

SB

97

23-GS1064\X  
Luckhaupt  
5/4/04

**CS FOR SENATE BILL NO. 97( )**

**IN THE LEGISLATURE OF THE STATE OF ALASKA  
TWENTY-THIRD LEGISLATURE - SECOND SESSION**

**BY**

**Offered:  
Referred:**

**Sponsor(s): SENATE RULES COMMITTEE BY REQUEST OF THE GOVERNOR**

**A BILL**

**FOR AN ACT ENTITLED**

1 "An Act relating to public interest litigants and to attorney fees and costs and the  
2 posting of bonds or other security; amending Rules 65, 79, 80, and 82, Alaska Rules of  
3 Civil Procedure, and Rules 205, 508, and 602, Alaska Rules of Appellate Procedure; and  
4 providing for an effective date."

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

6 \* Section 1. The uncodified law of the State of Alaska is amended by adding a new section  
7 to read:

8 **FINDINGS, PURPOSE, AND INTENT.** (a) The legislature finds that

9 (1) the portion of the judicially created policy relating to the award of  
10 enhanced attorney fees and enhanced costs to public interest litigants who prevail in part or in  
11 full in a civil action or appeal that they initiate created an unbalanced set of incentives for  
12 parties litigating issues that fall under the public interest litigant exception;

13 (2) this imbalance imposed significant costs on the state and municipalities  
14 and, to a lesser degree, imposed unbalanced burdens on private citizens and businesses;

1 (3) the legislature responded to these and other problems with the public  
2 interest litigant policy through the enactment of ch. 86, SLA 2003;

3 (4) the superior court has declared that certain reforms embodied in ch. 86,  
4 SLA 2003, are beyond the legislature's authority or require a two-thirds vote of the  
5 legislature; and

6 (5) while the legislature does not endorse the declaration of the superior court,  
7 it seeks to avoid a clash with another branch of government by providing for more limited  
8 reforms that are clearly within its authority.

9 (') The purpose of sec. 2 of this Act is to provide for a more equal footing for parties  
10 in civil actions and appeals by abrogating the special status given to public interest litigants  
11 with respect to the award of attorney fees and costs. It is the intent of the legislature to  
12 expressly overrule the decisions of the Alaska Supreme Court in Dansereau v. Ulmer, 955  
13 P.2d 916 (Alaska 1998); Southeast Alaska Conservation Council, Inc. v. State, 665 P.2d 544  
14 (Alaska 1983); Thomas v. Bailey, 611 P.2d 536 (Alaska 1980); Anchorage v. McCabe, 568  
15 P.2d 986 (Alaska 1977); Gilbert v. State, 526 P.2d 1131 (Alaska 1974), and their progeny,  
16 insofar as they relate to the award of attorney fees and costs to or against public interest  
17 litigants in future civil actions and appeals.

18 (c) This Act does not preclude the enactment of, or create an implied repeal of,  
19 specific statutes authorizing awards of costs or fees in particular situations, such as in  
20 AS 45.50.537.

21 (d) Consistent with (c) of this section, this Act also is intended to enact a specific  
22 statute governing the award of costs and fees in certain challenges to decisions of the Alaska  
23 Board of Fisheries and the Alaska Board of Game.

24 \* **Sec. 2.** AS 09.60.010 is amended by adding new subsections to read:

25 (f) Except as otherwise provided by statute, a court in this state may not  
26 discriminate in the award of attorney fees and costs against a party in a civil action or  
27 appeal based on the nature of the policy or interest advocated by the party, the number  
28 of persons affected by the outcome of the case, whether a governmental entity could  
29 be expected to bring or participate in the case, the extent of the party's economic  
30 incentive to bring the case, or any combination of these factors.

31 (g) Except as otherwise provided by statute, a court in this state may not

1 discriminate in the award of attorney fees and costs to a party in a civil action or  
2 appeal based on the nature of the policy or interest advocated by the party, the number  
3 of persons affected by the outcome of the case, whether a governmental entity could  
4 be expected to bring or participate in the case, the extent of the party's economic  
5 incentive to bring the case, or any combination of these factors.

6 (h) In a civil action or appeal concerning the establishment, protection, or  
7 enforcement of a right under the United States Constitution or the Constitution of the  
8 State of Alaska, the court

9 (1) shall award, subject to (i) and (j) of this section, full reasonable  
10 attorney fees and costs to a claimant, who, as plaintiff, counterclaimant, cross  
11 claimant, or third-party plaintiff in the action or on appeal, has prevailed in asserting  
12 the right;

13 (2) may not order a claimant to pay the attorney fees of the opposing  
14 party devoted to claims concerning constitutional rights if the claimant as plaintiff,  
15 counterclaimant, cross claimant, or third-party plaintiff in the action or appeal did not  
16 prevail in asserting the right, the action or appeal asserting the right was not frivolous,  
17 and the claimant did not have sufficient economic incentive to bring the action or  
18 appeal regardless of the constitutional claims involved.

19 (i) In calculating an award of attorney fees and costs under (h)(1) of this  
20 section,

21 (1) the court shall include in the award only that portion of the services  
22 of claimant's attorney fees and associated costs that were devoted to claims concerning  
23 rights under the United States Constitution or the Constitution of the State of Alaska  
24 upon which the claimant ultimately prevailed; and

25 (2) the court shall make an award only if the claimant did not have  
26 sufficient economic incentive to bring the suit, regardless of the constitutional claims  
27 involved.

28 (j) The court, in its discretion, may abate, in full or in part, an award of  
29 attorney fees and costs otherwise payable under (h) and (i) of this section if the court  
30 finds, based upon sworn affidavits or testimony, that the full imposition of the award  
31 would inflict a substantial and undue hardship upon the party ordered to pay the fees

1 and costs or, if the party is a public entity, upon the taxpaying constituents of the  
2 public entity.

3 \* **Sec. 3.** AS 09.68.040 is amended by adding a new subsection to read:

4 (d) A court in this state may not excuse a litigant requesting the entry of a stay  
5 or other interlocutory relief from posting a bond or other security to protect the  
6 persons who will be adversely affected if the excuse is based on the nature of the  
7 policy or interest advocated by the party, the number of persons affected by the  
8 outcome of the case, whether a governmental entity could be expected to bring or  
9 participate in the case, the extent of the party's economic incentive to bring the case, or  
10 any combination of these factors.

11 \* **Sec. 4.** AS 16.05 is amended by adding a new section to read:

12 **Sec. 16.05.812. Attorney fees and costs.** In a civil action or appeal  
13 challenging a decision, order, regulation, or other action of the Board of Fisheries or  
14 the Board of Game,

15 (1) a prevailing private plaintiff shall be entitled to an award of its full  
16 actual reasonable attorney fees and costs if the party does not otherwise have an  
17 economic incentive to bring the case; and

18 (2) a private plaintiff who does not prevail may not be subject to an  
19 award of attorney fees or costs against it unless the party otherwise has an economic  
20 incentive to bring the case or the party's claim or claims are frivolous.

21 \* **Sec. 5.** The uncodified law of the State of Alaska is amended by adding a new section to  
22 read:

23 **INDIRECT COURT RULE AMENDMENTS.** (a) AS 09.60.010(b), (c), (d), and (e),  
24 enacted by ch. 86, SLA 2003, have the effect of amending Rules 79 and 82, Alaska Rules of  
25 Civil Procedure, and Rule 508, Alaska Rules of Appellate Procedure, by restricting the  
26 discretion of courts to enhance awards of attorney fees and awards of costs on the basis of  
27 certain factors.

28 (b) AS 09.60.010(l), (g), (h), (i), and (j), added by sec. 2 of this Act, and  
29 AS 16.05.812, added by sec. 4 of this Act, have the effect of amending Rules 79 and 82,  
30 Alaska Rules of Civil Procedure, and Rule 508, Alaska Rules of Appellate Procedure, by  
31 restricting the discretion of courts to enhance awards of attorney fees and awards of costs on

1 the basis of certain factors.

2 (c) AS 09.68.040(c), enacted by ch. 86, SLA 2003, has the effect of amending Rules  
3 65 and 80, Alaska Rules of Civil Procedure, and Rules 205 and 602, Alaska Rules of  
4 Appellate Procedure, by limiting the court's discretion related to the posting of bonds or other  
5 security by certain parties.

6 (d) AS 09.68.040(d), added by sec. 3 of this Act, has the effect of amending Rules 65  
7 and 80, Alaska Rules of Civil Procedure, and Rules 205 and 602, Alaska Rules of Appellate  
8 Procedure, by limiting the court's discretion related to the posting of bonds or other security  
9 by certain parties.

10 \* Sec. 6. The uncodified law of the State of Alaska is amended by adding a new section to  
11 read:

12 APPLICABILITY. Sections 2 - 5 of this Act apply to civil actions and appeals filed  
13 on or after the effective date of this Act.

14 \* Sec. 7. The uncodified law of the State of Alaska is amended by adding a new section to  
15 read:

16 SEVERABILITY. Under AS 01.10.030, if any provision of this Act, or the  
17 application of it to any person or circumstance is held to be invalid, the remainder of this Act  
18 and the application to other persons or circumstances are not affected except that if

19 (1) AS 09.60.010(g) is held by the Alaska Supreme Court to be invalid or is  
20 found to not effect a change to a court rule as provided in sec. 5 of this Act, then  
21 AS 09.60.010(h), (i), and (j), AS 09.68.040(d), and AS 16.05.812 are not severable;

22 (2) the portion of AS 09.60.010(b), enacted by ch. 86, SLA 2003, relating to  
23 awards of attorney fees to public interest litigants is held by the Alaska Supreme Court to be  
24 invalid or is found to not effect a change to a court rule as provided in sec. 5 of this Act, then  
25 AS 09.60.010(c), (d), and (e), AS 09.68.040(c), enacted by ch. 86, SLA 2003, and  
26 AS 16.05.812 are not severable.

27 \* Sec. 8. The uncodified law of the State of Alaska is amended by adding a new section to  
28 read:

29 RETROACTIVITY. Sections 5(a) and (c) of this Act are retroactive to September 11,  
30 2003.

31 \* Sec. 9. The uncodified law of the State of Alaska is amended by adding a new section to

1 read:

2            ~~CONDITIONAL EFFECT.~~ Sections 1 - 8 of this Act take effect only if sec. 5 of this  
3 Act receives the two-thirds majority vote of each house required by art. IV, sec. 15,  
4 Constitution of the State of Alaska.

5        \* **Sec. 10.** This Act takes effect immediately under AS 01.10.070(c).

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8 reforms that are clearly within its authority.

9 (b) The purpose of sec. 2 of this Act is to provide for a more equal footing for parties  
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16 2003.

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19 CONDITIONAL EFFECT. Sections 1 - 8 of this Act take effect only if sec. 5 of this  
20 Act receives the two-thirds majority vote of each house required by art. IV, sec. 15,  
21 Constitution of the State of Alaska.

22 \* Sec. 10. This Act takes effect immediately under AS 01.10.070(c).

# FISCAL NOTE

**STATE OF ALASKA**  
**2004 LEGISLATIVE SESSION**

Fiscal Note Number: SB97-LAW-5-5-04  
 Bill Version: SB97  
 () Publish Date: \_\_\_\_\_

Revision Date/Time (Note if correction): \_\_\_\_\_ Dept. Affected: LAW  
 Title "An Act relating to public interest litigants and to RDU None  
attorneys fees; and amending Rule 82..." Component None  
 Sponsor Senate Rules  
 Requester Senate Rules Component No. \_\_\_\_\_

**Expenditures/Revenues (Thousands of Dollars)**

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
<b>TOTAL OPERATING</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

<b>CAPITAL EXPENDITURES</b>						
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<b>CHANGE IN REVENUES ( )</b>						
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**FUND SOURCE (Thousands of Dollars)**

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
<b>TOTAL</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

Estimate of any current year (FY2004) cost: 0.0  
 Mark this box (X) if funding for this bill is included in the Governor's FY 2005 budget proposal:

**POSITIONS**

Full-time						
Part-time						
Temporary						

**ANALYSIS:** *(Attach a separate page if necessary)*  
 Passage of this legislation will have no foreseeable fiscal impact on the Department of Law.

Prepared by: Kathryn A. Daughetee, Director Phone 465-3673  
 Division Administrative Services Date/Time 5/5/04 8:23 AM  
 Approved by: Kathryn Daughetee for Gregg D. Renkes, Attorney General Date 5/5/2004  
 Agency Department of Law

# FISCAL NOTE

**STATE OF ALASKA**  
**2003 LEGISLATIVE SESSION**

Fiscal Note Number: 1  
 Bill Version: SB 97  
 (S) Publish Date: 3/03/03

Revision Date/Time (Note if correction): \_\_\_\_\_ Dept. Affected: Law  
 Title "An Act relating to public interest litigants and BRU Civil Division  
to attorneys fees; and amending Rule 82, ...Civil Procedure." Component Deputy Attorney General's Office  
 Sponsor Rules Committee  
 Requester Governor Component No. 2205

**Expenditures/Revenues (Thousands of Dollars)**

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
<b>TOTAL OPERATING</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

<b>CAPITAL EXPENDITURES</b>						
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<b>CHANGE IN REVENUES ( )</b>						
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**FUND SOURCE (Thousands of Dollars)**

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
<b>TOTAL</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

Estimate of any current year (FY2003) cost: 0.0  
 Check this box (X) if funding for this bill is included in the Governor's FY 2004 budget proposal:

**POSITIONS**

Full-time						
Part-time						
Temporary						

**ANALYSIS:** (Attach a separate page if necessary)

Under Rule 82, Alaska Rules of Civil Procedure, attorney's fees are awarded to the prevailing party. By rule, the attorney's fee awards are limited to a percentage of the actual fees depending on a number of factors, including whether the case is contested or goes to trial, and whether or not a money judgment is received. The complexity of the case and length of trial are among a list of other factors that may be used by the court to vary the size of the award. In contrast, under current Alaska case law public interest litigants may receive full attorney fees when they prevail, with no apportionment by issue, and are not liable for opposing party's fees when they lose their case.

This bill requires that attorney fee awards to or against a public interest litigant follow the same court rule as non-public interest litigants. The bill further requires that if a court increases the award from the percentages set out in (b)(1) or (b)(2) of the rule, it must apportion the attorney's fee by issue, and absent exceptional circumstances, can only award the increased fee for an issue the party prevailed upon.

Prepared by: Joan M. Kasson Phone (907) 465-5370  
 Division Attorney General's Office Date/Time 1/27/03 8:28 AM  
 Approved by: Kathryn Daughhelee for Gregg D. Renkes, Attorney General Date 1/27/2003  
 Agency Department of Law

## FISCAL NOTE

STATE OF ALASKA  
2003 LEGISLATIVE SESSION

BILL NO. SB 97 #1

### ANALYSIS CONTINUATION

Passage of this legislation will have no impact on the Department of Law's operating budget. However, each year the department seeks supplemental funding to pay judgments and claims against the state, including public interest litigant attorney's fee awards. Total attorney's fee awards under the public interest litigant exception to Rule 82 included in judgments against the state for the last five years are as follows: FY98, \$186.4; FY99, \$413.9; FY00, \$34.7; FY01 \$298.4; FY02 \$335.9. (These numbers represent fees only, and do not include costs, pre-judgment or post-judgment interest.)

Passage of this legislation would lower, but not eliminate these awards in the future, thereby reducing the amount of supplemental requests. Public interest litigants would still be allowed to recover fees under Rule 82. Thus, the extent to which the fee awards would be reduced under this legislation would depend on the application of Rule 82 schedules to public interest litigation. In turn, this depends on the nature of the litigation and the extent to which the courts vary the award under the provisions Rule 82(b)(3).

Most public interest litigation does not involve recovery of a money judgment. When there is no money judgment, Rule 82 provides that the prevailing party can receive 30 percent of their reasonable attorney's fees if the case goes to trial, and 20 percent if it does not. This starting amount can be changed by the court after considering a list of eleven factors contained in Rule 82(b)(3), including case complexity, length of trial, reasonableness of the claims and defenses, relationship of the amount of work, the significance of the matters at stake, etc. The Judicial Council study noted in the following paragraph found that variances to the Rule 82 schedule were relatively rare for the types of civil cases the study examined. (See p. 61.) However, we have no way of knowing if the same would be true for public interest cases. At the most, assuming that all cases were non-monetary, did not go to trial, and contained no factors listed under Rule 82(b)(3), the awards would be reduced 80 percent from the amounts that would be granted under existing law. The actual reduction would almost certainly be less.

The Alaska Judicial Council, in its October 1995 report, *Alaska's English Rule: Attorney's Fee Shifting in Civil Cases*, discusses the development in Alaska of Rule 82 and the public interest exception. (<http://www.ajc.state.ak.us/Reports/atylfee.pdf>) The cases cited in the report indicate the Supreme Court intended to encourage public interest litigation by making it more financially feasible for people to litigate questions of general public concern through full reimbursement of their legal costs if they win, and by not making them pay any of the prevailing party's legal costs if they lose. (See pp. 73-77.) We have been unable to find objective data to indicate whether or not the public interest exception is a primary motivation for parties to litigate public interest issues. However, anecdotal evidence found in the Judicial Council report (pp. 129-131) suggests that the public interest exception has the effect of encouraging public interest litigation, and thus there may be fewer public interest litigation cases in the future if this bill passes.

# FISCAL NOTE

**STATE OF ALASKA**  
**2003 LEGISLATIVE SESSION**

Fiscal Note Number: 2  
 Bill Version: SB 97  
 (S) Publish Date: 3/03/03

Revision Date/Time (Note if correction): \_\_\_\_\_ Dept. Affected: Administration  
 Title An Act relating to public BRU Risk Management  
interest litigants..... Component Risk Management  
 Spncor \_\_\_\_\_  
 Requester \_\_\_\_\_ Component No. 71

**Expenditures/Revenues** (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
<b>TOTAL OPERATING</b>	.	.	.	.	.	.

<b>CAPITAL EXPENDITURES</b>						
-----------------------------	--	--	--	--	--	--

<b>CHANGE IN REVENUES ( )</b>						
-------------------------------	--	--	--	--	--	--

**FUND SOURCE** (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
<b>TOTAL</b>	.	.	.	.	.	.

Estimate of any current year (FY2003) cost: 0.0  
 Check this box (X) if funding for this bill is included in the Governor's FY 2004 budget proposal:

**POSITIONS**

Full-time						
Part-time						
Temporary						

**ANALYSIS:** (Attach a separate page if necessary)

Risk Management is not usually involved in public interest cases, as most do not involve recovery of damages that are typical in tort actions.

Prepared by: J. Brad Thompson, Director Phone \_\_\_\_\_  
 Division Risk Management Date/Time 2/3/03 11:52 AM  
 Approved by: \_\_\_\_\_ Date 2/3/2003  
 Agency Administration

# STATE OF ALASKA

*Frank H. Murkowski, Governor*

## DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

P.O. BOX 110300  
JUNEAU, ALASKA 99811-0300  
PHONE: (907)465-3600  
FAX: (907)465-2075

April 17, 2003

Senator Ralph Seekins  
State Capitol, Room 125  
Juneau, AK 99801-1182

Dear Senator Seekins:

The judicially created doctrine respecting the award of attorney's fees for or against a party deemed to be a public interest litigant has created an unbalanced set of incentives for parties litigating issues that fall under the public interest litigant rule. This imbalance has led to increased litigation, arguments made with little merit, difficulties in compromising claims, and significant costs to the state and private citizens.

These concerns are particularly acute in litigation related to natural resource issues. Moreover, unlike other areas of public interest law, there are a number of dedicated and well funded entities whose purpose is to litigate issues of public concern in the natural resource area. Thus, while many years ago there may have been a legitimate need to provide an incentive for public interest litigation on natural resource issues, that need no longer exists. The absence of a compelling need, coupled with the concerns described above that have arisen from application of the public interest exception to natural resource litigation, led us to the conclusion that it is appropriate for the legislature to limit the public interest litigant exception.

For that reason the Governor earlier requested the introduction of legislation designed to limit the application of the public interest doctrine in certain natural resource cases where substantial amounts of public involvement were already provided. That bill is now in front of your committee.

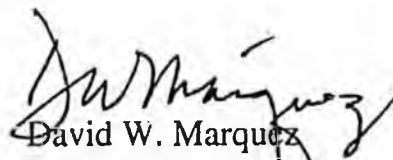
I am attaching a proposed amendment to that legislation. The amendment is intended to clarify that the bill applies to administrative appeals as well as civil lawsuits initiated in state court. It also clarifies that limitations on the types of decision listed, including coastal consistency determinations, the adoption of regulations and decisions for which there was an opportunity for public comment and administrative review, are applicable to the three agencies listed. This change is in response to concerns that the limitations applied only to DNR or, in the alternative, were inclusive of other agencies. The amendments also delete sections 2 and 3 of the bill, proposed changes to the Alaska Rules of Civil Procedure. Eased upon comments received since the bill was introduced, it was felt that it was not appropriate to change the court rules at this time. Thus the bill would be limited to statutory changes that only affect the court created public interest litigant doctrine. Because of these changes the bill would no longer require a two-thirds majority and thus section 4 would not be necessary. It is therefore also deleted.

Thank you for your consideration of these amendments.

Sincerely,

GREGG D. RENKES  
Attorney General

By:

  
David W. Marquez  
Legislative Liaison

DWM:lb

AMENDMENT

OFFERED IN THE SENATE

BY \_\_\_\_\_

RULES COMMITTEE

TO: SB 97

1 Page 1, line 1, following "fees", through line 2:

2 Delete "**and amending Rule 82, Alaska Rules of Civil Procedure**"

3

4 Page 1, line 11, following "action":

5 Insert "**or an appeal from an administrative agency,**"

6

7 Page 1, line 13, following "**Resources**", through line 14:

8 Delete "**making a coastal consistency determination, adopting**"

9 Insert "**through which one or more of those agencies makes a coastal**

10 **consistency determination or adopts**

11

12 Page 2, line 3, following "litigant" through line 5:

13 Delete "**as provided in Rule 82(g), Alaska Rules of Civil Procedure, on the**  
14 **effective date of this Act**"

15 Insert "**in the same manner as attorney's fees may be awarded to or against a**  
16 **non-public interest litigant**"

17

18 Page 2, line 6, through page 3, line 2:

19 Delete all material and insert new bill sections to read:

20 "**Sec. 2.** AS 09.60.010 is amended by adding a new subsection to read:

21 (b) In this section, "public interest litigant" means a party bringing a civil  
22 action or appeal that

23 (1) is designed to effectuate strong public policies;

24 (2) will benefit numerous people;

1 (3) could only be expected to be brought by a private party; and

2 (4) the party bringing the civil action or appeal would lack sufficient

3 economic incentive to bring if it did not involve issues of general importance.

4 \* **Sec. 3.** The uncodified law of the State of Alaska is amended by adding a new

5 section to read:

6 **APPLICABILITY.** This Act applies to all civil actions and appeals filed on or

7 after the effective date of this Act."

FRANK H. MURKOWSKI  
GOVERNOR  
GOVERNOR@GOV.STATE.AK.US



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JUNEAU, ALASKA 99811-0001  
(907) 465-3500  
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STATE OF ALASKA  
OFFICE OF THE GOVERNOR  
JUNEAU

February 28, 2003

The Honorable Gene Therriault  
President of the Senate  
Alaska State Legislature  
State Capitol, Room 107  
Juneau, AK 99801-1182

Dear President Therriault:

Under the authority of art. III, sec. 18, of the Alaska Constitution, I am transmitting a bill that would change the Alaska Rules of Civil Procedure as they apply to the award of attorney's fees. First, the bill provides for specific rules that govern the award of attorney's fees to or against certain public interest litigants. The bill does so by specifically requiring that any award of attorney's fees to or against public interest litigants for cases contesting decisions by the Department of Environmental Conservation, the Department of Fish and Game, or the Department of Natural Resources making a coastal consistency determination, adopting regulations, or in which the public had an opportunity to comment to the agency and seek administrative review before the agency, be governed by Alaska Rule of Civil Procedure 82 (Rule 82). The bill would then amend Rule 82 to require that attorney's fees be awarded to or against a public interest litigant in those situations in the same manner as attorney's fees are awarded to or against non-public interest litigants under Rule 82(b). Second, the bill provides, for all litigants, that in the absence of exceptional circumstances, courts may award increased fees only for issues upon which a party prevailed.

Under Rule 82, attorney's fees are awarded to the prevailing party. By rule, the attorney's fee awards are limited to a specified percentage of the actual fees, with the precise percentage dependent upon a number of factors, including whether the case is contested or goes to trial, and whether or not a money judgment is received. The complexity of the case and length of trial are among a list of other factors that may be used by the court to vary the size of the award. Upon consideration of a variety of factors, a court may apportion fees based upon the issues and whether a party prevailed. In contrast, current Alaska case law creates an exception to Rule 82 by which, in most circumstances, public interest

The Honorable Gene Therriault  
February 28, 2003  
Page 2

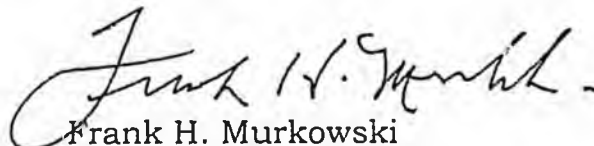
litigants who prevail receive full attorney's fees, with no apportionment by issue, but are not liable for an opposing party's fees if the public interest litigant loses the case.

The attorney's fee exception for public interest litigants creates several undesirable incentives when decisions of the state are called into question. First, those seeking to preserve an action of the state have an incentive to avoid litigation because of the possibility of full attorney's fees being awarded against them. This is compounded by the fact that those seeking to overturn actions of the state have an affirmative incentive to take a chance on doubtful claims because they may win and earn large rewards in the form of full fees, without the counterbalancing risk of even partial fees being awarded against them. This is of particular concern in the area of resource development where well-financed groups have sought to use litigation to impede the state's efforts to proceed with the orderly development of its resources.

This bill would redress this imbalance in the narrow group of cases involving the resource agencies.

I urge your prompt consideration and passage of this bill.

Sincerely,

A handwritten signature in cursive script, appearing to read "Frank H. Murkowski".

Frank H. Murkowski  
Governor

## Sectional Analysis HB 145 and SB 97

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

Section 1 of the bill amends AS 09.60.010 to require that attorney's fee awards to or against a public interest litigant in civil cases contesting decisions by the Departments of Environmental Conservation, Fish and Game, and Natural Resources which make a coastal consistency determination or adopt regulations or decisions by those agencies for which the public had an opportunity to comment to the agency and seek administrative review before the agency, may only be made as provided in the proposed new subsection (g) to Rule 82, found in section 3 of the bill and described below. Section 1 makes it clear that such attorney's fee awards must conform to the language in subsection (g) expressed in this bill and not to later amendments to subsection (g).

Section 2 of the bill would amend Alaska Rule of Civil Procedure 82 by adding a new paragraph to subsection (b) providing that if a court increases the award from the percentages set out in (b)(1) or (b)(2) of the rule, it must apportion the attorney's fee by issue and, absent exceptional circumstances, can only award the increased fee for an issue the party prevailed upon. This would change the current application of Civil Rule 82 which courts construe to allow, but not require, apportionment of attorney's fees by issue.

Section 3 of the bill would add a new subsection (g) to Alaska Rule of Civil Procedure 82 providing that attorney's fees to or against public interest litigants for cases contesting decisions by the Departments of Environmental Conservation, Fish and Game, and Natural Resources making a coastal consistency determinations, adopting regulations, or for which the public had an opportunity to comment to the agency and seek administrative review before the agency, are to be awarded in the same manner as attorney's fees are awarded to or against non-public interest litigants under subsection (b) of Rule 82. This would change current Alaska case law which creates an exception to Rule 82 by which, in most circumstances, public interest litigants who prevail in civil litigation receive full attorney's fees, with no apportionment by issue, but are not liable for an opposing party's fees if the public interest litigant loses the case.

Because sections 2 and 3 of the bill amend the Alaska Civil Rules, they must receive a two-thirds vote in each house in order to become law. Section 1 only requires a majority vote. For section 1 to have its intended effect, it is necessary that sections 2 and 3 also are passed by the legislature. Thus, Section 4 of this bill provides that section 1 takes effect only if sections 2 and 3 receive a two-thirds majority vote in each house.

# FISCAL NOTE

STATE OF ALASKA  
2003 LEGISLATIVE SESSION

Fiscal Note Number: 1  
Bill Version: SB 97  
(S) Publish Date: 3/03/03

Revision Date/Time (Note if correction): \_\_\_\_\_ Dept. Affected: Law  
Title "An Act relating to public interest litigants and BRU Civil Division  
to attorneys fees; and amending Rule 82, ...Civil Procedure." Component Deputy Attorney General's Office  
Sponsor Rules Committee  
Requester Governor Component No. 2205

**Expenditures/Revenues** (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
<b>TOTAL OPERATING</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

<b>CAPITAL EXPENDITURES</b>						
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<b>CHANGE IN REVENUES ( )</b>						
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**FUND SOURCE** (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
<b>TOTAL</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

Estimate of any current year (FY2003) cost: 0.0  
Check this box (X) if funding for this bill is included in the Governor's FY 2004 budget proposal:

**POSITIONS**

Full-time						
Part-time						
Temporary						

**ANALYSIS:** *(Attach a separate page if necessary)*  
Under Rule 82, Alaska Rules of Civil Procedure, attorney's fees are awarded to the prevailing party. By rule, the attorney's fee awards are limited to a percentage of the actual fees depending on a number of factors, including whether the case is contested or goes to trial, and whether or not a money judgment is received. The complexity of the case and length of trial are among a list of other factors that may be used by the court to vary the size of the award. In contrast, under current Alaska case law public interest litigants may receive full attorney fees when they prevail, with no apportionment by issue, and are not liable for opposing party's fees when they lose their case.  
  
This bill requires that attorney fee awards to or against a public interest litigant follow the same court rule as non-public interest litigants. The bill further requires that if a court increases the award from the percentages set out in (b)(1) or (b)(2) of the rule, it must apportion the attorney's fee by issue, and absent exceptional circumstances, can only award the increased fee for an issue the party prevailed upon.

Prepared by: Joan M. Kasson Phone (907) 465-5370  
Division: Attorney General's Office Date/Time 1/27/03 8:28 AM  
Approved by: Kathryn Daughhelee for Gregg D. Renkes, Attorney General Date 1/27/2003  
Agency: Department of Law

## FISCAL NOTE

STATE OF ALASKA  
2003 LEGISLATIVE SESSION

BILL NO. SB 97 #1

### ANALYSIS CONTINUATION

Passage of this legislation will have no impact on the Department of Law's operating budget. However, each year the department seeks supplemental funding to pay judgments and claims against the state, including public interest litigant attorney's fee awards. Total attorney's fee awards under the public interest litigant exception to Rule 82 included in judgments against the state for the last five years are as follows: FY98, \$186.4; FY99, \$413.9; FY00, \$34.7; FY01 \$298.4; FY02 \$335.9. (These numbers represent fees only, and do not include costs, pre-judgment or post-judgment interest.)

Passage of this legislation would lower, but not eliminate these awards in the future, thereby reducing the amount of supplemental requests. Public interest litigants would still be allowed to recover fees under Rule 82. Thus, the extent to which the fee awards would be reduced under this legislation would depend on the application of Rule 82 schedules to public interest litigation. In turn, this depends on the nature of the litigation and the extent to which the courts vary the award under the provisions Rule 82(b)(3).

Most public interest litigation does not involve recovery of a money judgment. When there is no money judgment, Rule 82 provides that the prevailing party can receive 30 percent of their reasonable attorney's fees if the case goes to trial, and 20 percent if it does not. This starting amount can be changed by the court after considering a list of eleven factors contained in Rule 82(b)(3), including case complexity, length of trial, reasonableness of the claims and defenses, relationship of the amount of work, the significance of the matters at stake, etc. The Judicial Council study noted in the following paragraph found that variances to the Rule 82 schedule were relatively rare for the types of civil cases the study examined. (See p. 61.) However, we have no way of knowing if the same would be true for public interest cases. At the most, assuming that all cases were non-monetary, did not go to trial, and contained no factors listed under Rule 82(b)(3), the awards would be reduced 80 percent from the amounts that would be granted under existing law. The actual reduction would almost certainly be less.

The Alaska Judicial Council, in its October 1995 report, *Alaska's English Rule: Attorney's Fee Shifting in Civil Cases*, discusses the development in Alaska of Rule 82 and the public interest exception. (<http://www.ajc.state.ak.us/Reports/atlyfee.pdf>) The cases cited in the report indicate the Supreme Court intended to encourage public interest litigation by making it more financially feasible for people to litigate questions of general public concern through full reimbursement of their legal costs if they win, and by not making them pay any of the prevailing party's legal costs if they lose. (See pp. 73-77.) We have been unable to find objective data to indicate whether or not the public interest exception is a primary motivation for parties to litigate public interest issues. However, anecdotal evidence found in the Judicial Council report (pp. 129-131) suggests that the public interest exception has the effect of encouraging public interest litigation, and thus there may be fewer public interest litigation cases in the future if this bill passes.

# FISCAL NOTE

STATE OF ALASKA  
2003 LEGISLATIVE SESSION

Fiscal Note Number: 2  
Bill Version: SB 97  
(S) Publish Date: 3/03/03

Revision Date/Time (Note if correction): \_\_\_\_\_ Dept. Affected: Administration  
Title An Act relating to public BRU Risk Management  
interest litigants..... Component Risk Management  
Sponsor \_\_\_\_\_  
Requester \_\_\_\_\_ Component No. 71

**Expenditures/Revenues** (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
<b>TOTAL OPERATING</b>	.	.	.	.	.	.

<b>CAPITAL EXPENDITURES</b>						
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<b>CHANGE IN REVENUES ( )</b>						
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**FUND SOURCE** (Thousands of Dollars)

FUND SOURCE	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009
1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
<b>TOTAL</b>	.	.	.	.	.	.

Estimate of any current year (FY2003) cost: 0.0  
Check this box (X) if funding for this bill is included in the Governor's FY 2004 budget proposal:

**POSITIONS**

POSITIONS	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009
Full-time						
Part-time						
Temporary						

**ANALYSIS:** (Attach a separate page if necessary)

Risk Management is not usually involved in public interest cases, as most do not involve recovery of damages that are typical in tort actions.

Prepared by: J. Brad Thompson, Director Phone \_\_\_\_\_  
Division: Risk Management Date/Time 2/3/03 11:52 AM  
Approved by: \_\_\_\_\_ Date 2/3/2003  
Agency: Administration

APR 22 2003

Headquarters:  
217 2nd Street, Suite 201  
Juneau, Alaska 99801  
(907) 586-2323 FAX 463-5515

Regional Office:  
601 West 5<sup>th</sup> Ave., Suite 600  
Anchorage, Alaska 99501  
(907) 278-2722 FAX 278-6643



**SB 97 – Public Interest Litigants**  
Testimony by Pamela La Bolle, President

The Alaska State Chamber of Commerce, representing approximately 700 business members and 35 local chambers of commerce, offers the following comments in support of SB 97 regarding Public Interest Litigants.

The Public Interest Litigant is a special status granted to a certain group of Alaskans over the interests of other Alaskans. This status was not created by the elected representatives of Alaskans through the recognized public process of the legislature, but instead was created by the courts.

Under this special status, litigants are provided exemption from the requirements of Rule 82 (g) of the Alaska Rules of Civil Procedure that provides for the prevailing party in a civil procedure to recover a portion of its attorney fees. Under Rule 82, if the prevailing party is the defendant, they can recover 20-30% of the attorney fees incurred. The rationale, in addition to encouraging settlement, is to provide partial compensation to parties who are forced to go to litigation to defend their rights.

The Alaska State Chamber was among those who worked hard to bring Rule 82 into law, and it is our belief that it is fair to all. We believe that no groups, based on their political characteristics, should be accorded special treatment or immunity from Rule 82.

The public interest litigant doctrine came about in the 1990 case of *The Anchorage Daily News v. Anchorage School District* before the Alaska Supreme Court. Under this special status, the court determined that if the prevailing party is considered a public interest litigant, they are able to recover all of their attorney fees. If the public interest litigant loses, however, they do not have to pay any of the other parties' attorney's fees.

Some groups routinely challenge state resource development decisions and are granted the status of public interest litigant by the courts. These groups are often special interest groups posing as public trusts. Such challenges typically allege as many as 15 to 20 specific deficiencies in the state's administrative finding. When groups challenging resource development decisions prevail, they generally do so on just one or two issues, however they are typically awarded full costs and attorneys fees.

SB 97 will return fairness to the civil proceedings. Under Rule 82, the court is allowed to raise or lower the amount to be awarded in attorney's fees based upon established factors. The rule should be applied equally to all litigants.

We urge the committee to support SB 97.



ALASKA

## Statement of Support

### Senate Bill 97

### Public Interest Litigant Fees

March 8, 2003

The Alaska Chapter of the National Federation of Independent Business has over 2,500 members, making it the largest small-business advocacy group in the state. NFIB supports SB 97. This bill allows for equal treatment of litigants under Court Civil Rule 82.

Civil rule 82 provides for a percentage of attorney fees to be reimbursed to the prevailing party. Through Alaska Supreme Court decisions, a policy has been established to exempt public interest litigants from Rule 82 when they do not prevail and give them a higher percentage when they do. This gives public interest litigants an incentive to litigate even weak claims because they will suffer no economic burden if they lose and usually are able to obtain full attorney fees if they prevail.

Groups that litigate "in the public interest" have imposed substantial economic burdens on the State in the development of its resources. Passing SB 97 will take away the incentive to litigate just to delay a project. Such delaying tactics have caused otherwise good projects to become uneconomic and not go forward.

Public interest litigants will not be unfairly treated by SB 97. They will simply be treated like all other Alaskans. They have the right to provide public input before an agency decision is made. They have the right to administratively appeal an agency decision with no cost to them if they lose. This bill will simply treat public interest litigants like every other litigant when they decide to go to court to contest a decision of a resource agency in making a coastal consistency determination, adopting regulations or making other administrative decisions for which there has been an opportunity for public comment.

Passage of SB 97 will benefit the economy in Alaska by reducing project delays.

### **NFIB/Alaska urges support for SB 97**

Submitted by Thyes Shaub on behalf of NFIB/Alaska



April 8, 2003

By Hand Delivery

Honorable Ralph Seekins, chairman  
Senate Judiciary Committee  
Alaska State Capitol, Room 125  
Juneau, Alaska

Re: **SB 97: Public Interest Litigants, attorneys fees, and  
Rule 82, Alaska R. Civil Proc.**

JUNEAU

230 South Franklin #206  
Juneau, AK 99801  
(907) 586-1627  
FAX (907) 586-1066

Dear Senator Seekins:

Enclosed is a copy our comments on CSSB 97, a work draft of SB 97. The bill passed out of the Senate Resources Committee without adopting the amended version, to which these comments were addressed. With the colloquy that took place, it appears that SB 97 as passed is intended to not adversely affect access to the court system by Alaskans with disabilities. The bill appears to be limited to disputes arising out of actions by the Alaska Departments of Environmental Conservation, Fish and Game, or Natural Resources.

However, SB 97 as currently before your committee still contains ambiguity. The structure of the revision of AS 09.60.010 and new rule 82(g) [see sections 1 and 3 of the bill] could be construed to apply more broadly to any dispute involving any "agency" action to adopt a regulation or to appeal any administrative adjudicative proceeding. The problem is the intended effect of the phrase that follows "determination" on page 1, line 14: does the phrase that follows modify the preceding phrase, or is it a separate category of civil action that is governed? Also, the term "agency" is undefined in the bill, and so it is unclear whether the effect of the bill is limited to just the three agencies listed, to all state agencies, or whether it applies to all levels of government (municipal, borough, or other public agencies).

Alaskans with disabilities may be involved in disability-related disputes with DEC, Fish and Game, or DNR. The Disability Law Center of Alaska has represented individuals who, because of their disability, were unable to access hunting and fishing areas. Based upon our advocacy, modifications to regulation were provided, enabling our clients equal access to the hunting and fishing programs of the State. The disability laws apply to all aspects of state function, including regulation of fish, game and other natural resources. See, e.g., *Applicability of the Americans with Disabilities Act to Regulations of the Boards of Fish and Game*, Inf. Op. Atty. Gen. Alaska (Oct. 23, 1992)(copy enclosed).

MEMBER OF THE  
NATIONAL  
ASSOCIATION OF  
PROTECTION &  
ADVOCACY  
SYSTEMS

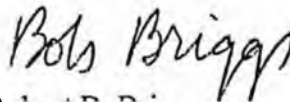
Senator Ralph Seekins, Chairman, Alaska Senate Judiciary Committee  
Re: SB 97: Public interest litigants, attorneys fees, and Rule 82, Alaska R. Civ. Proc.  
April 8, 2003  
Page 2 of 2

---

We have previously opposed bills that have been more broadly worded than the current version of SB 97, now before your committee. For your benefit, I enclose a copy of the minutes from a hearing before the Alaska House Judiciary Committee from 2001 on former Senate Bill 183. The testimony given then is still relevant today. We urge reconsideration of the idea that elimination of the public interest litigant exception is the best approach.

We look forward to working with your committee, staff, and the Administration to ensure that Alaskans with disabilities continue to have access to the court system -- as public interest litigants when appropriate -- to redress grievances. We urge that the ambiguities of SB 97 be clarified, and if not clarified, that the bill should not become law as it would create more problems than it would solve.

Very truly yours,



Robert B. Eriggs

Cc: (w/ encls.)

Members of Senate Judiciary Committee  
James Clark, Chief of Staff, Office of the Governor  
Gregg Renkes, Attorney General

**CSSB 97**  
**Testimony of Janel Wright**  
**Disability Law Center of Alaska**  
**April 7, 2003**

The "public interest litigants" rule currently protects the public's ability to challenge State decisions on matters of broad public interest without subjecting themselves to the financial hardship of paying the State's attorney fees if litigation is not successful. CSSB 97 eliminates this protection by prohibiting courts from taking into consideration the public interest nature of the case when a court determines whether to award attorney fees to the prevailing party.

The Disability Law Center of Alaska is the Protection and Advocacy System designated to advocate on behalf of Alaskans with disabilities. An important component of our ability to effectively advocate on behalf of Alaskans with disabilities is judicious pursuit of state court remedies. To eliminate public interest litigant status will effectively eliminate individuals with disabilities' opportunity to access the judicial branch of their government to enforce their rights. Individuals with disabilities have the highest rate of unemployment of any group in our country and, as a group, have the highest number living in poverty. If faced with the prospect of liability for the defense's attorney fees, individuals with disabilities will be unable to protect their rights.

Eliminating the current body of case law regarding allocation of attorney fees is unnecessary. The "public interest litigant exception" does not foster frivolous lawsuits. The Alaska Supreme Court has clearly stated that *any* lawsuit brought frivolously or vexatiously exposes both the attorney and the client to payment of the defense's attorney fees, including an award of full fees in egregious cases. As such, there is no real need for this bill.

It was the wise decision of the framers of both the Alaska and the U.S. Constitutions that citizens have not one, but three avenues to access their government and redress their grievances. The executive, the legislative and judicial branches of the government each serve an important role in providing checks and balances against unwarranted government action against individuals. Alaska Civil Rule 82's public interest litigant exception is designed to recognize and enable access by individuals to the judicial branch of their government to resolve legal disputes. The effect of CSSB 97 is to deter citizens from participating in good faith actions to protect their rights when government agencies overstep their authority, violate their rights and make arbitrary decisions.

I urge you to vote against this bill.

## House JUDICIARY Minute



Apr 30, 2001

SB 183-ATTY FEES:APPORTIONMT'/PUBLIC INT.LITIGANT

CHAIR ROKEBERG announced the first order of business, SENATE BILL NO. 183, "An Act relating to public interest litigants and to attorney fees; and amending Rule 82, Alaska Rules of Civil Procedure."

Number 0052

BILL CHURCH, Staff to Senator Dave Donley, Alaska State Legislature, came forth on behalf of the Senate Finance Committee, sponsor of SB 183. He stated:

Senate Bill [183] makes public interest litigants subject to Alaska Court Rule 82 regarding judgments for attorney fees, thus adopting a uniform standard for all litigants. Courts would still continue to have the ability to award higher fees or full attorney fees whenever the court felt that exceptional circumstances justified the higher award.

Through Alaska Supreme Court decisions, the doctrine known as Public Interest Litigant Doctrine [PILD] has been established. The doctrine isn't codified in law or set out in any court procedure. The courts apparently felt that the Public Interest Litigant Doctrine created a social policy to encourage plaintiffs to advocate for issues that are deemed by the court to be in the public interest.

Civil Rule 82 sets out the formula for the reimbursement of attorney fees to be collected by a prevailing party in a legal action. Court Civil Rule 82 limits attorneys' fees recovered by prevailing litigants to 20 percent of the litigants' reasonable actual attorneys' fees incurred on a case resolved without trial and 30 percent in a case that does go to trial.

The PILD does create an exception to Civil Rule 82 by allowing the courts to classify a party as a public interest litigant, thus allowing the party to collect full or reasonable attorney fees if they prevail. And if they lose, the public interest litigant pays none of the prevailing party's attorney fees. And it's not a good public policy when not even innocent victims of violent crime who bring subsequent civil suit against criminals are allowed such generous attorney fees.

Additionally, Senate Bill 183 prevents legal fees from 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 or several of the points that they brought

up at suit.

This problem was created recently in an Alaska Supreme Court decision titled Dansereau v. Ulmer in 1998. Prior to Dansereau v. Ulmer, lawyer fees for public interest litigants were only awarded for issues on which they prevailed. Dansereau v. Ulmer set a precedent that allows courts to award lawyer fees for all contested points even if the public interest litigant only prevailed on one.

Senate Bill 183 also includes a provision that gives courts the flexibility to continue to follow the Dansereau case or award higher or full attorney fees when the court finds exceptional circumstances to justify the higher reward. Senate Bill 183 was introduced 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. Based on the claims paid in recent years this legislation could save the state hundreds or thousands of dollars annually. ...

Finally, what this does is it promotes a uniform standard of attorney fee payments under Rule 82 to all litigants [and] it creates a disincentive to promote spurious lawsuits. ... It does not diminish the ability of the court to award higher or full attorney fees. In other words, a court can still award the full fee in a public interest litigant case, but it does set the standard for the court as a baseline that they are subject to Rule 82 unless they wish to go beyond that.

So, anyone that's going to say that this takes away their right to collect attorney fees, I don't believe has really read the bill, because it does not do that. In each situation, it allows the court to award the attorney fees. And lastly, it's just good public policy to treat all litigants alike.

Number 0418

CHAIR ROKEBERG asked Mr. Church whether the change in policy in the Dansereau case is the primary rationale for bringing forth this particular bill.

MR. CHURCH responded that this bill was brought forth in the 21st legislature. It made it through the Senate, but it was too late in the session to receive a hearing in the House.

Number 0491

DALE BONDURANT, Alaska Constitutional Legal Defense Conservation Fund, testified via teleconference in opposition to SB 183. He stated that he thinks this effectively eliminates the ability of an ordinary "John Doe" to legally defend the public's constitutional right under the national law.

MR. BONDURANT said he is a 54-year resident of Alaska and has been active in the fish, wildlife, and water resources of the state. In 1977, he was one of three named plaintiffs in the case in which the Alaska Constitutional Legal Defense Fund sued

the Secretary of the Interior. They won that all Alaskan waters had reasonable access in Alaska.

MR. BONDURANT remarked that Alaska even adopted a change in statute to ensure that these waters were available for the use by all people. In 1987, he said, they dragged the state into another case and won for the treatment of 30 million acres of submerged land and over 100,000 miles of waters. Also under that case, the state won the right to manage all the resources within those waters.

MR. BONDURANT said [the Alaska Constitutional Legal Defense Fund] has consistently defended the privilege and immunity clauses, the constitution, equal protection rights, and having no discrimination because of race. He said he thinks [the Alaska Constitutional Legal Defense Fund] has proven its point; however, [SB 183] will eliminate them from the deal, because there is no guarantee that they will get their funding back. If they lost a big case, they would have to pay out of their own pockets.

MR. BONDURANT asked the committee to kill the bill because he thinks it denies the average citizen the right to protect the public from "big money."

Number 0756

REPRESENTATIVE OGAN stated that SB 183 is aimed at the organizations that continually bring public interest lawsuits against the state over wildlife issues. He said he understands that it is a "two-edged sword." He asked Mr. Bondurant whether those groups would be able to continue with lawsuits if this were to be eliminated. He said it seems that some groups use these issues to raise a tremendous amount of money. One example would be Greenpeace's using the ANWR (Arctic National Wildlife Refuge) issue as one of its greatest fundraisers. He emphasized that it seems \$100,000 is a "drop in the bucket" for [organizations] that have the national fundraising capacity of raising tens of millions of dollars.

MR. BONDURANT responded that he thinks Representative Ogan is right on those cases. He said this, however, is going to eliminate guys like him who are defending the rights of the general public, not those [large organizations]. If [the large organizations] lose a case, there are people willing to write them a \$.5 million check.

REPRESENTATIVE OGAN asked whether there is a way to tighten [the bill] for people who are truly suing on behalf of the public's interest and don't have the resources to otherwise sue. He said he thinks anybody with deep pockets and millions of dollars in the bank who is funding a lawsuit with state money is abusing the system. He noted a letter in his bill packet about people with disabilities who can't sue and said he is looking for a way to accommodate that, with the bill sponsor.

MR. BONDURANT replied that he doesn't know how Representative Ogan could do that. He said it is hard to separate people into classes, and he thinks [the legislature] is responsible for making sure the public is heard. He added that he thinks his organization is well known in Alaska for fighting for the equal rights of everybody.

Number 1090

AL SUNDQUIST, President, Alaska Chapter, Americans United for Separation of Church and State, testified via teleconference in opposition to SB 183. He stated:

Americans United is based in Washington, D.C., and is a national, nonpartisan, nonsectarian organization committed to preserving the constitution and principle of religious liberty and separation of church and state. Founded in 1947, the organization represents 60,000 members and (indisc.) houses of worship in all 50 states.

Although only six months old, the Alaska chapter is growing rapidly, and in response to results, we established (indisc.) the First Amendment by far-right religious organizations. I oppose the placement of economic obstacles to the use of the courts by the Alaskan citizens. I am concerned about the loss of redress and grievances and actions regarding religious liberties threatened by this bill, as it is [a] denial of access by individuals to the courts to resolve these disputes. Please vote no on SE 183.

REPRESENTATIVE OGAN asked Mr. Sundquist whether he is part of the group that advocates removing "In God We Trust" from [U.S.] money.

REPRESENTATIVE BERKOWITZ suggested sticking to the subject.

MR. SUNDQUIST responded no [to Representative Ogan's question] and pointed out that [his organization] has been in defense of both the establishment clause and freedom of choice.

Number 1234

ROBIN SMITH testified via teleconference on behalf of herself in opposition to SB 183. She stated that she thinks this bill will effectively eliminate public interest lawsuits, except those by large or wealthy organizations. One reason lawsuits occur in Alaska, she said, is because several laws have passed that are unconstitutional. She suggested that one way to eliminate some lawsuits is to require that new laws pass a constitutionality requirement prior to enactment. This bill, she added, will have an impact on conservative and liberal interests.

MS. SMITH went on to say that Wev Shea spoke last year against a similar bill and again this year against this bill in the Senate Finance Committee indicating that this wrongly eliminates the public's voice. She stated that she does not believe the bill has sufficient public input. The notification online, she said, was inaccurate, saying that the Senate Finance Committee was not going to take any testimony and that [the bill] is only going to be heard in the House once. She expressed that she doesn't think that is a good public process and asked, if this bill is such an excellent bill, why it is being rushed.

CHAIR ROKEBERG asked whether she had anything in mind for a constitutional test.

MS. SMITH responded that she didn't. She remarked that she has noticed several bills that have been challenged and put down

based on their unconstitutionality. If all laws enacted by the legislature passed a constitutionality review, "we" wouldn't be setting ourselves up for lawsuits.

CHAIR ROKEBERG remarked that he is not so sure that most lawsuits emanate from laws passed by the legislature. He suggested that legislators are responsible for passing only constitutional laws.

MS. SMITH remarked that several times there have been attorneys tied to the state who don't think a particular law is constitutional, yet the legislature has passed bills like this in the past. In some ways, she said, the legislature sets itself up for lawsuits.

Number 1450

APRIL FERGUSON testified via teleconference in opposition to SB 183. She said she believes it is bad law and bad public policy. She stated:

I believe that this bill places a hurdle in front of citizens who wish to complain about government or seek redress from harm allegedly done by government. And I do not believe that all litigants are alike. I think that public [interest] advocates come (indisc.) on behalf of the general public and that this bill is really going to kill their ability to do so, or people are just not going to be able to afford to come before the court.

... I would like to bring your attention to a letter by Mr. Robert Briggs, a staff attorney for the Disability Law Center. ... Mr. Briggs talks about some of the unintended consequences of SB 183 and how ... this particular bill may affect land use regulations, redistricting decisions, illegal taxes, unlawful election (indisc.), [and] school district actions. Virtually any type of challenged government action would be possibly impacted by this bill. ...

I also think that this is being rushed. I don't think that a lot of people know that it is out there, and I think it takes a much more careful, thoughtful scrutiny than being addressed in the last stage of the legislative session. And if the purpose of this bill is aimed at natural resource litigation or the environmental community, then we all know those particular groups have access to quite a bit more sums of money than a number of these other smaller groups such as the Disability Law Center.

Number 1612

ROBERT BRIGGS, Staff Attorney, Disability Law Center of Alaska, came forth in opposition of SB 183. He stated that if the purpose of the bill is to prevent frivolous litigation, it's unnecessary. Existing doctrine in the public interest litigant exception clearly states that people who bring cases in bad faith and for vexatious purposes are liable for full attorney fees and costs. That doctrine applies to public interest litigants as well as anybody who brings a case because of a direct financial interest.

MR. BRIGGS remarked that he thinks the bill will have little effect on some of the cases it is intended to prevent in the future. Most cases involving the permitting of infrastructure for research development in Alaska will be brought in federal court and won't be affected by this bill.

MR. BRIGGS said it is unlikely the bill will stop out-of-state moneyed interests; in fact, he thinks the bill will fuel their fundraising efforts. It will give them an example of how the Alaska State Legislature is so adverse to their interests that they need more money to fund their lawsuits.

MR. BRIGGS said the important point, brought up by Mr. Bondurant, is that there will be unintended victims of this bill - Alaskan victims. Mr. Briggs suggested that even ordinary litigants with public interest cases will be victims, because it encourages focusing on who is a prevailing litigant based on issue, and it will cause two trials: one over the merits of the case, and one over who won by a greater margin and which issues they prevailed upon.

Number 1760

MR. BRIGGS went on to say that there is an insightful opinion by Justice Jay Rabinowitz against the revisions to Civil Rule 82 as it applies to regular litigants. Mr. Briggs stated that he had participated as part of the Civil Rule 82 revision committee around 1992. Justice Rabinowitz opposed Civil Rule 82 and argued that all of the factors would actually cause attorneys to fight more over the attorney fees after the litigation itself had been decided. Mr. Briggs said he thinks the supreme court wisely decided that that these factors should be fought about in public interest cases as well.

MR. BRIGGS stated that he thinks other victims of this bill would be those who seek court resolution of disputes involving something other than money. Some examples would be those who litigate over the question of when human life should be recognized; the parameters of religious practice and belief; or the limits of science and medicine and dealing with human cells or tissue, genetic, or health information.

MR. BRIGGS said if he has to tell a family that they should expect to pay 20 percent of the other side's fees, should they lose in a dispute, they will definitely be "chilled" from bringing a lawsuit, simply because they are poor.

MR. BRIGGS urged the committee to not pass the bill. However, if it should pass, he asked the committee to substantially revise it to eliminate its practical effect: taking away from the courts the discretion of when to exempt, from the penalty for losing, the cost of attorney fees.

Number 1869

CHAIR ROKEBERG asked Mr. Briggs whether the federal courts have the same [public interest litigant doctrine].

MR. BRIGGS responded that it has been awhile since he has brought a federal case. Generally, the Equal Access to Justice Act governs. He believes it to be somewhat similar to the public interest litigant exception; under that, people who bring

a case against the federal government for reasons that don't involve direct financial interests have a low risk of paying attorney fees, should they lose.

CHAIR ROKEBERG asked whether Rule 11 has ever been used in the State of Alaska.

MR. BRIGGS answered that he has never been involved in a case where it has been used; however, he hasn't been in state court very much. He believes a good civil litigator should never be in court, because he or she should convince the other side of the merits of the case before getting to the courthouse door.

CHAIR ROKEBERG asked Mr. Briggs what the National Association of Protection and Advocacy Systems is.

MR. BRIGGS responded that it is an association of nonprofit and state agencies in each of the 50 states. As a condition of receiving federal grants to serve people with disabilities, the state is required under federal law to set up a protection and advocacy system. The Disability Law Center, he said, was designated by Governor Hickel to be the protection and advocacy system of Alaska. As that system, [the Disability Law Center] receives some state and federal grants to advocate for people with disabilities. He stated, "It is our view that as part of the tools in our tool chest we need to bring lawsuits against the state."

MR. BRIGGS noted that currently he is litigating a series of administrative appeals about the administration of the Medicaid program on behalf of several families with disabled children. He said it is his belief that the state is not adequately managing the Medicaid system with regard to the benefits that should be made available to those families. He said, "If we lose the tool of seeking courts to redress how the state administers those benefits, it will be a significant tool we will have lost in advocating for people with disabilities."

CHAIR ROKEBERG asked whether in that case this has a general applicability to the individual or the group of clients.

Number 2053

MR. BRIGGS stated that he has five clients.

CHAIR ROKEBERG asked how that makes up the public interest.

MR. BRIGGS responded that [his organization] believes behavior the state exhibits is systemwide, at least in the Southeast region.

CHAIR ROKEBERG asked Mr. Briggs whether the courts have accepted their case as a public interest litigant case.

MR. BRIGGS answered that they are still in administrative proceedings and have prevailed in two of them; therefore, they will not need court action. He noted that they had moved to have the administrative proceedings joined as one proceeding, but the hearing officer declined.

CHAIR ROKEBERG asked whether it is in Mr. Briggs's best interest to try to group those cases together so they can qualify for a public interest litigant case.

MR. BRIGGS answered in the affirmative.

CHAIR ROKEBERG stated that he thinks the system is being corrupted.

Number 2117

MR. BRIGGS remarked that he would have to respectfully disagree with Chair Rokeberg about whether the system is being abused. In his experience, he said, there has not been a lot of public interest litigation that has been brought frivolously or abusively. The Dansereau case involved Wev Shea's challenge to the election practices of the current administration. The original request of fees involved about \$170,000 and the trial court awarded about \$20,000 in fees. He stated that perhaps it is abusive if the supreme court is saying, "You should not look into the factors in deciding whether to award attorney fees." However, he doesn't think the case itself was abusive; the issue was of fundamental importance to society, which is whether the city administration properly followed election law when deciding how to administer the election.

CHAIR ROKEBERG asked what the result of that case was and whether it had an effect on the state.

MR. BRIGGS answered that it is a larger question than he could answer.

CHAIR ROKEBERG stated that he figures it had almost no [effect] other than embarrassing the governor.

Number 2178

REPRESENTATIVE BERKOWITZ pointed out that there are four threshold questions that need to be answered affirmatively before someone can qualify as a public interest litigant. These are not easy thresholds to cross. He acknowledged that the public interest litigant serves another function besides advocating for the client and pursuing public policies. There is also a check and balance on governmental power. He stated that it is the only way he can think of whereby an individual can take on the weight of government. "If we retreat from that concept, we're retreating from one of the most fundamental notions of how a democracy should work," he added.

REPRESENTATIVE KOOKESH asked Mr. Briggs how long it will be after this bill passes before he would bring a suit.

MR. BRIGGS responded that he is not sure that [the Disability Law Center of Alaska] would challenge the bill if it were passed. He stated that it doesn't raise constitutional questions, except the right of access to the courts. The people who will be affected by this bill are going to be "mom and pop" people who can't afford the risk of loss. He explained that this would put those people "in the same pot" as all of the people who are subject to Rule 82. In most states, each side bears its attorney fees and costs, whether they win or lose; however, it is unusual that in Alaska if a person loses, he or she pays 20 percent of the defense's fees. He added that he thinks the Alaska Supreme Court wisely decided that public interest litigants should not be subject to that losing penalty the way the general litigant population is.

Number 2311

LAUREE HUGONIN, Alaska Network on Domestic Violence and Sexual Assault, came forth in opposition to SB 183. She stated:

We have the unfortunate circumstance of being a public interest litigant. In 1996, after the Domestic Violence Act passed, the court was refusing to implement all three forms of protective orders that the legislature had, in statute, allowed.

So, we didn't litigate against the executive branch or the legislative branch; we actually went to court against the court system and wanted a result to be that they would conform to the statutory provisions that allowed a victim of domestic violence to be able to get one two or three protective orders, the way that the legislature had set it out.

We prevailed in that case. We did not get all of our attorneys' fees; we probably got about 75 or 80 percent. ... Since we did prevail, we didn't have to face the issue of - if we had lost - having to pay the court system's fees. I think that's an important concept in the public interest litigant venue. It's not as if we were going against someone, maybe, of an equal kind of circumstance.

We were litigating against the court system. ... They have almost unlimited resources available to them and ... [are] able to continue that litigation, whereas we don't accept any state money. The federal money we get, of course, is for projects; it's not available for any kind of litigation.

... So we were fundraising for private donations to be able to carry forward the litigation. And it was fortunate that I had had experience in the legislative process ... so I could do a lot of legwork for the attorney. I could get legislative records, and I knew how to look up and research statutes. And we put a lot of our own effort into the case.

We also didn't just enter the case frivolously. ... We approached the court forms committee in trying to talk to them about how to resolve the situation. We approached the court system's [administration] in trying to resolve the situation. We tried to get an attorney general's opinion about the statutes so that the court could feel more comfortable in relying on that to resolve the situation. All of the steps that we had taken were to no avail. The court system was firm in its position, and they were not accurate, and they did have to change to allow for these three forms of protection.

We entered the lawsuit on behalf of a Jane Doe, who currently had a threatening situation with the protective orders. And then we entered it on behalf of victims who had come after that to be able to take up this protection that the legislature had afforded them. So, I think when you are determining whether or

not to move forward with the legislation, it is important to keep in mind that it's not just the million-dollar environmental cases that come forward that take advantage ....

TAPE 01-79, SIDE B  
Number 2465

MS. HUGONIN continued:

... [They are] not after money, but they're going to try and clarify statutes, trying to uphold public policy, trying to be able to have the institution of government correct its misbehavior, and I think that's an important avenue to allow to continue.

So, while I understand that this bill would preclude - if for some reason we would have to be in the position of being a public interest litigant again - for us requesting attorneys' fees, I think it would be very difficult for us to go forward against an entity with unlimited resources if we were going to have to pay their costs in the end. ...

There might be some area for compromise if you're looking at prevailing issues. I can see some merit to the fact that if I brought a case and I lost, ... maybe I shouldn't get all of the money back, if it was something that I didn't have much of a hope of winning in the first place. ... I think it's very important that that's deliberately thought through, and ... this isn't the best way to get to the people that you're really having a problem with.

REPRESENTATIVE KOOKESH asked Ms. Hugonin to define the people with whom [the legislature] is having a problem.

MS. HUGONIN responded that she understood last year from testimony that it was the major environmental groups that were coming forward that made people feel they were taking advantage of the public interest litigant's status.

Number 2382

PPM LaBOLLE, President, Alaska State Chamber of Commerce, came forth in support of SB 183. She stated:

Some groups routinely challenge state resource development decisions and our granted public interest litigant status by the courts. And these groups are often special-interest groups posing as public interest groups and public trusts. And their challenges typically allege as many as 15 or 20 specific deficiencies in state's administrative finding. ... When they're challenging the resource development decisions and they prevail, they generally prevail ... on one or two issues; however, they are awarded the attorneys' fees on all, as if they had won the whole case. That is one of the problems.

The other problem is, we're in a case right now and we were unable to achieve ... public interest litigant status. We had to raise money; I think the meter is

running at just a tad in excess of \$200,000 right now. This is in defense of the tort reform ... law that was passed in '97. And we feel that the ... unfair part about those who are public interest litigants [is] if they win, they win it all, and if they lose, they still win it all. ... The donations that we've collected for our case have been \$25 here, \$50 there, and \$100 someplace else. ... It is just a very one-sided situation. The state chamber was one of the leading groups [that] fought long and hard to achieve Rule 82, and the exception is not fair to those of us who have to abide by Rule 82.

CHAIR ROKEBERG remarked that he is astounded that the state chamber almost has to go to the "bake sale" level to acquire funding. He said he thought big business was the monolith of this state in terms of its deep pockets and its ability to generate money to influence the public process.

MS. LaBOLLE said that is a misconception.

CHAIR ROKEBERG asked Ms. LaBolle whether the environmental community has greater access to funding than the business community does in Alaska for public policy formation.

MS. LaBOLLE answered that that is the perception; however, she would have no way of knowing if there is proof to that.

Number 2215

REPRESENTATIVE BERKOWITZ asked Ms. LaBolle why their effort to achieve public interest litigant status was rejected.

MS. LaBOLLE responded that she doesn't know.

REPRESENTATIVE BERKOWITZ asked whether they tried to get in as an amicus.

MS. LaBOLLE responded that [the Alaska State Chamber of Commerce] is an amicus.

REPRESENTATIVE BERKOWITZ stated that on the face of what it takes to be a public interest litigant, that doesn't qualify. Only a private party can be expected to bring a suit. He stated that if the state were already involved, the public interest litigant would be the plaintiff, not the defendant.

CHAIR ROKEBERG remarked that it doesn't seem fair; with the \$3 million-plus cost, it could be put in the court budget.

Number 2144

REPRESENTATIVE BERKOWITZ noted that these are areas in which folks have won.

CHAIR ROKEBERG stated that perhaps it was only a portion of the claims.

REPRESENTATIVE BERKOWITZ stated that perhaps the payment only cost a portion of the cost.

REPRESENTATIVE KOOKESH stated that he doesn't think those suits would have gone away even if there hadn't been this exception to

rule 82. He said he thinks a lot of those people could afford to bring those cases.

Number 2116

MS. LaBOLLE remarked that [the Alaska State Chamber of Commerce] had found that some groups make a good living on these public interest litigant groups by suing on all sorts of issues within a case, knowing they can't prevail on much. However, if they prevail on one [issue], they've gained enough money to have six more cases.

REPRESENTATIVE BERKOWITZ asked who the groups are that are getting rich off of public interest litigant status.

MS. LaBOLLE answered that the perception is that they are mostly the environmental groups who are opposing resource development.

REPRESENTATIVE BERKOWITZ asked for the names of the groups.

CHAIR ROKEBERG asked Ms. LaBolle whether they would be Trustees for Alaska, Earth Justice, and the Sierra Club.

MS. LaBOLLE responded that "at the risk of being sued for alleging anything in this committee," it is generally believed that those are the sorts of groups that gather funding through the success of their lawsuits.

REPRESENTATIVE BERKOWITZ stated that he understands about perceptions, but he also understands one objective in court is to arrive at some form of truth. If the perception is incorrect, he thinks one way to correct reality is by putting real groups out there that are actually benefiting.

Number 2008

REPRESENTATIVE KOOKESH asked, when balancing what's in the best interest of the public, whether it is in [the state's] best interest to get rid of some of these conservation groups at the expense of the mom and pops.

MS. LaBOLLE responded that it is a difficult situation; however, if the commitment to a principle is there, then everyone should be willing to "pony up" the cost of the litigation. It will provide more basis if [a group] shows that it has gathered support to even bring the litigation.

REPRESENTATIVE KOOKESH asked what would happen to an individual who sees that he or she may owe somebody money down the line.

MS. LaBOLLE noted that court policy establishes public interest litigant status. What is being sought through legislation such as this is legislative intent, as well as having the elected representatives making the decisions as to what the public policy is.

CHAIR ROKEBERG asked, if this is court policy, whether the courts should pay, or whether the members of the bar should go pro bono so that there wouldn't be a discussion of legal fees.

Number 1811

JUDY ERICKSON, Owner, Capital Information Group, came forth to

share a personal story. She stated that she and her husband brought a suit against the state for failure to disclose records that had been public for years. She said they were granted public interest litigant status and prevailed on most of their [claims]. Their attorneys got minimal fees; they negotiated with the state over the fees.

MS. ERICKSON remarked that her concern is that they could never have brought a suit against the state if they had thought they would have had to pay. The state could drag it out for years. She pointed out that it is the "small guy" [who is affected].

CHAIR ROKEBERG asked Ms. Erickson whether she understands the frustration exhibited by many of the members over this. In addition, he asked whether there is abuse of this.

MS. ERICKSON responded that she can see their frustration when [the legislature] promotes resource development and someone tries to stop it. She said she thinks in most cases people bring [suits] because they truly believe they're right. She stated:

You're throwing out the baby with the bath water. You're saying, ... "OK, we're going to get rid of the whole." And then what happens to the Dale Bondurants and the Judy Ericksons ... who are fighting for something? ... Pam [LaBolle] said that we should ... get a group going. ... I'm a sole proprietor ... and I don't have a lot of time to go soliciting to get contributions so that I can sue the state.

Number 1649

REPRESENTATIVE COGHILL stated that if a well-funded group had come [to Ms. Erickson] at the time when she was interested in pursuing her interest, it would have given her a lot of publicity. He said he thinks that is what [the legislature] is struggling about - how to filter. If there were people in Alaska who oppose getting information, they would only have the voice of the system. He asked Ms. Erickson whether she sees that as an unfairness.

MS. ERICKSON responded that she brought her case not knowing she had public interest litigant status. She said she first sued against the Hickel Administration, which opposed the status. When the Knowles Administration came in, they continued the case, but they backed down on the opposition. Most people bring these cases not knowing if they are going to get the status or not. She added that if she had been denied the status, she would have had to reconsider the cost.

CHAIR ROKEBERG stated that he thinks the committee's interest is in the legal factors.

REPRESENTATIVE BERKOWITZ asked which [factor]. He said he keeps hearing about this great legal factor.

REPRESENTATIVE COGHILL responded that they have talked about environmental communities.

REPRESENTATIVE BERKOWITZ stressed that he has to hear names, because the environmental community is "this big nebulous thing." He asked which environmental law firms are doing this.

CHAIR ROKEBERG offered Trustees for Alaska.

REPRESENTATIVE BERKOWITZ agreed that that is an Alaskan-based organization.

CHAIR ROKEBERG offered Earth Justice.

REPRESENTATIVE BERKOWITZ indicated that Earth Justice is not an Alaskan-based organization. Therefore, he said, there is one case that [the environmental] community has had. He said he hardly sees evidence of rampant Alaskan environmental [lawsuits].

Number 1536

REPRESENTATIVE COGHILL remarked:

I think that if you look down through this list ... up through 1993, ... the case could be made. ... And I agree with ... Ms. Erickson - it's a tool that's being used, and sometimes it's not being used the way I personally would the public policy. Looking for the court to use Rule 82 is a way that they could use some discretionary powers.

REPRESENTATIVE OGAN stated that he supports the concept of what the bill is trying to do, but doesn't want to eliminate the Scott Ogan, Judy Erickson, and Dale Bondurants, the "little people" that this was designed for, to be able to sue and get some coverage. He said he would like to work on this a little more. He added that he doesn't think there are enough votes to amend the court rules the way the bill is written.

Number 1390

MR. CHURCH responded that he believes Senator Donley would be willing to work on the points that were raised. He said he thinks part of it is addressed within subsection (b)(3), subparagraph (K) of Rule 82. It says that the court can, in awarding attorney fees, consider other equitable factors deemed relative to the court.

MR. CHURCH said he thinks there is a lot of latitude given to the court to look at situations in which an individual versus a large corporation is bringing a public interest litigant case. Almost exclusively, he pointed out, the testimony has been that this will take away public interest litigant cases. He said he wonders if that means people don't trust the courts to make reasonable decisions in evaluating these cases.

MR. CHURCH clarified that the law establishes that Rule 82 applies to all cases, regardless of whether it is a public interest litigant or a victim of a horrendous crime trying to bring a civil suit against a perpetrator. This only gives the courts a baseline to look at an attorney fee award, and it in no way prevents the court from doing what it has done in the past: award full attorney fees.

MR. CHURCH offered some history. When [PILD] was established in 1974, the court said the exception to Rule 82 was designed to encourage plaintiffs to bring issues of public interest before the courts. There was no differentiation between individuals

like [Ms. Erickson] and any large organization. Later, in the Anchorage v. McCabe opinion in 1977, Chief Justice Boochever submitted an opinion in opposition. His comments were:

The opinion [regarding the Gilbert v. State on the encouragement issue] seems to take the position that such litigation should be actively encouraged. In my view, our function is not to encourage litigation of any sort.

On the other hand I believe that we should strive to prevent our courts from becoming inaccessible as a practical matter to those who seek to vindicate rights shared by the public.

MR. CHURCH explained that the chief justice at that time was looking for a balance in the cases. At the same time, a plaintiff shouldn't be encouraged to bring a case because of any perceived award. Certainly, he said, in these cases the only monetary award is to the attorneys.

Number 1151

MR. CHURCH stated that this would still allow the courts to disregard apportionment as in the Dansereau case. In that case, they were public interest litigants who only prevailed on one of three issues. The lower court apportioned the attorney fees, but the supreme court, on an appeal, awarded full attorney fees and said the lower court did not have the right to apportion fees.

CHAIR ROKEBERG asked Mr. Church whether he had looked at the federal Equal Access to Justice Act.

MR. CHURCH answered that he hadn't. The only thing he'd researched was what goes on in other states. Essentially, the other 49 states don't make a differentiation as to public interest litigants. They award attorney fees based on a set percentage or a set dollar value per hour.

CHAIR ROKEBERG asked whether [other states] recognize [PILD].

MR. CHURCH responded that they don't specifically. For example, cases that he reviewed on the West Coast do not.

REPRESENTATIVE BERKOWITZ clarified that the antecedents of public interest litigants is known in common law as *qui tan* suits. In other states, they are also known as private attorney general suits. This is not a uniquely Alaskan feature.

Number 0991

REPRESENTATIVE OGAN stated that he had talked with Gerald Luckhaupt [drafting attorney of Legislative Legal and Research Services], who said, "Alaska is the only state when you lose, you pay attorneys' fees." He asked Mr. Church whether that is correct.

MR. CHURCH answered that he has also heard that statement.

REPRESENTATIVE OGAN remarked that people who are interested in suing are afraid because of that, which is already a disincentive to litigate. This public interest law basically

exempts them from that provision.

MR. CHURCH stated that when the state loses or wins a public interest litigant case, it pays the attorney fees.

CHAIR ROKEBERG stated that in the bill packet there is a list of at least 70 public interest litigant cases. He asked Mr. Church whether his office broke those down to see who they were by parties, and what type of representation they had.

MR. CHURCH responded that he has the information that the list was based on, which provides the case name and a description of the case; however, it does not give who the representing attorney was.

Number 0860

REPRESENTATIVE BERKOWITZ pointed out that there were 70 cases in the past ten years; the high year was 1995, with twenty [cases], and the low year was last year, with three. He said it hardly seems a rampant problem.

CHAIR ROKEBERG responded that the committee takes up a lot of issues that only affect a small number of people. They try to avoid the constitutional constraints about special-interest legislation, but many times try to "cure the evils" that may befall a small number of people.

REPRESENTATIVE BERKOWITZ remarked that he is trying to prevent the committee from creating a huge injustice. He said, "Let's move the bill and kill it."

CHAIR ROKEBERG stated that he would like to first see what research has been done, and that Representative Ogan has already agreed to work on the bill.

REPRESENTATIVE BERKOWITZ and CHAIR ROKEBERG spoke simultaneously: Representative Berkowitz moved to report SB 183 out of committee, while Chair Rokeberg announced that he would recess the meeting. [No action was taken on the motion. SB 183 was held over.]

Bill Root:



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**INFORMAL OPINIONS**  
**OFFICE OF THE ATTORNEY GENERAL**  
**1992 Vol.II**



**DEPARTMENT OF LAW**  
**STATE OF ALASKA**

# MEMORANDUM

State of Alaska

Department of Law

Hon. Carl L. Rosier  
Commissioner  
Dep't of Fish and Game

DATE: October 23, 1992

FILE NO.: 663-93-0088

TEL. NO.: 465-3600

SUBJECT: Applicability of the  
Americans with Disabilities  
Act to regulations  
of the Boards of Fish  
and Game

FROM:

Jack Griffin /s/  
Assistant Attorney General  
Natural Resources Section

You have asked several questions about what the Joint Boards of Fisheries and Game and the Department of Fish and Game can do to ensure that hunting and fishing regulations in Alaska comply with the Americans with Disabilities Act (ADA). This memorandum will explore the general requirements of the ADA, address whether the boards may delegate to the commissioner the authority to accommodate persons with disabilities (they can), and suggest procedures that the boards may adopt to enable hunters and fishers with disabilities to request reasonable modifications to policies they feel are discriminatory.<sup>1</sup>

I. GENERAL REQUIREMENTS OF TITLE II OF THE AMERICANS WITH DISABILITIES ACT AND THE IMPLEMENTING REGULATIONS

Congress enacted the Americans with Disabilities Act (ADA), 42 U.S.C.A. § 12101 et seq. (Supp. 1992), because among other things "discrimination against individuals with disabilities continue[s] to be a serious and pervasive social problem; . . . individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion . . . [and the] failure to make modifications to existing facilities and practices . . . ; [and] the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity . . . to pursue those opportunities for which our free society is justifiably famous . . . ." 42 U.S.C.A. § 12101(2), (5), and (9). To ensure its provisions are

<sup>1</sup> This memorandum does not try to address the full impact of the ADA upon the boards and the department. For example, the potential need for wheelchair access to board meetings or sign language interpreters for informational programs of the department is not addressed. The scope of this memorandum is limited to the potential impact of the ADA upon hunting and fishing regulations in Alaska, and the procedures the boards and department may adopt to insure that those regulations do not discriminate against the disabled.

complied with, the Act provides persons who have suffered discrimination because of their disabilities the same remedies, procedures, and rights that are available under the Civil Rights laws. See 42 U.S.C.A. § 12132. As with those laws, the Department of Justice has broad enforcement authority.

Title II of the ADA, 42 U.S.C.A. § 12131 et seq. (Supp. 1992), prohibits public entities from discriminating against individuals with disabilities when providing public services:

Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C.A. § 12132.

A "qualified" individual with a disability is an individual with a disability who meets the "essential eligibility requirements" of the agency's program, service, or activity.<sup>2</sup> Generally, there are no "essential eligibility requirements" to sport hunt or fish in Alaska other than the possession of a valid sport hunting or fishing license. Thus, virtually anyone with a disability may be qualified to hunt or fish in Alaska. "Disability" means, with respect to an individual, "a physical or

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<sup>2</sup> A "qualified individual with a disability" is defined as one who,

with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

42 U.S.C.A. § 12131(2) (Supp. 1992).

mental impairment that substantially limits one or more of the major life activities of such individual . . . ."<sup>3</sup>

<sup>3</sup> The definition of disability found in the Department of Justice's title II regulations provides in full:

Disability means, with respect to an individual, a physical or mental impairment that substantially limits one or more of the major life activities of such individual; a record of such an impairment; or being regarded as having such an impairment.

(1)(i) The phrase physical or mental impairment means--

(A) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin, and endocrine;

(B) Any mental or psychological disorder such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

(ii) The phrase physical or mental impairment includes, but is not limited to, such contagious and noncontagious diseases and conditions as orthopedic, visual, speech and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, specific learning disabilities, HIV disease (whether symptomatic or asymptomatic), tuberculosis, drug addiction, and alcoholism.

(iii) The phrase physical or mental impairment does not include homosexuality or bisexuality.

(2) The phrase major life activities means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(3) The phrase has a record of such an impairment means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits

(continued...)

The antidiscrimination provisions of title II of the ADA clearly apply to the Department of Fish and Game and the Boards of Fisheries and Game. For purposes of title II, a "public entity" includes any state or local government, and any department, agency, or other instrumentality of a state or local government. 42 U.S.C. § 12131(1)(A) & (B) (Supp. 1992). It is also likely a court would find that the regulations promulgated by the boards, such as those identifying the areas and the methods and means for taking fish and game, are part of a "service," "program," or "activity," since

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<sup>3</sup>(...continued)

one or more major life activities.

(4) The phrase is regarded as having an impairment means--

(i) Has a physical or mental impairment that does not substantially limit major life activities but that is treated by a public entity as constituting such a limitation;

(ii) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment;  
or

(iii) Has none of the impairments defined in paragraph (1) of this definition but is treated by a public entity as having such an impairment.

(5) The term disability does not include--

(i) Transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders;

(ii) Compulsive gambling, kleptomania, or pyromania; or

(iii) Psychoactive substance use disorders resulting from current illegal use of drugs.

sport hunting and fishing must take place in conformance with those regulations.<sup>4</sup>

Congress directed the Department of Justice to adopt regulations implementing title II of the ADA, see 42 U.S.C. § 12134(a) (Supp. 1992), and those regulations have been codified at 28 C.F.R. part 35. Section 35.130 sets forth the general prohibition against discrimination, and provides, in part, as follows:

(a) No qualified individual with a disability shall, on the basis of disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any public entity.

(b)(1) A public entity, in providing any aid, benefit, or service, may not . . . on the basis of disability-(i) Deny a qualified individual with a disability the opportunity to participate in or benefit from the aid, benefit, or service; [or] (ii) Afford a qualified individual with a disability an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others . . .; [or]. . . (vii) Otherwise limit a qualified individual with a disability in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving the aid, benefit, or service.

These regulations also provide that an agency may not employ "methods of administration" that have the effect of denying persons with disabilities the ability to enjoy the benefits of an agency's programs:

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<sup>4</sup> While neither the ADA nor the regulations promulgated pursuant to the ADA define these terms, the 1988 amendments to the Rehabilitation Act of 1973 define "program or activity" to mean "all of the operations of . . . a department, agency, special purpose district, or other instrumentality of a state or of a local government . . ." 29 U.S.C.A. § 794(b) (Supp. 1992). Because of the close relationship between the Rehabilitation Act of 1973 and the ADA, courts may look to this definition when interpreting the ADA.

Hon. Carl L. Rosier, Commissioner  
Department of Fish and Game  
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A public entity may not . . . utilize criteria or methods of administration:

(i) That have the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability; [or]

(ii) That have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the public entity's program with respect to individuals with disabilities . . . .

28 C.F.R. § 35.130(b)(3).

There is a dearth of case law interpreting the ADA, due of course to its recent enactment. Nevertheless, it is possible to obtain substantial insight into the scope and meaning of Title II by examining case law interpreting its precursor, section 504 of the Rehabilitation Act of 1973, Pub. L. 93-112, 87 Stat. 394, 29 U.S.C.A. § 794 (1985 and Supp. 1992). Section 504 is virtually identical to section 202 of the ADA, 42 U.S.C.A. § 12132, except that section 504 applies only to state agencies receiving "Federal financial assistance." The Department of Justice, in the comments preceding the regulations implementing title II of the ADA, describes title II as "essentially extend[ing] the nondiscrimination mandate of section 504 to those State and local governments that do not receive Federal financial assistance . . . ." <sup>5</sup>

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<sup>5</sup> 56 Fed. Reg. 35694 (1991). As a result, the Department of Justice's regulations implementing title II of the ADA "[hew] closely to the provisions of existing section 504 regulations." *Id.* This approach is in fact mandated by section 204 of the ADA, which provides that the regulations implementing Title II must be consistent with the Department of Health, Education, and Welfare's coordination regulation for section 504, now codified at 28 C.F.R. Part 41, and, with respect to "program accessibility, existing facilities," and "communications," with the Department of Justice's section 504 regulations for its federally conducted programs and activities, codified at 28 C.F.R. Part 39. 42 U.S.C.A. 12134(b) (Supp. 1992). See 56 Fed. Reg. 35694 (1991). In addition, section 203 of the ADA, 42 U.S.C.A. 12133 (Supp. 1992), provides that the remedies, procedures, and rights available under section 504, set forth in section 794a of Title 29, shall be the remedies, procedures, and rights for any person alleging discrimination on the basis of disability in violation of 42 U.S.C.A. § 12132.

In determining whether a particular regulation is consistent with the ADA, the primary issue will be whether the person with a disability has been given "meaningful access" to the benefit or service at issue. See *Alexander v. Choate*, 469 U.S. 287, 301 (1985). In *Choate*, the United States Supreme Court, interpreting § 504 of the Rehabilitation Act, held that the balance between the rights of the handicapped to be integrated into society and the legitimate interests of agencies in preserving the integrity of their programs is met where "an otherwise qualified individual [is] provided with meaningful access to the benefit the [agency] offers." 469 U.S. at 301.

The benefit itself, of course, cannot be defined in a way that effectively denies otherwise qualified handicapped individuals the meaningful access to which they are entitled; to assure meaningful access, reasonable accommodations in the [agency's] program or benefit may have to be made.

*Id.* See *Southeastern Community College v. Davis*, 442 U.S. 397, 410-13 (1979). In determining the appropriate scope of the benefit at issue, and whether it is "readily accessible to and usable by individuals with disabilities," the regulations implementing title II provide that the service, program, or activity must be "viewed in its entirety."<sup>6</sup>

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<sup>6</sup> 28 C.F.R. § 35.150(a) provides:

General. A public entity shall operate each service, program, or activity so that the service, program, or activity, when viewed in its entirety, is readily accessible to and usable by individuals with disabilities. The paragraph does not--

(1) Necessarily require a public entity to make each of its existing facilities accessible to and usable by individuals with disabilities;

(2) Require a public entity to take any action that would threaten or destroy the historic significance of an historic property; or

(3) Require a public entity to take any action that it can demonstrate would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative  
(continued...)

The principle of meaningful access is illustrated in *Baker v. Department of Environmental Conservation* 634 F. Supp. 1460, 1464-66 (N.D.N.Y. 1986), where a number of handicapped individuals alleged that a regulation prohibiting the use of "mechanically propelled vessels and aircraft" on certain bodies of water within the Adirondack State Park discriminated against them in violation of § 504 of the Rehabilitation Act. The court rejected the handicapped individuals' arguments on the grounds that "over fifty-one percent of the Park land is classified . . . [to] allow the use of motorized vehicles and float planes . . . [and] eighty-three percent of the publicly usable Adirondack lake/pond surface water is open to motors . . . ." 634 F. Supp. at 1465. As a result, "it is clear the handicapped do have meaningful access to the Adirondack Park as a whole." *Id.* (emphasis added). The analysis employed by the court in *Baker* illustrates the analysis the boards and the department should use to determine whether a particular hunting or fishing regulation denies persons with disabilities a meaningful opportunity to hunt or fish.

If there is no meaningful access to the service or benefit at issue, federal regulations require the agency to "make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability . . . ." 28 C.F.R. § 35.130(b)(7), 56 Fed. Reg. 35718-19 (1991) (emphasis added). See *Choate*, 469 U.S. at 300. Modifications do not have to be made, however, if the agency "can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity," 28 C.F.R. § 35.130(b)(7), or would result in "undue financial and administrative burdens."<sup>7</sup> These regulations mirror the *Choate* and

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<sup>6</sup>(...continued)  
burdens . . . .

(Emphasis added.)

<sup>7</sup> 28 C.F.R. 35.150(a)(3). When a public entity believes that complying with the ADA will fundamentally alter the nature of its program or result in undue administrative burden or expense, it has the burden of proof and must make specific findings that support its conclusion:

In those circumstances where personnel of the public entity believe that the proposed action would fundamentally alter the service, program, or activity or would result in undue financial and  
(continued...)

<sup>7</sup>(...continued)

administrative burdens, a public entity has the burden of proving that compliance with § 35.150(a) of this part would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the head of a public entity or his or her designee after considering all resources available for use in the funding and operation of the service, program, or activity, and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action would result in such an alteration or such burdens, a public entity shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that individuals with disabilities receive the benefits or services provided by the public entity.

28 C.F.R. 35.150(a)(3). The Department of Justice's regulations further suggest methods a public agency may use to comply with the regulations:

A public entity may comply with the requirements of this section through such means as redesign of equipment, reassignment of services to accessible buildings, assignment of aides to beneficiaries, home visits, delivery of services at alternate accessible sites, alteration of existing facilities and construction of new facilities, use of accessible rolling stock or other conveyances, or any other methods that result in making its services, programs, or activities readily accessible to and usable by individuals with disabilities. A public entity is not required to make structural changes in existing facilities where other methods are effective in achieving compliance with this section. A public entity, in making alterations to existing buildings, shall meet the accessibility requirements of §35.151. In choosing among available methods for meeting the requirements of this section, a public entity shall give priority to those methods that offer services, programs, and activities to qualified individuals with disabilities in the most integrated setting  
(continued...)

Davis decisions, where the Supreme Court held that "while a[n agency] need not be required to make 'fundamental' or 'substantial' modifications to accommodate the handicapped, it may be required to make 'reasonable' ones." *Choate*, 469 U.S. at 300.

While it is impossible to predict with certainty the effect these principles will have upon fish and game management in Alaska, it is more likely than not that few, if any, modifications to existing regulations will be required. To illustrate a circumstance where modification of a regulation might be required, imagine the Board of Game permitted but a single moose hunt in Alaska, in an area traversed by roads and trails, but limited access exclusively to access by foot. Modification of the hunt to permit a hunter with a disability to use pack animals or an off-road vehicle would probably be required by the ADA, since a meaningful opportunity for persons with disabilities to take moose would not otherwise exist, and allowing one or more persons with disabilities to use pack animals or an off-road vehicle probably would not fundamentally alter the hunt or cause undue administrative burdens or expense. Notice, however, that the modification relates to a barrier created by the Board, *i.e.*, the prohibition of access except by foot. Let us assume that in this hypothetical hunt any form of access was permissible, but that because of rugged terrain and thick brush, *i.e.*, barriers created by nature, access by persons with disabilities was as a practical matter precluded. In our view the ADA would not require modification of the hunt, since there is nothing in that Act to indicate an intent that public entities cure the disparate impact natural barriers have upon persons with disabilities.<sup>8</sup>

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<sup>7</sup>(...continued)  
appropriate.

28 C.F.R. 35.150(B)(1).

<sup>8</sup> This is evidenced in part by § 507(c)(1) of the ADA, which deals with access to federal wilderness areas:

Congress reaffirms that nothing in the Wilderness Act is to be construed as prohibiting the use of a wheelchair in a wilderness area by an individual whose disability requires use of a wheelchair, and consistent with the Wilderness Act no agency is required to provide any form of special treatment or accommodation, or to construct any facilities or modify any conditions of lands within a wilderness  
(continued...)

**II. THE BOARDS MAY DELEGATE TO THE COMMISSIONER THE AUTHORITY TO ACCOMMODATE REQUESTS FROM PERSONS WITH DISABILITIES FOR MODIFICATIONS TO EXISTING HUNTING AND FISHING REGULATIONS AND POLICIES**

You have asked whether "the boards [can] establish eligibility criteria and delegate to the commissioner the authority to accommodate disabled persons." If by "establish[ing] eligibility criteria" you are referring to a process to determine who does or does not have a disability, the answer is yes, as long as the boards do not establish criteria that are any more rigorous or less comprehensive than required by the ADA's definition of "disability." The boards also can empower the commissioner to determine whether a particular hunter or fisher fits within the ADA's definition, and may further delegate to the commissioner the authority to make reasonable accommodations for persons with disabilities. This should not, however, discourage the boards from addressing the concerns of persons with disabilities in the first instance, when proposals for particular hunting or fishing regulations are initially considered.

The Boards of Fisheries and Game were created for purposes of conservation and development of the fishery and game resources of the state. AS 16.05.22(a)(b). Pursuant to AS 16.05.251, the Board of Fisheries may adopt regulations it considers advisable for "establishing open and closed seasons and areas for the taking of fish," AS 16.05.251(a)(2); "establishing the means and methods employed in the pursuit, capture and transport of fish," AS 16.05.251(4); and "regulating commercial, sport, subsistence, and personal use fishing as needed for the conservation, development, and utilization of fisheries," AS 16.05.251(a)(12). The Board of Game has similar powers with respect to the state's game resources. See AS 16.05.255(2), (3), and (10). For the purpose of administering AS 16.05.251 and 16.05.255, each board has been given specific authority to "delegate authority to the commissioner to act in its behalf." AS 16.05.270.

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<sup>B</sup>(...continued)

area in order to facilitate such use.

42 U.S.C.A. § 12207(c)(1) (emphasis added).

However, if the Board of Game chose to establish a hunt in a particular area simply because that area was inaccessible to the disabled, that would be an act of purposeful discrimination prohibited by the ADA.

Requests for accommodation from hunters and fishers with disabilities will necessarily affect the boards' regulations governing, among other things, the methods and means of taking the state's fish and game resources. Since it is possible the boards will not be able to address every request for accommodation -- because of the limits imposed by the boards' schedules, or because the impacts of a particular regulation were not obvious at the time it was adopted, or for other reasons -- procedures should be in place that enable the department to address requests for accommodation as they arise. Because neither the department nor the boards have the discretion to ignore the ADA's requirements, the boards' failure to adopt adequate procedures probably will not be a defense to a lawsuit alleging the state failed to make a reasonable accommodation. AS 16.05.270 provides the necessary authority for the boards to adopt such procedures. So long as these procedures are consistent with the ADA and reasonably necessary to carry out that statute's purpose, the boards' approach will be upheld. See *Trustees for Alaska v. State, Department of Natural Resources*, 795 P.2d 805, 812 (Alaska 1990) (regulations delegating a statutory determination to another agency will be upheld where they are consistent with and reasonably necessary to carry out the purposes of the statute).

III. SUGGESTED PROCEDURES FOR ENABLING THE DEPARTMENT TO HANDLE REQUESTS FOR ACCOMMODATION UNDER TITLE II OF THE ADA

A number of states have grappled with the issue of how to effectively accommodate the concerns of persons with disabilities in their desire to hunt and fish. For our present purposes, the approach adopted by the Missouri Conservation Commission (the rough equivalent of Alaska's Boards of Fisheries and Game) is probably the most helpful. The relevant provision of the Missouri Wildlife Code provides as follows:

3 CSR 10-7.411 Special Methods for Handicapped Persons.

(1) The director may issue special authorization to physically handicapped persons to allow them to hunt and take wildlife by methods not prescribed in hunting rules in accordance with the following:

(A) Any handicapped person may make application to the director for a special exemption using a form provided by the department which describes the physical handicap and the type of exemption desired and is signed by a licensed physician. If

granted, the authorization will be in writing and describe in detail the handicap and the type of special method authorized. This written authorization shall be carried by the person at all times while hunting.

(B) The person must have the physical disability described in the special authorization and the disability must be to such an extent that hunting by prescribed methods is impossible.

Under this approach, the person with a disability submits an application for an exemption from the requirements of a specific hunting restriction (a typical example might be the general rule against hunting from a motorized vehicle), and includes with the application a physician's verification of the disability. If the exemption is granted, the person with a disability carries written authorization for the exemption while hunting.<sup>9</sup> A copy of the form developed by the Director of the Missouri Department of Conservation is attached to this memorandum.

The Department of Law believes that the approach adopted by Missouri is essentially sound, and provides a useful starting point for the development of a similar approach by the Boards of Fisheries and Game under the ADA. We would recommend slightly modifying Missouri's approach, as follows:

1. The boards and the department should take all necessary steps to ensure that the regulations and policies they adopt or propose to adopt comply with the ADA. A person with a disability (or personal representative of the person with a disability) who believes a proposed or existing regulation or policy is inconsistent with the ADA should, if possible, submit an alternate proposal (under the normal schedule for

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<sup>9</sup> Under the Missouri regulation, the applicant must carry at all times a "detailed description" of the applicant's disability. We believe such a requirement would raise serious concerns under Alaska's constitutional right of privacy, Alaska Const., art. I, § 22. The written authorization should therefore omit any description of the applicant's disability or should limit the description to the minimum necessary to allow enforcement in the field; the description of the exemption or modification can be as detailed as the circumstances require. The Missouri regulation also refers only to physical disabilities. The ADA applies to both physical and mental disabilities.

submitting proposals or by petition) to the relevant board that (a) explains why the regulation or policy prohibits meaningful access to a program, service, or benefit; and (b) suggests modifications to the regulation or policy that will reasonably accommodate the needs of persons with disabilities. The boards should use the standards set forth in paragraphs 5, 6, and 7, below, to evaluate their regulations, policies and proposals.

2. A person with a disability (or personal representative of the person with a disability) who believes an existing regulation or policy prohibits meaningful access to a program, service, or benefit, should submit an application, on a form developed and made available by the commissioner, that contains:

- (a) the statement of a physician or other competent documentary evidence sufficient to enable the commissioner to ascertain the nature and extent of the individual's disability;

- (b) a statement by the person with a disability that identifies the regulation or policy at issue and explains why the individual feels the regulation or policy prohibits meaningful access to a program, service, or benefit; and

- (c) a statement by the person with a disability requesting an exemption from the regulation or policy, or suggesting one or more modifications to the regulation or policy that the individual feels are necessary to reasonably accommodate the individual's disability.

3. An application requesting an exemption from or modification to an existing regulation or policy should be submitted to the commissioner at least 30 days prior to the date the person with a disability wants to hunt, fish, or participate in the activity that is the subject of the application. This deadline will enable the commissioner to evaluate the application and the effects, if any, that granting the exemption or modification may have upon the conservation, development, or utilization of the fish and game resources of the state. The commissioner should be given the discretion to accept applications that are submitted after the deadline where there is a legitimate reason for not complying. An obvious example would be a hunt that has been modified by an emergency regulation.

4. The commissioner should determine whether to grant an exemption or modification as soon as practicable after

receiving an application, and where possible at least two weeks prior to the date the applicant wishes to hunt, fish, or participate in the activity that is the subject of the application.

5. The commissioner need not grant an exemption or modification where the regulation or policy does not, when viewing the relevant program, service or benefit as a whole, prohibit the person with a disability from obtaining meaningful access to the program, service, or benefit.
6. In deciding whether to grant the relief requested, the commissioner is not limited to the form of the exemption or modification requested by the person with a disability. The commissioner may, when necessary to avoid discrimination, adopt any exemption or modification that provides the person with a disability meaningful access to the program, service, or benefit at issue.
7. If an existing regulation or policy prohibits a person with a disability from meaningful access to a program, service, or benefit, but the commissioner finds that the person cannot be accommodated without (a) fundamentally altering the program, service, or benefit; or (b) incurring undue administrative burdens and expense, the commissioner should set forth, in writing, all facts that support the decision. The decision must be made after considering all resources available for use in the funding and operation of the service, program, or benefit. The commissioner should take any other action that would not result in such an alteration or burdens but that nevertheless provides persons with disabilities the benefits or services at issue.
8. If the commissioner decides to grant all or part of the relief requested in the application, the commissioner should provide a written description of the authorized exemption or modification to the handicapped individual. The written authorization should be carried by the person at all times while hunting or fishing.

The procedure outlined above attempts to incorporate many of the terms and specific requirements of the ADA. The procedure is illustrative only, and we do not suggest this procedure is the only possible means of carrying out the ADA's obligations. Nevertheless, the approach ultimately adopted by the boards should be adopted as regulations and should contain the substance of the procedure described above. Finally, please note that this memorandum, by setting forth the minimum requirements of the ADA,

Hon. Carl L. Rosier, Commissioner  
Department of Fish and Game  
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should not be construed as discouraging the boards or the department from doing more than the ADA requires to provide persons with disabilities opportunities to hunt and fish in Alaska.

#### IV. CONCLUSION

The Boards of Fisheries and Game and the Department of Fish and Game must ensure that their regulations and policies do not preclude persons with disabilities from a meaningful opportunity to hunt and fish in Alaska. The boards may delegate to the commissioner the authority to grant reasonable exemptions from or modifications to existing regulations or policies when those exemptions or modifications are necessary to accommodate persons with disabilities and avoid discrimination. No exemptions or modifications are necessary where existing regulations or policies do not impose artificial barriers upon hunters and fishers with disabilities, or where such exemptions would fundamentally alter the program, service, or benefit at issue, or cause undue administrative burdens or expense.

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(d) **Withdrawal of Attorney.**

(1) An attorney who has appeared for a party in an action or proceeding may be permitted to withdraw as counsel for such party only as follows:

(A) For good cause shown, upon motion and notice of hearing served upon the party in accordance with Rule 77 and after the withdrawing attorney provides to the court the last known address and telephone number of the attorney's client; or

(B) Where the party has other counsel ready to be substituted for the attorney who wishes to withdraw; or

(C) Where the party expressly consents in open court or in writing to the withdrawal of the party's attorney and the party has provided in writing or on the record a current service address and telephone number.

(2) An attorney shall be considered to have properly withdrawn as counsel for a party in an action or proceeding in which a period of one year has elapsed since the filing of any paper or the issuance of any process in the action or proceeding, and

(A) The final judgment or decree has been entered and the time for filing an appeal has expired, or

(B) If an appeal has been taken, the final judgment or decree upon remand has been entered or the mandate, has issued affirming the judgment or decree.

This subparagraph (2) shall not apply to an attorney who files and serves a notice of continued representation.

(c) **Stipulations.** Stipulations between parties or their attorneys will be recognized only when made in open court, or when made in writing and filed with the clerk.

(f) **Time for Argument.** Unless otherwise specially ordered no longer than one quarter hour shall be allowed each party for argument upon any motion, or on any hearing other than a final hearing on the merits. The time for opening statements and arguments at the trial of an action shall be determined in accordance with Civil Rule 46(h).

(g) **Disbarment and Discipline.** Whenever it appears to the court that any member of the bar has been disbarred or suspended from practice or convicted of a felony, that member shall not be permitted to practice before the court until the member is thereafter reinstated according to existing statutes and rules.

(Adopted by SCO 5 October 9, 1959; amended by SCO 98 effective September 16, 1968; by SCO 258 effective November 15, 1976; by SCO 355 effective April 1, 1979; by SCO 390 effective November 7,

1979; by SCO 604 effective September 14, 1984; by SCO 612 effective January 1, 1985; by SCO 696 effective September 15, 1986; by SCO 876 effective July 15, 1988; by SCO 1153 effective July 15, 1994; and by SCO 1450 effective October 15, 2001)

**Annotations**

**Cases**

Trial court did not abuse discretion but acted appropriately and with high regard to propriety and to the public image of the legal profession in granting motion of counsel for his voluntary disqualification where a conflict of interest was not yet actually indicated but it could not be determined that such a conflict might not develop by testimony to be offered during the trial. *Gregoire v. National Bank of Alaska*, Op. No. 336, 413 P2d 27 (Alaska 1966).

Where a client states by affidavit that he has discharged his attorney by means of letter, it is not error to allow that attorney to withdraw, even though the attorney does not serve the client with notice of hearing on a motion to be allowed to withdraw. *Moran v. Kenal Towing and Salvage, Inc.*, Op. No. 1056, 523 P2d 1237 (Alaska 1974).

Where there is no dispute as to the material terms of a settlement, the provisions of paragraph (e) of this rule are met if both parties admit either in a writing filed with the clerk or orally in open court that a settlement had been reached. *Interior Credit Bureau, Inc., v. Bussing*, Op. No. 1366, 559 P2d 104 (Alaska 1977).

Trial court did not err in holding that plaintiff, who was both a doctor and a lawyer, could either represent himself or be represented by counsel, but not both, in his action against hospital for its failure to renew his staff privileges. *Eufemio v. Kodiak Island Hosp.*, Op. No. 3868, 837 P2d 95 (Alaska 1992)

Trial court abused its discretion in denying attorney's properly presented motion to withdraw as counsel. *Devincenzi v. Wright*, Op. No. 4136, 882 P2d 1263 (Alaska 1994).

**Rule 82. Attorney's Fees.**

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

(b) **Amount of Award.**

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

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

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(2) In cases in which the prevailing party recovers no money judgment, the court shall award the prevailing party in a case which goes to trial 30 percent of the prevailing party's reasonable actual attorney's fees which were necessarily incurred, and shall award the prevailing party in a case resolved without trial 20 percent of its actual attorney's fees which were necessarily incurred. The actual fees shall include fees for legal work customarily performed by an attorney but which was delegated to and performed by an investigator, paralegal or law clerk.

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

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

- (G) vexatious or bad faith conduct;
- (H) the relationship between the amount of work performed and the significance of the matters at stake;
- (I) the extent to which a given fee award may be so onerous to the non-prevailing party that it would deter similarly situated litigants from the voluntary use of the courts;

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

- (K) other equitable factors deemed relevant.

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

(4) Upon entry of judgment by default, the plaintiff may recover an award calculated under subparagraph (b)(1) or its reasonable actual fees which were necessarily incurred, whichever is less. Actual fees include fees for legal work performed by an investigator, paralegal, or law clerk, as provided in subparagraph (b)(2).

(c) **Motions for Attorney's Fees.** A motion is required for an award of attorney's fees under this rule or pursuant to contract, statute, regulation, or law. The motion must be filed within 10 days after the date shown in the clerk's certificate of distribution on the judgment as defined by Civil Rule

58.1. Failure to move for attorney's fees within 10 days, or such additional time as the court may allow, shall be construed as a waiver of the party's right to recover attorney's fees. A motion for attorney's fees in a default case must specify actual fees.

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

(e) **Equitable Apportionment Under AS 09.17.080.** In a case in which damages are apportioned among the parties under AS 09.17.080, the fees awarded to the plaintiff under (b)(1) of this rule must also be apportioned among the parties according to their respective percentages of fault. If the plaintiff did not assert a direct claim against a third-party defendant brought into the action under Civil Rule 14(c), then

(1) the plaintiff is not entitled to recover the portion of the fee award apportioned to that party; and

(2) the court shall award attorney's fees between the third-party plaintiff and the third-party defendant as follows:

(A) if no fault was apportioned to the third-party defendant, the third-party defendant is entitled to recover attorney's fees calculated under (b)(2) of this rule;

(B) if fault was apportioned to the third-party defendant, the third-party plaintiff is entitled to recover under (b)(2) of this rule 30 or 20 percent of that party's actual attorney's fees incurred in asserting the claim against the third-party defendant.

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

(Adopted by SCO 5 October 9, 1959; amended by SCO 497 effective January 18, 1982; by SCO 712 effective September 15, 1986; by SCO 921 effective January 15, 1989; by SCO 1006 effective January 15, 1990; by SCO 1066 effective July 15, 1991; repealed and reenacted by SCO 1118am effective July 15, 1993; amended by SCO 1195 effective July 15, 1995; by SCO 1200 effective July 15, 1995; by SCO 1241 effective July 15, 1996; by SCO 1246 effective July 15, 1996; by SCO 1281 effective August 7, 1997; and by SCO 1340 effective January 15, 1999)

**Note to SCO 1118am:** By adopting these amendments to Civil Rule 82, the court intends no change in existing Alaska law regarding the award of attorney's fees for or against a public interest litigant, see, e.g., *Anchorage Daily News v. Anchorage School Dist.*, 803 P.2d 402, 404 (Alaska 1990); *City of Anchorage v. McCabe*, 568 P.2d 986, 993-

(c) **Reversal or Partial Reversal.** In cases of reversal of any judgment, order or decision of the superior court, costs shall be allowed the appellant or petitioner unless otherwise ordered by the court. In cases of partial affirmance and partial reversal, the court will determine which party, if any, shall be allowed costs.

(d) **Costs to be Awarded.** When costs are awarded in the appellate court, they shall include, unless the court otherwise orders and subject to Rules 210(b)(6) and (c)(6), the filing fee, the costs of preparing the transcript, premiums for any bond under Rule 204(c) or 204(d), and the costs of duplicating and mailing briefs and excerpts of records. Duplicating costs will not be awarded in excess of the rate generally charged by printers in the city in which counsel is located.

(e) **Attorney's Fees.** Attorney's fees may be allowed in an amount to be determined by the court. If such an allowance is made, the clerk shall issue an appropriate order awarding fees at the same time that an opinion or an order under Rule 214 is filed. If the court determines that an appeal or cross-appeal is frivolous or that it has been brought simply for purposes of delay, actual attorney's fees may be awarded to the appellee or cross-appellee.

(f) **Procedure.**

(1) **Bill of Costs.** At the time an opinion or an order under Rule 214 is filed, the clerk shall notify the party or parties entitled to recover costs under subsections (b) and (c) of this rule. That party or parties shall serve and file an itemized and verified bill of costs within 10 days after the date of notice of the opinion or order. Date of notice is defined in Civil Rule 58.1(c). The bill of costs shall be limited to the items specified in subsection (d) of this rule. Failure to file a timely bill of costs is a waiver of the right to recover costs. Objections to the bill of costs may be filed within 7 days after service of the bill. Promptly after expiration of the time for filing objections, the clerk shall issue an itemized award of costs. A hearing on the bill of costs shall not be held unless requested by the clerk. The clerk may not delegate to a deputy clerk the authority to award costs in cases in which objection is filed, except with the approval of the chief justice. Return of the record shall not be delayed pending the award of costs.

(2) **Reconsideration.** A party aggrieved by an order awarding costs under subsection (f)(1) of this rule or an order awarding attorney's fees under subsection (e) of this rule may file a motion for reconsideration within ten days after the date of notice of the order. The non-moving party may file a response within seven days after service of the motion. Reconsideration of an award of costs or attorney's fees under (f)(1) or (e) will be determined by an individual justice or judge. Full court reconsideration of such individual justice's or judge's

decision may be sought pursuant to Appellate Rule 503(b).

(3) **Rehearing.** If a timely petition for rehearing is filed, the clerk shall not award costs until the court has disposed of the case on rehearing. Supplemental or amended bills of costs may not be filed after disposition of a petition for rehearing unless requested by the court.

(g) **Exemptions.**

(1) **Workers' Compensation Appeals.** In an administrative appeal from the Alaska Workers' Compensation Board or in an appeal from a denial of a claim of benefits under the Employment Security Act, an award of costs or attorney's fees shall not be made against the claimant in either the supreme court or the superior court unless the court finds that the claimant's position was frivolous, unreasonable, or taken in bad faith.

(2) In an administrative appeal from the Alaska Workers' Compensation Board, full reasonable attorney's fees will be awarded to a successful claimant. Counsel for the claimant shall serve and file an affidavit of services rendered on appeal within 10 days from the date of notice of an opinion or an order under Rule 214. Objections to the affidavit of services may be filed within 7 days of service of the affidavit. An individual justice shall determine the amount of fees to be awarded.

(h) **Execution.** Upon proper application, the clerk of the trial court may issue writs of execution upon the award of costs and attorney's fees made pursuant to this rule, without the approval of a judge of the trial court.

(SCO 439 effective November 15, 1980; amended by SCO 507 effective July 1, 1982; by SCO 508 effective July 1, 1982; by SCO 512 effective October 1, 1982; by SCO 552 effective February 1, 1983; by SCO 554 effective April 4, 1983; by SCO 562, effective May 2, 1983; by SCO 583 effective February 1, 1984; by SCO 619 effective June 15, 1985; by SCO 847 effective January 15, 1988; by SCO 1024 effective July 15, 1990; by SCO 1155 effective July 15, 1994; by SCO 1279 effective July 31, 1997; and by SCO 1440 effective October 15, 2001)

**NOTE:** In 1997 the legislature enacted AS 18.16.030(m), which provides that a filing fee may not be required of, and court costs may not be assessed against, a minor in a proceeding to bypass parental consent to an abortion. According to ch. 14, § 10 SLA 1997, AS 18.16.030(m) has the effect of amending Administrative Rule 9, Civil Rule 79, and Appellate Rule 508 by prohibiting filing fees and assessment of court costs in certain actions. Instead of amending individual rules to implement AS 18.16.030, the supreme court has adopted a separate rule on judicial bypass proceedings in the superior

**Rule 506. Rehearing.**

(a) **Grounds for Petition.** The court may order a rehearing of a matter previously decided if, in reaching its decision:

- (1) The court has overlooked, misapplied or failed to consider a statute, decision or principle directly controlling; or
- (2) The court has overlooked or misconceived some material fact or proposition of law; or
- (3) The court has overlooked or misconceived a material question in the case.

A rehearing will not be granted if it is sought merely for the purpose of obtaining a reargument on and reconsideration of matters which have already been fully considered by the court.

(b) **Time for Filing — Form of Petition.** An original and five copies of a petition for rehearing must be filed within 10 days after the date of notice of the opinion or other decision. Date of notice is defined in Civil Rule 58.1(c) and Criminal Rule 32.3(c). The petitioner shall specifically state which of the grounds for rehearing specified in paragraph (a) exists, and shall specifically designate that portion of the opinion, the brief, or the record, or that particular authority, which the petitioner wishes the court to consider. The petition shall be prepared in conformity with Rule 513.5(b) and when filed shall be accompanied by proof of service on all parties. No petition for rehearing shall exceed five typewritten pages. No memoranda or briefs in support of a petition for rehearing, and no response to a petition for rehearing, shall be received unless requested by the court.

(SCO 439 effective November 15, 1980; amended by SCO 554 effective April 4, 1983; by SCO 584 effective February 1, 1984; by SCO 688 effective May 1, 1986; by SCO 718 effective September 15, 1986; and by SCO 827 effective August 1, 1987)

**Annotations**

**Cases**

Rehearing was granted on state's representation that a portion of its argument had been misconstrued. *State v. Keep*, Op. No. 313, 409 P2d 321 (on hearing). (Alaska 1965).

Questions raised for the first time on petition for rehearing will not be considered by the supreme court. *Watts v. Seward School Board*, Op. No. 380, 423 P2d 678 (on rehearing). (Alaska 1967).

An argument not raised on appeal will not be considered on rehearing. *Wernberg v. State*, Op. No. 972, 519 P2d 801 (Alaska 1974).

On appeals of workman's compensation decision to superior court, superior court did not abuse its discretion in reducing the original fee award to appellees following appellant's motion to reconsider by (1) not requesting a reply from appellees to appellant's motion for reconsideration or (2) by reducing the fee award because appellees' brief was

excessive. *Childs v. Tulin*, Op. No. 3645, 799 P2d 1338 (Alaska 1990).

This rule was not intended to allow parties to raise new arguments after they have had a chance to analyze an appellate court decision; the rule implicitly limits rehearing to legal principle or propositions that were raised by the parties in the normal course of the appeal. *Booth v. State*, Op. No. 1428, 903 P2d 1079 (Alaska App. 1995).

**Rule 507. Judgment.**

(a) The opinion of the appellate court, or its order under Rule 214, shall constitute its judgment, and shall contain its directions to the trial court, if any. No mandate shall be issued.

(b) Unless the opinion or order expressly states otherwise, the judgment of the appellate court takes effect and full jurisdiction over the case returns to the trial court on the day specified in Rule 512(a) for return of the record. However, in an appeal under Appellate Rule 207 relating to release prior to judgment, the judgment of the Court of Appeals takes immediate effect and full jurisdiction over the case returns to the trial court on the day the Court of Appeals issues its opinion or order deciding the appeal.

(c) A motion to stay the effect of the judgment of the appellate court beyond the day specified in Rule 512(a) shall be made to that court.

(SCO 439 effective November 15, 1980; amended by SCO 551 effective February 1, 1983; amended by SCO 729 effective December 15, 1986)

**Annotations**

**Cases**

An order of dismissal by the supreme court is not in itself a mandate. *Singletary v. State*, Op. No. 1711, 583 P2d 847 (Alaska 1978).

Although appellate court opinion reversing defendant's conviction and remanding the case for a new trial was issued on June 6, 1986, the opinion did not become operative and had no force or validity as an order for a new trial until the date specified for return of the record, thus the date specified for return, not the issuance date, triggered commencement of the 120-day speedy trial period. *Nitz v. State*, Op. No. 759, 745 P2d 1379 (Alaska App. 1987).

**Rule 508. Costs.**

(a) **Dismissal or Denial.** If an appeal is dismissed or petition denied by the appellate court, costs shall not be allowed to the appellee or respondent, unless otherwise ordered by the court.

(b) **Affirmance of Judgment.** In all cases of affirmance of a judgment or any order or decision of the superior court, costs shall be allowed to the appellee or respondent unless otherwise ordered by the court.

94 (Alaska 1977); *Gilbert v. State*, 526 P.2d 1131, 1136 (Alaska 1974), or in the law that an award of full attorney's fees is manifestly unreasonable in the absence of bad faith or vexatious conduct by the non-prevailing party. See, e.g., *Malvo v. J.C. Penney Co.*, 512 P.2d 575, 588 (Alaska 1973); *Demoski v. New*, 737 P.2d 780, 788 (Alaska 1987).

**Note:** AS 25.25.313(c), added by § 6 of ch. 57 SLA 1995 (the Uniform Interstate Family Support Act), has the effect of amending Civil Rule 82 by requiring the court to award costs and fees against a party who requests a hearing primarily for delay in a support proceeding listed in AS 25.25.301.

RABINOWITZ, Justice dissenting.

I dissent from the court's adoption of the amendments to Civil Rule 82 called for in [SCO 1118am.] In my view no compelling case has been made demonstrating the need for these changes.<sup>1</sup> Further, my judicial hunch is that these amendments to Civil Rule 82, in particular the new provisions reflected in (b)(3)(A) through (K), will unnecessarily and dramatically increase litigation over attorney's fees awards both in our trial courts as well as in this court.<sup>2</sup>

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

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

**Note to SCO 1281:** In 1997 the legislature amended AS 09.30.065 concerning offers of judgment. According to ch. 26, § 52, SLA 1997, the amendment to AS 09.30.065 has the effect of amending Civil Rules 68 and 82 by requiring the offeree to pay costs and reasonable actual attorney fees on a sliding scale of percentages in certain cases, by eliminating

provisions relating to interest, and by changing provisions relating to attorney fee awards. According to § 55 of the session law, the amendment to AS 09.30.065 applies "to all causes of action accruing on or after the effective date of this Act." However, the amendments to Civil Rule 68 adopted by paragraph 5 of this order are applicable to all cases filed on or after August 7, 1997. See paragraph 17 of this order.

**Note:** Chapter 94 SLA 1998 adopts AS 46.03.761, which allows the Department of Environmental Conservation to impose administrative penalties against an entity that fails to construct or operate a public water supply system in compliance with state law or a term or condition imposed by the department. According to section 5 of the act, subsection (j) of this statute has the effect of amending Civil Rules 79 and 82 by allowing the recovery of full reasonable attorney fees and costs in an action to collect administrative penalties assessed under AS 46.03.761.

#### Annotations

##### Cases

- I. In General
  - II. Prevailing Party
  - III. Review
    - A. Standard
    - B. Abuse of Discretion or Error
  - IV. Fee Schedule
- I. In General

The common law did not permit allowance of attorney's fees as costs to the prevailing party, but in Alaska such allowance is of relatively ancient origin and prior to attainment of statehood the matter was regulated by statute. *McDonough v. Lee*, Op. No. 378, 420 P.2d 459 (Alaska 1966).

The purpose of this rule is to encourage settlement of civil litigation as well as to avoid protracted litigation. *Miklantsch v. Domnick*, Op. No. 538, 452 P.2d 438 (Alaska 1969).

Where a mechanics' lienor files a four-count complaint against the beneficiary of a deed of trust to foreclose the mechanics' liens but prevails on only one count, the trial court may properly refuse to award either party costs or attorney's fees. *Brand v. First Federal Savings & Loan Association of Fairbanks*, Op. No. 658, 478 P.2d 829 (Alaska 1970).

This rule does not apply where plaintiffs seek an injunction and are awarded an injunction which is to be void if the defendant pays certain damages, since the rule in such case is not an accurate criterion for determining a fee. *Stauber v. Granger*, Op. No. 777, 495 P.2d 67 (Alaska 1972).

The purpose of this rule is only to partially compensate a client for the productive work done by his attorney. It is irrelevant that actual attorney's fees are several times the amount awarded. *State v. Abbott*, Op. No. 804, 498 P.2d 712 (Alaska 1972).

The determination of which party prevails and is entitled to costs is within the discretion of the trial judge. *DeWitt v. Liberty Leasing Co. of Alaska*, Op. No. 818, 499 P.2d 599 (Alaska 1972).

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