on a case resolved without trial and 30 percent for those cases that go to trial. PILD creates an exception to Civil Rule 82 by allowing the courts to classify a party as a "public interest litigant", thus allowing said party to collect full, reasonable, actual attorney fees if they prevail. And if they lose, the public interest litigant pays none of the prevailing party's attorney fees.

SB 123 makes public interest litigants subject to Court Civil Rule 82 regarding judgments for attorneys fees, thus adopting a uniform standard for all litigants.

Additionally, SB 123 prevents legal fees being awarded to a litigant for claims on which they did not prevail. Such awards serve to promote spurious lawsuits, since plaintiffs know they will receive compensation for all costs even if they only win on one of several points. This problem was created by the recent Alaska Supreme Court Decision Dansereau V. Ulmer 955 P.2d 916 1998. Prior to Dansereau V. Ulmer lawyer fees for public interest litigants were only awarded for issues on which they prevailed. Dansereau V. Ulmer sets a precedent that allows courts to award the lawyer fees for all contested points even if the public interest litigants only prevailed on one point.

SB 123 seeks to prevent awards of lawyer fees of \$150 or more an hour to litigating organizations that have staff attorney's on salary for \$30 - \$40 per hour. When organizations are awarded such unnecessarily high lawyer fees they are able to utilize the embellished award to not only pay their in house lawyers but to also finance political and advocacy operations. It is wrong that the current system is being exploited in this way.

The Senate Finance Committee introduced SB 123 to make "public interest litigants" equally accountable for their lawsuits and to protect the state from having to pay excessive lawyer fees for frivolous public litigant cases.

SB 123 Differences

Public Interest Litigant Doctrine (as opposed to Rule 82)

- Prevailing PIL recovers full, reasonable, actual attys fees and costs.
- Losing PIL is not liable for any of the prevailing party's attys fees and costs.
- Four requirements for a PIL
 - 1) Lawsuit implements strong public policies.
 - 2) Numerous people would benefit from the lawsuit's success
 - 3) Only a private party could be expected to bring a lawsuit.
 - 4) Plaintiff must not have a significant economic interest in the outcome.

Version (I)

Amends Rule 82 (attys fees). Attorney's fees are awarded to and against a PIL in the same manner as civil litigants under Rule 82, Alaska Rules of Civil Procedure.

- Prevailing PIL: For non-monetary judgements, receives 30% attys fees for a case that goes to trial and 20% attys fees for a case that doesn't go to trial.
- Losing PIL: Required to pay 30%/20% attys fees to prevailing parties.
- Exceptions to varying attys fees apply under Rule 82(b)(3)
- Apportionment: No requirement to apportion attys fees by issue
- Costs: Doesn't address the issue of awarding costs to or against a PIL under Rule 79.

Version K

Amends Rule 79 (costs) and Rule 82 (attys fees)

- Prevailing PIL: Receives 50% attys fees with trial, and 25% attys fees without trial.

- Losing PIL: Court may award attys fees against a losing PIL only if issue presented was frivolous. Otherwise, losing PIL is not responsible for attys fees.
- Exceptions to varying attys fees under Rule 82(b)(3) do not apply.
- Apportionment: attys fees must be apportioned by issue.
- Costs: Prevailing PIL would be awarded costs apportioned by issue. Losing PIL would pay costs for frivolous issues only.

Compromise Version M (not yet distributed)

Amends Rule 82 (attys fees)

- Prevailing PIL: receives attys fees in the same manner as civil litigants under Rule 82 except a) fees shall be apportioned by issue
- Losing PIL: Court may award attys fees against a PIL only if issue presented was frivolous.
- Exceptions apply under Rule 82(b)(3), allowing the court to vary attys fees and not apportion under exceptional circumstances.
- Apportionment: Courts must apportion by issue unless exceptional circumstances can be found.
- Costs: Doesn't address the issue of awarding costs to or against a PIL under Rule 79.

ALASKA STATE CHAMBER OF COMMERCE

Position 99 - 25

Public Interest Litigants

WHEREAS, Alaska court doctrine recognizes a party status known as "public interest litigant";

WHEREAS, the four-part test to qualify as a "public interest litigant" established by the Alaska Supreme Court in *Anchorage Daily News v. Anchorage School District*, 803 P.2d 402, 404 (Alaska 1990), requires that:

- (1) the case pursued by the party must be designed to effectuate strong public policies;
- (2) if the party prevails, numerous people will receive benefits from the litigation;
- (3) the challenge must be one that only a private party could have been expected to initiate;
and
- (4) the purported public interest litigant would not have sufficient economic incentive to file suit;

WHEREAS, some groups routinely challenge state resource development decisions and are granted "public interest litigant" status by the courts;

WHEREAS, these groups are often special interest groups posing as public trusts as well as public interests litigants;

WHEREAS, these challenges typically allege as many as 15 to 20 specific deficiencies in the state's administrative finding;

WHEREAS, when groups challenging resource development decisions prevail, they generally prevail on only one or two issues;

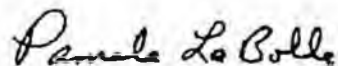
WHEREAS, even though the groups only prevail on one or two issues, they are typically awarded full costs and attorneys fees;

NOW, THEREFORE BE IT RESOLVED, that the Alaska State Chamber supports legislation to amend state law to direct the Alaska courts to apportion the same percentage of costs and fees paid to a public interest litigant as the percentage of issues raised on which the litigant prevailed.

ADOPTED

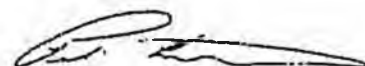
March 2, 1999

BY



Pamela La Bolle
President

BY



Peter Leathard
Chairman



ALASKA MINERS ASSOCIATION, INC.

3305 Arctic #202, Anchorage, Alaska 99503 FAX: (907) 563-9225 Telephone: (907) 563-9229

April 7, 1999

Honorable Dave Donley
Alaska State Senate
Capitol Building
Juneau, AK 99801

RE: SB-123, Regarding Public Interest Litigants and Rule 82

Dear Senator Donley,

The Alaska Miners Association wishes to go on record in strong support of Senate Bill 123 which deals with public interest litigants and attorney fees and amends Rule 82 of the Alaska Rules of Civil Procedure.

For many years so-called public interest groups have blocked and harassed businesses and legitimate development projects under the guise of protecting the public interest. The current procedures for awarding attorney fees actually encourage such actions and suits, regardless of the merit of the case. The public interest litigant has everything to gain and nothing to lose by taking the action. Under the current procedures for awarding fees, these litigants will often be paid their fees even if they prevail on only a very marginal part of their case. Furthermore, if these groups lose the case, they do not currently face the possibility of being required to pay their opponents fees.

It is long past time for Rule 82 to be changed and we urge that SB-123 be passed and become law at the earliest possible time.

Sincerely,

Steven C. Borell, P.E.
Executive Director



Alaska State Legislature

Please enter into the record my testimony to the Senate Finance Comm.
 committee name
 committee on S.B. 123, dated 4/21/99.
 bill/subject

As one who has litigated civil rights public interest litigation as well as property owners class actions designated as public interest, I oppose this bill. According to a public interest litigant goes against 30 years of A.K. Sup. Ct. decisions. According 20-30 has the potential to kill such litigation. Keep in mind that James Watt headed a conservative public interest litigation group. Let the cap on such fees if that is a concern.

Signed: Hugh Fleischer

Testifier

SLF

Representing (Optional)

140 W. 11th Ave. 99501

Address

274-2453

Phone No.

(OVER)

On the morning after the Littleton, when everyone is reeling from this tragedy - we should re-double efforts to prevent such a carnage coming here. In that regard, DFEYS is on the front line - plz. fund the Division so that "problem children" can be dealt with by understanding professionals.



Alaska State Legislature

Please enter into the record my testimony to the Senate Finance
committee name
committee on SB 123 / Public Interest Litigants dated 4/21/99
bill/subject

1. This bill is a reaction to a high public interest attorney fee award of \$295/hr. The best resolution would be to simply cap fees at "reasonable attorneys fees of no more than \$165/hr.
2. Most public interest litigants in my experience make \$30,000 per year or less. ~~SB 123 allows~~ They are fishermen, hunters, teachers, etc. SB 123 imposes ^{substantial} fees against them if they file good faith claims, but lose. This provision allowing fees against public interest litigants should be dropped, except where the claim has "no good faith basis".
3. Good public interest litigation, of all political colors, occurs. It is a strength of our state. Let it continue, with a reasonable fee cap of \$165/hr. This is a compromise all sides of this issue can live with. Call with any questions.

Signed: Yu Lan (Les Gara)
Testifier

Representing (Optional)
1202 1242 W. 10TH Ave, Anchorage
Address
274 - 0730
Phone No.



Alaska State Legislature

Please enter into the record my testimony to the Senate Finance
 committee name
 committee on SB 123 / Public Interest Litigants dated 4/21/99
 bill/subject

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3. Good public interest litigation, of all political colors, occurs. It is a strength of our state. Let it continue, with a reasonable fee cap of \$165/hr. This is a compromise all sides of this issue can live with. Call with any questions.

Signed: Yu Lian (Les Gara)
 Testifier

Representing (Optional)
~~1202~~ 1242 W. 10th Ave, Anchorage
 Address
274-0730
 Phone No.



Alaska State Legislature

Please enter into the record my testimony to the Senate Finance
 committee name
 committee on SB 123 / Public Interest Litigants dated 4/21/99
 bill/subject

1. This bill is a reaction to a high public interest attorney fee award of \$295/hr. The best resolution would be to simply cap fees at "reasonable attorneys fees of no more than \$165/hr.

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3. Good public interest litigation, of all political colors, occurs. It is a strength of our state. Let it continue, with a reasonable fee cap of \$165/hr. This is a compromise all sides of this issue can live with. Call with any questions.

Signed: Les Gara (Les Gara)
 Testifier

Representing (Optional)
~~1202~~ 1242 W. 10th Ave, Anchorage
 Address
274-0730
 Phone No.

KETCHIKAN GATEWAY BOROUGH

Office of the Borough Attorney • 344 Front Street • Ketchikan, Alaska 99901

Scott A. Brandt-Erichsen
Borough Attorney

(907) 228-6635
Fax: (907) 247-6625

April 6, 1999

Senator John Torgerson
Senate Finance Committee
State Capitol Room 514
Juneau, Alaska 99801-1182

Re: Senate Bill 123

Dear Senator Torgerson:

At its meeting of Monday, April 5th, 1999, the Ketchikan Gateway Borough Assembly requested that I send a letter indicating that the Ketchikan Gateway Borough Assembly supports Senate Bill 123.

The public interest litigant doctrine protects unsuccessful public interest litigants from attorney fee awards against them, and provides for recovery of costs by successful public interest litigants. The purpose of a public interest litigant concept is to avoid discouraging litigation that is truly in the public interest through the threat of awards against the plaintiff and the expense of representation.

In the Assembly's discussion of Senate Bill 123, concerns were expressed about abuse of the "public interest litigant" status by some entities to recover more than their actual expenses. For example, if a non-profit entity which commonly engages in "public interest" type litigation has staff counsel, they may actually pay their counsel \$30.00 per hour, but bill their counsel's time for attorney's fees purposes at \$150 per hour. If they recover reasonable actual attorney's fees as a prevailing public interest litigant, the windfall is the difference between the billed rate and the compensation paid. This windfall may then be used to fund other additional litigation or other projects of the entity. Apart from the potential windfall effect, the current application of the public interest litigant principle, as a practical matter, acts to encourage litigation against the government.

A normal litigant with a vested financial interest can only recover partial fees even if successful, and must pay the opposing party's Rule 82 fees if unsuccessful. The potential full recovery of costs without a risk of responsibility for the costs the litigation imposed on the opposite side (normally a governmental entity) creates an imbalance. It has a tendency to encourage "recreational litigation" by those with the time and inclination. For just the filing fee and often minor expenses, a "sport litigant" can delay governmental action and cause the expenditure of significant public resources in defending against the litigation without a risk of bearing those costs in the event that the plaintiff is unsuccessful. At the same time, the public interest plaintiff may be paid handsomely for their time if they are successful even in part.

The changes proposed by Senate Bill 123 would retain the protection of the public interest litigant from awards of attorney's fees and costs against them, so long as the claim has a reasonable basis. It would not allow protection for spurious claims. It would also level the playing field somewhat on successful claims by taking away the windfall aspect of successful public interest litigation. Additionally, by relating costs to specific claims, a public interest litigant could not simply put forth dozens of causes of action in the hopes of being paid for all time spent on the matter if it prevails on only one of its claims.

For these reasons, the Ketchikan Gateway Borough Assembly supports Senate Bill 123.

Separately, as an attorney who has worked on public interest litigation cases, I personally endorse Senate Bill 123. On one occasion, while representing the Municipality of Anchorage, I found myself in a situation where my client was being sued by individuals on both sides of an issue, both of which were found to be public interest litigants. In this situation, it was obvious that the Municipality of Anchorage would win one and would lose one. Due to the public interest litigant nature of the claims, the municipality could not recover from the unsuccessful litigant and would be required to pay the costs of the successful litigant. As the case progressed, there was little that could be done except to watch the bills mount.

Provisions such as those in Senate Bill 123 would significantly improve this situation. No longer would attorney's fees for the public interest litigant be a potential blank check,

and therefore there would be less of an incentive for "sport litigation."

If I can be of further assistance in connection with this legislation, please contact me at your convenience.

Sincerely,

KETCHIKAN GATEWAY BOROUGH



Scott A. Brandt-Erichsen
Borough Attorney

ss/1/SB.123

cc: Honorable Mayor and Assembly
Borough Manager
Borough Clerk
Representative Bill Williams

2/16/00

Senator John Torgerson
Senate Finance Committee
State of Alaska Legislature

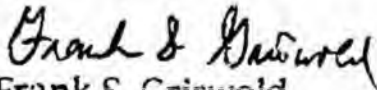
Re: Senate Bill No. 123

Dear Senator Torgerson,

The Supreme Court has ruled that public interest litigation is to be encouraged, why is the Senate now considering measures to deter it? The Court has imposed a stringent four pronged criteria for qualifying as a public interest litigant. Those with a financial incentive to bring suit, even in matters of general public concern, do not generally qualify as public interest litigants. Altruistic efforts to further the public good should not be thwarted; successful public interest litigants deserve to be awarded 100% of attorney fees actually and necessarily incurred. Reducing the award of attorney fees would discourage attorneys from taking a public interest case on a contingency basis. A public interest litigant could be forced to either prosecute the case himself or be saddled with attorney fees even in a winning cause. Either way this would constitute a strong disincentive to filing suit and matters of great public importance could go under-represented or unrepresented altogether. For the same reasons, no unsuccessful public interest litigant should be held liable for the prevailing party's attorney fees if the suit was brought in good faith. There are already suitable provisions in the Alaska Rules of Civil Procedure to discourage the filing of any frivolous litigation.

Senate Bill 123 is not in the public interest and should be voted down. Thank you for considering my concerns.

Sincerely,


Frank S. Griswold
(Lay Pro Se Public Interest Litigant)
519 Klondike Avenue
Homer, Alaska 99603
235-7627

Comments made by Bob Dickson during February 17, 2000
Senate Finance Committee hearing of SB 123

This is Bob Dickson calling. I am in Anchorage. I'm a lawyer. I'm a shareholder in the law firm of Atkinson, Conway and Gagnon. I've been in private, civil practice for about 27 years, a little more. My practice is commercial, civil litigation. A lot of it construction, some of it in health law. And, I would like to talk in favor of what I understand now is to be version "I" because it fundamentally treats all public interest litigants (PIL) the same as all other civil litigants. I'll explain why as I walk through some of the comments.

Mr. Dickson: First, I would like to correct, with all due respect to Darwin, the question was in "all other civil litigants, does the court, is the court able to apportion the issues," and the answer was: "it's up to the court's discretion." Actually what the Alaska Supreme Court has held, and this is a ruling of long-standing and it continues to hold to it, is that the lower court has the discretion to determine who is the prevailing party. The lower court is suppose to look at all of the issues, determine which of the core issues, the ones that were really litigated and determine who prevailed on those. The, the case that has really prompted this, in which the court allowed the lower court to look at some issues and award attorney's fees, even though there was a loss on a lot of other issues, it's not so much saying that the lower court has the discretion to divide up issues, but it has the discretion to determine who is the overall prevailing party when all of the issues that are litigated are looked at. So that's, really what the state of law is right now.

Mr. Dickson: And, I would suggest that it is very difficult. Some of these versions have the language that allows the award of attorney's fees or the decision to not award attorney's fees on an issue by issue basis. As a practicing lawyer, I can tell you that will be very difficult to carry out. Not only among the lawyers who will be submitting motions, but more importantly perhaps, the judges trying to figure how much attorney's fees are attributable to what issues. That will be a very, very difficult thing to carry out. Another point is the question on, I think it was mentioned in version "K," which will allow attorney's fees to be awarded only against a PIL, only when there are frivolous lawsuits. The law has

been long standing since back in the 1970's, the law on attorney's fees, Rule 82 and it's not in Rule 82, but it has been a long standing principle of the court. And that is, even though Rule 82 has always been designed to award partial attorney's fees, the court has always said, if a lawsuit is frivolous, or, one of the parties has engaged in vexatious conduct, if it's frivolous, the lower court has always had the ability to award full attorney's fees against the losing party if it was a frivolous lawsuit. And after 27 years, I can tell you there have been quite a few that I have considered frivolous, have prevailed on and the courts have disagreed. I can tell from my experience, and there's not a shadow of doubt that, the courts will not throw out cases because they are frivolous. As a practical matter, when you get a lawyer and a party who genuinely believe in their case, even if they lose, getting a court to say that it was frivolous, is essentially impractical. It's just simply not going to happen. So, as a practical matter, I don't see that as having any real affect.

Mr. Dickson: To the Senator, and I didn't catch the name and I apologize, but the Senator who had the question about "why do we need this litigation," because tort reform addressed all of this and fixed it last year. Senator, the kinds of litigation that the PIL, this statute addresses the litigation involving Public Interest Litigants, has nothing to do with torts. The torts are when someone does something or allegedly does something wrong, is negligent and tort reform addressed those kinds of cases. If there is a tort claim, there automatically is enough money involved to provide the economic incentive to bring the lawsuit or defend the lawsuit. So, if they're mutually exclusive, between a tort case and the kinds of cases that PLI people are involved in, those are cases where timbering is opposed, or mining, or someone is attacking a zoning ordinance or someone is attacking an election result or a bond issue. Those are the kinds of issues this legislation is looking at and are completely separate from the tort reform types.

Mr. Dickson: I think that one thing I have not heard in any of the debate, that one of the points I'd like to make is that and I don't think it's really come home is that, the public interest litigation, which is an exception as I heard, is an exception to Rule 82. It's not codified anywhere and it's not set out in statute or even in Rule 82. Basically what's going on is that the Alaska Supreme

Court is making, what are in essence, political decisions of a nature that really ought to be made by the legislature. If you look at the over 100 cases since 1968, when this doctrine was started, what you find is that those parties who have been accorded public interest litigant status, are those who are living a subsistence lifestyle. Newspapers, even the Anchorage Daily News was accorded that, even though it is a commercial operation, environmental protection and conservation groups have always been accorded that status. Native cultural interests have, home owners who are opposing an apartment house going up a few doors away. Sometimes commercial fishermen when they are in essence preserving, wanting to preserve the resources, but not if they're attacking regulations on set netting. Oil companies, miners, logging companies, trucking companies, labor unions, and others have always been consistently refused that status because the Supreme Court says that those parties have sufficient economic interest in the result of the litigation too. They don't need to be accorded a PIL status and the Supreme Court, as I think I've heard, the whole idea behind this, the court has explained the purpose for this exception as being, to encourage plaintiffs to bring issues of public interest to the courts. That's what it said in the McCave case, which started the whole idea of awarding full attorney's fees to a party that prevails. It also said in another case that "litigation on behalf of the public interest should be encouraged. Few aggrieved parties would be in the position to advance the public interest by invoking the injunctive powers of the courts." And there are several other examples, basically the Supreme Court wants to encourage those types of public issues that have gone through the executive branch and have been found in accordance with the laws passed by the legislature. The Supreme Court wants those issues to be brought to the courts, so that the Supreme Court can have its view of whatever the issue is. And it's basically a matter of separation of powers as to who should be making the political decision as to which groups are going to be preferred over others. And that's not a point or an argument that I've heard voiced, but it, when you take a look at those 100 cases, you see a very definite pattern of those groups and interests that are considered "politically correct," or politically influential such as newspapers and others. They receive this interest, whereas, those interests that are aligned with more development and things of that nature, are typically on the other end of the

decision. That I submit is basically, being a political decision ought to be made by the legislature and that's why I suggest that the best way to do this is version "I," which basically and simply says that all PIL litigants are treated like all other civil litigants. Alaska is the only state in the union that permits the recovery of even a portion of attorney's fees as a matter of course in all civil cases. We're the only state that does it. And I can tell you as a practicing lawyer that Rule 82 in its normal application does have the affect of keeping really frivolous suits out and awarding those people who have prevailed, giving them an incentive because they will be able to recover a portion of their attorney's fees. Rule 82 already does the job of screening out, to the extent that it can effectively be done, the so-called frivolous cases. And it seems to me that since all other civil litigants in the state have to abide by Rule 82, in its normal application that all other parties ought to be treated equally and without trying to give a boost or a detriment to one political group or another. Those are my remarks.

Senator Adam: I just have three questions Mr. Dickson, thank you for your response. The first question is, is, I'll just read them, is what is the purpose of applying Civil Rule 82 to public interest litigants. My second is, is, again, on frivolous lawsuits, I thought that we have Alaska Rules of Civil Procedure to help stop that and I thought that when the Supreme Court looked at this, that they, they made this criteria so tight that you would keep out frivolous lawsuits. And my last question is, is no matter what version we look at on this, the passage of this amendment, doesn't it stifle the right of individuals or Alaska organizations to question the, the actions of the state and it, it upsets our check and balance system that we presently have.

Mr. Dickson: Let me start with the second question because I didn't hear the first one, but the second one dealing with frivolous. Rule 11 is a part of the Rules of Civil Procedure. It says, it talks to the lawyer. It says that any lawyer who signs a pleading has to basically, it does by signing it, certify that they have made some inquiry, reasonable inquiry into the facts. And the arguments that are being made are reasonably based upon the facts and are in accordance with the law unless there is a good reason to be trying to change the law and you're up front about

trying to change the law. That is Rule 11, that, I have never seen a lawsuit thrown out, in fact, I've never, actually well, there was one exception, I've never seen that rule used as a real sanction. In federal court where there's a similar rule, I've seen it used once. But, the Alaska Supreme Court in interpreting Rule 82, has put in this other provision that full attorney's fees can be awarded against a losing party if the case was frivolous. But, as my point being, that's what the Supreme Court says, that's what the law is. It simply has not stopped what some people consider frivolous law suits. The Supreme Court doesn't consider them frivolous.

Mr. Dickson: The second question, or the third question was, does any version stifle the ability of people to question the action of the state. What it would do, is it deprives an incentive for people to give them a financial incentive to do it. It puts everybody on an equal plane with all other people who have wrongs or interests that they want to protect. It doesn't put them at a disadvantage, it simply removes a very strong financial incentive. They can't lose. If they qualify, even if they lose, they don't owe any attorney's fees and if they win their attorney recovers full attorney's fees. It does remove an incentive that, in the minds of many, has been abused. And, I'm sorry, I didn't hear the first question.

Senator Adams: My first question is, why are we applying Civil Rule 82 to public interest litigants. Why is that necessary.

Mr. Dickson: Because that, that's a good question. The court, the Supreme Court awards fees and costs by virtue of a statute that the legislature has enacted, that's 09.60.10, that statute the legislature says the Supreme Court is authorized to determine costs and allow costs, which include attorney's fees to the prevailing party in a civil action. Therefore, all PIL litigation is considered civil litigation. Rule 82 automatically covers PIL litigation. What this legislation is designed to do is remove an exception to Rule 82 that the Supreme Court in its opinions has carved out. So Rule 82 automatically applies.

Other public testimony was taken in the interim of the following excerpt. The following testimony was in regards

to specific considerations about the award of attorney's fees.

Co-Chair Parnell: Mr. Dickson, one thing came up, your discussion about when the court awards [inaudible] attorney's fees, you discussed how the court determines who the prevailing party is and then they go into that 30 percent calculation and with the possibility of enhanced attorney's fees. We thought, or I thought you said that they do not currently apportion fees by issue or that, and I'm not clear on that. Could you clarify that for us.

Mr. Dickson: Yes that is correct. The Supreme Court has discouraged awarding attorney's fees by issue. It, the language in that most recent case was, as far as they come. But typically they have, the lower courts have been instructed on numerous occasions to look at all of the issues, decide which were the ones that were primarily litigated, which ones are the core or central points of the litigation. And the person who prevailed on that, the party who prevailed on that issue or those core issues, is determined to be the prevailing party and then recovers 30 percent if it goes to trial, of all attorney's fees. Even if some of those attorney's fees were spent on unsuccessful motions for summary judgment or discovery issues that turned up to be not well taken, that type of thing. So, the goal has been to decide, after the dust has settled, at the end of the litigation, who "prevailed." Now it is up to the trial court, it is within the trial court's discretion to determine who has prevailed. And there has been a number of occasions where the lower court has decided, neither party prevailed and then did not award any attorney's fees in either direction, but it is something, who prevails is up to the, is within the discretion of the trial court.

Co-Chair Parnell: Mr. Dickson, we currently have some discussion around our table because it appears from some of our state judgments, that attorney's fees have been awarded based upon, prevailing on a particular issue and have been segregated. Do you have any experience or knowledge of those as opposed to the prevailing party determination.

Mr. Dickson: No, in fact, my experience and my understanding of the Supreme Court is that what the trial court is suppose to do, is determine who prevailed overall and not on a case by an issue by issue basis. And the

problem with that is that the Supreme Court has recognized, is how do you determine how much attorney's fees were spent on which issue. Typically all issues move forward at the same time some are subject to a summary judgment issue, some are not and it's very difficult to separate out fees that are attributable to a definitive claim or point.

Senator Donley: We might have a way out of this box Mr. Chairman, the real public policy problem I think we all want to address on the apportionment issue is, currently we've got some professional litigators out there, from special interest groups that have staff attorneys that they probably pay \$30 or \$40 an hour, who go out and file lawsuits and then get judgments, even if, and [inaudible] lawsuits and they plead maybe 20 items and they may prevail on one item, but then they get an award of attorney's fees based on 20 items and [inaudible] lot of money, plus the court awards the fees based on \$150 an hour, rather than what they're actually getting paid for their salaries. They take that money back and file more lawsuits. So, it actually encourages litigation and actually encourages almost frivolous litigation to argue and plead as many issues as you can even though you know you're not going to win on them, as long as you win on one, you get paid for all of them. And, I think that's a real serious problem that I'm hoping this legislation will address. And maybe the way to do that, is to compromise here and say that, the apportionment only occurs if the court awards more than the standard Rule 82. The court's making the decision, okay we're going to give more money to this public interest litigant than the standard Rule 82. Then we compel them to apportion and only award for the actual things they prevailed on.

Co-Chair Torgerson: Would that be above the 30 percent you mean?

Senator Donley: Yeah, if they go above the 30 percent, then they are required to apportion.

Co-Chair Torgerson: So it wouldn't be true Rule 82, because Rule 82 lets them exceed the 30 percent. Mr. Dickson do you have a comment on that?

Mr. Dickson: That's an interesting comment, or an interesting concept. I suppose in the last analysis that would be a reasonable compromise. It is true that Rule 82

permits a trial court to go beyond the 30 percent or 20 percent. There are about six different factors. And I should point out that one of those factors is, is the extent to which a given fee award maybe so erroneous to the non-prevailing party, that it would deter similarly situated litigants from the voluntary use of the courts. The whole issue of keeping poor people out of the courts has been an issue that has rightfully so, troubled the Supreme Court with Rule 82. And so this most recent amendment to Rule 82 has put that provision in as a way around the typical application, so if the committee were to say Rule 82 applies to everybody, including PIL, that part would go with that and would still give the lower court the opportunity to prevent the losing public interest litigant from being hit with a lot of attorney's fees if, in the discretion of the trial court, it thought it was warranted. But, getting back to the other question. If they're going to award more, the other side of the coin, if they're going to award more, requiring them to go to a issue by issue basis, it's certainly better than the current situation that's clear. I've raised the point of difficulty of apportioning it, but putting that difficulty aside requiring that if they're going to go above the 25 or 20, or 30 percent would be better than the current situation.

Senator Parnell: On the idea, I guess it comes back to the fundamental issue of why, why would we treat public interest litigants different than civil litigants in that regards. For instance, a civil litigant to file and may file eight cases of action in a complaint, they have eight different claims in a complaint, one or two of which are very strong, the other six of which they have a ten percent chance of winning, or a five percent chance of winning on. And yet what we're saying is that's occurring currently, in the civil litigant context, but we're saying in the public interest litigant context that we're going to punish you for doing that too. When they have a colorable argument, they've not been sanctioned for raising those claims even if they have a five-percent chance of winning. So the fundamental issue is, why would we treat them different than the civil litigant in that context. I don't know why we would do that.

Senator Donley: And maybe we don't treat them differently, maybe we make it apply to everybody under Rule 82, that if they go beyond that then they should apportion based on which issues they did prevail on, but there is a good

public policy argument for also making it, for public interest litigants and that's that, the court uses the public interest litigant label to abuse the process and to award excessive fees. We've seen that, they've proven their propensity for abusing the process by over awarding fees to people they classify as public interest litigants even when they're not truly prevailing parties. So, we're addressing a specific abuse the court's been doing and they use that label to, as an excuse for that abuse they're doing. But, I think it would be appropriate, it might be fine to apply it to everybody.

Senator Phillips: Can I ask Mr. Dickson for a recommendation?

Co-Chair Torgerson: Mr. Dickson, Senator Phillips asked if you had any recommendations on the debate that we just had and whether or not...

Mr. Dickson: My feeling would be to, if something is not broken, don't fix it. So, I'm a little hesitant to suggest making this new wrinkle about going beyond the 20 or 30 percent applied to all civil litigants. I haven't really thought that out. I can tell you that, for a long period of time there was a lot of litigation just over Rule 82, you would have basically two chapters of the lawsuit. First, on the merits and then second on the attorney's fees issue. The Supreme Court basically said it's most up to the discretion of the trial court trying to reduce that. So, I'm a little, I'm concerned that, to the extent we tweak it more, we run the risk of more litigation over just what that means in the "run of the mill" civil litigation, the commercial stuff, the tort stuff, the other type things. So I'm a little hesitant to, my, I would recommend not going that way because I'm concerned about how it would affect all the rest of the "bread and butter" type cases that go before the courts and the citizens and the companies that have to use the courts. I think effectively is to simply try to treat the PIL litigants the same as all others. I think that as a practical matter in looking at the way it would practically work itself out in the day to day business of the courts is that the only effective change would be to basically treat everybody the same.

Co-Chair Parnell: We have before us an amendment. Senator Donley moved an amendment that would add language from version "M," page two, which was subsection (g) that would

require the court to apportion the fees by issue. And, it says if the "court finds an issue presented by public interest litigants to be frivolous, then the court shall award attorney's fees under (b) of this rule." So essentially, this provision as it sits right now is more punitive to public interest litigants than the civil litigants because its requiring the court to apportion the fees by issue which we're not requiring of non-public interest litigants. Maybe the thing to do would be to vote on this particular amendment and if Senator Donley has another amendment to do with the issues he's raised, then we could take those up. Instead of working to craft this one, just a suggestion.

Senator Adams: The compromise language that I thought Senator Donley had, expounded on, I thought it was very good. That you'd paid for only the causes, the good causes that you would win. You would not be paid for the ones that were frivolous causes. I was hoping that was the direction we were coming to on this particular point.

Co-Chair Parnell: On that, that's a good point except you, it's confusing and complex to try to apportion by issue. And that's why they only get 30 percent of their attorney's fees. I presume that's one of the reasons they get 30 percent of the attorney's fees is because you bring eight causes of action, all of which have some merit, but two of which you've got a ninety percent shot of winning on, six of which you've got a five percent of winning on. If you actually determined to be the prevailing party, you're only entitled to 30 percent of your attorney's fees, if you go through trial. And, with a possibility of enhanced attorney's fees. So, I guess what I'm saying is that, the 30 percent is recognition that, that some of the claims are going to fall by the wayside. But it's also causing people to think about filing a lawsuit and take a second look at, because it could cost them that, it could cost them money to the other party if they don't prevail. So, it really is a hard thing to start saying that we're going to apportion fees by issue. It just adds more work to the courts and adds more litigation for the Supreme Court to resolve.

Senator Donley: Mr. Chairman, I was, I thought it was important to have the work that you'd done with other members of the legislature before the Committee and that's what this amendment is. I don't how, this is a really important discussion and I think we're all learning a lot.

I don't know how you feel about it, but I kind of like the idea of, if, because, I want to go ahead and finish out on this amendment if you would like it, because you helped develop this language. But if not, I could withdraw that amendment and propose something else. It would take me some time to get it drafted up. But I would think, I would like to go, the direction I would suggest possibly we consider, is that, if the court awards in excess, and make it apply to all litigants, not just the public interest litigants. But, if the court awards an excess of the Rule 82 standard amount, then it would, it shall apportion, based on issue, unless it finds exceptional circumstances, language that you've come up with already here that require an awarded fees without apportionment. And also make something that requires the court to state in their decision why they found those exceptional circumstances. [Inaudible] articulated why. And that gives the court a way out, so if they find its too hard to apportion, they don't have to, but it gives them direction that they should apportion if they're going to award more than the standard Rule 82.

Senator Green: Just review for me, I think I may have missed a discussion earlier. On the 30 percent attorney's fees, are these actual cost, as you had referred earlier to the normally work for \$30 an hour, that much. Or is this the inflated thing that we've seen in Finance when we've, the \$195 or the \$295, or whatever fee, that we're doing 30 percent of, because that makes a big difference. Because otherwise, we're paying three hundred percent plus, or a thousand percent of their fees and you can put anything you want to unless you're requiring a billable, their normal attorney's fees. I mean, like, if you did attorney's fees, you would have a method by which it says "x number of hours at this," and that's what, I would assume you would present to the court. Are you telling me that they could in a civil case, could they say, "oh we're not going to compute it at your normal \$200 an hour fee, but we're going to take it to \$350 an hour fee." Well how can they do that in public interest litigation then, why is that...

Senator Donley: It goes the other way.

Mr. Dickson: Can I respond to that? The answer to that is, in all other civil litigation, it is the actual fees incurred, the actual checks written by the client. And then the first thing the court does, is whether that's

reasonable and if it's been too much the court chops that down to reasonable, actual fees and awards 30 percent of that figure. The exception, part of the public interest litigation exception is that, and I think it was a Trustees of Alaska case, where it was demonstrated by the other party, that they were only basically charged \$40 to \$50 an hour. But their point was, well similar lawyers charge \$150 to \$200 an hour and we should get the value of that and the Supreme Court accepted that, so it's only in PIL litigation where this, they've actually allowed greater than actual attorney's fees.

Senator Green: Is there some way that we could address that issue? To me, that may be the bigger problem whether how you compute it.

Mr. Dickson: Certainly that's possible. That's possible.

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SB 123

PUBLIC INTEREST LITIGANT: FEES

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Address: 130 Seward, rm 209 Juneau Zip: 99801

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