ALASKA LEGISLATURE 2522

HOUSE and SENATE FINANCE COMMITTEE FILES, 2003-2004

88

SITE: Offnets	SUBJECT OF MEETING:
COMMITTEE: SFIN	BILL # HB123
DATE: 4/30/04	UPDATE #:

PRINT YOUR NAME	COMMUNITY	REPRESENTING/AFFILIATION	DO YOU WANT TESTIFY Y or N
Janelle Vanasse		Peoples Learning	Y
Pat Pitney		University of Alaska	Ans. ?'s

HB 142

THE
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DOCUMENT(S)
ARE
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COPIES

Alaska Academy of Ophthalmology
Carl Rosen, M.D.
President
542 W. 2nd Ave
Anchorage, Ak 99501
907-563-8526

MAR 7 - 2003

3/7/03
Alaska House of Representatives
Pouch V
Juneau, Ak 99801

Dear Representative Martin Wilson,

The Alaska and American Academy of Ophthalmology endorses HB 142(introduced by State Representative Cheryl Heinze), an act relating to provider responsibility for ocular postoperative care in Alaska, to regulate potential abuses of comanagement arrangements.

This legislation closes a patient protection loophole. Ocular care is one of the rare areas where non-physicians inappropriately perform post-operative care.

This legislation would prevent itinerant ophthalmologists from allowing non-medical personnel to provide inappropriate post-operative care after eye surgery.

It is imperative that trained physicians see patients after surgery to check for infections, other diseases, complications that might occur following surgery to prevent potential loss of vision.

It is irresponsible to permit delegation of post-operative care to an optometrist who can neither accurately diagnose nor treat complications and emergencies.

This legislation would have no fiscal impact to consumers or to health care costs. In fact, patients would receive better and safer treatment at no additional costs.

Below, please find our analysis of HB 142. We ask for your support and co-sponsorship of this important legislation.

BRIEFING: HB 142

HB 142, an act relating to provider responsibility for ocular postoperative care in Alaska, has been introduced to regulate potential abuses of comanagement arrangements.

- HB 142 recognizes the unique challenges of practicing in Alaska. HB 142 does not prohibit legitimate comanagement. HB 142 would have no effect on responsible surgical practice in Alaska. HB 142 is consistent with the principles of the Joint Position Paper of the American Academy of Ophthalmology and the American Society of Cataract and Refractive surgery on Ophthalmic Postoperative Care.
- HB 142 provides that *unless* a surgeon enters into a written comanagement agreement with the patient, the bill requires a surgeon to be physically available to a patient for postoperative care in the community in which the operation was performed for 120 hours after the surgery.
- HB 142 PERMITS COMANAGEMENT if:
    - the distance the patient would have to travel to the regular office of the operating surgeon would result in an unreasonable hardship for the patient, as determined by the patient;
    - the surgeon will not be available for postoperative care as a result of the surgeon's personal travel, illness, travel to an area of the state for occasional practice of medicine, or travel to an area of a state designated as a physician shortage area; or
    - other justifiable circumstances exist, as determined by the State Medical Board.
- HB 142 PROTECTS OPHTHALMOLIGSTS AND PATIENTS by prohibiting comanagement arrangements:
    - in which a fee is paid to the person to whom the care is delegated that does not reflect the fair market value of the services performed by that person;
    - that are entered into as a matter of routine and not on a case-by-case basis;

- that are not clinically appropriate for the patient;
- that is made with the intent to induce surgical referrals; or
- that is based on economic considerations affecting the surgeon.

- HB 142 CONTAINS EXTRA FLEXIBILITY for the surgeon by allowing the surgeon to delegate postoperative care of a patient without a written comanagement agreement because of unanticipated circumstances that were reasonably foreseeable before the surgery was performed.

Please feel free to call me at anytime @ 907-563-8526 and I would be glad to answer any question you may have or provide you with more information.

Sincerely,

Carl Rosen, M.D.
Alaska Academy of Ophthalmology
President

Testimony Against Alaska Co-Management Bill (HB142) April 22, 2003

Optometrists have been co-managing for over 30 years to the benefit of patients in Alaska as well as the rest of the country. This has been recognized Federally. In 1980, Congress amended the Medicare statues to include payment to Optometrists for co-management of cataract post-operative care. Federal Law is already regulating co-management of surgical patients by Optometrists and is already quite extensive in providing protections for patients.

In Alaska, co-management is important due to the distances that have to be traveled by patients to receive surgical care. There 98 Optometrists in at least 17 locations throughout Alaska and there are only 26 Ophthalmologists in 6 locations in Alaska. Surgical co-management is part of our education, training and licensure, and is part of our standard of care.

This co-management bill brings up several of the following issues:

By stating that co-management may **only** occur in situations when a surgeon is on vacation, illness or out of town:

Limits a patient's rights to choose a physician to manage their care.
In the state of Alaska, a patient will often have to travel long distances with great expenses for post surgical care. (Including airfare, car rental, hotel and food.) Follow-up surgical care at least includes a one day, one week, one month and three month follow-ups if everything goes normal.
Additionally, it indicates that we are capable of co-managing if the surgeon is on vacation, illness or called on an emergency, but unless it is one or these situations, we are not capable of co-management under this bill.

By stating that a surgeon may **only go into a co-management agreement after five Days** (if he is on vacation, sick, called on an emergency). This means that a surgeon is going to have to design his surgical schedule so that he is in his office five days after he does the surgery. This will create problems if a surgeon wants to go on vacation or for surgeons who travel to remote towns in Alaska which do not have a patient base to support a surgeon for five days. In the last case, these services will not be offered anymore. Additionally, this limits outside competition from coming to this state as well as special surgical procedures.

By stating if the surgeon needs to go into a co-management situation **that the surgeon gets to decide if the Optometrist is qualified to treat the patient.**

The qualification of an Optometrist is determined by the National Boards, Alaska State Optometry Board and the Alaska department of occupational licensure. Not by an Ophthalmologist.

This bill limits competition and risks price fixing. Competition is important to the growth of all profession. It continually tests and increases the standards of care, it keep prices competitive, and with a patients freedom to choose which provider is best for their needs, it keep the industry honest and progressive.

Co-management is in no way new to Optometry and has been successfully done for over 20 year in this state. This bill would be a set back in the healthcare provided to Alaskans.

~~[illegible]~~

- regulation of all surgeons would be necessary.
- no public health reason.

Dr. Sheryl Lentfer - Wasilla
O.D.

Alaska Academy of Ophthalmology
Carl Rosen, M.D.
President
542 W. 2nd Ave
Anchorage, Ak 99501
907-563-8526

4/11/03

Alaska House of Representatives
Pouch V
Juneau, Ak 99801

Finance Committee Members

Dear Representative,

The Alaska and American Academy of Ophthalmology endorses HB 142(introduced by State Representative Cheryl Heinze), an act relating to provider responsibility for ocular postoperative care in Alaska, to regulate potential abuses of comanagement arrangements.

This legislation closes a patient protection loophole. Ocular care is one of the rare areas where non-physicians inappropriately perform post-operative care.

This legislation would prevent itinerant ophthalmologists from allowing non-medical personnel to provide inappropriate post-operative care after eye surgery.

It is imperative that trained physicians see patients after surgery to check for infections, other diseases, complications that might occur following surgery to prevent potential loss of vision.

It is irresponsible to permit delegation of post-operative care to an optometrist who can neither accurately diagnose nor treat complications and emergencies.

This legislation would have no fiscal impact to consumers or to health care costs. In fact, patients would receive better and safer treatment at no additional costs.

- that are not clinically appropriate for the patient;
- that is made with the intent to induce surgical referrals; or
- that is based on economic considerations affecting the surgeon.

- HB 142 CONTAINS EXTRA FLEXIBILITY for the surgeon by allowing the surgeon to delegate postoperative care of a patient without a written comanagement agreement because of unanticipated circumstances that were reasonably foreseeable before the surgery was performed.

Please feel free to call me at anytime @ 907-563-8526 and I would be glad to answer any question you may have or provide you with more information.

Sincerely,

Carl Rosen, M.D.
Alaska Academy of Ophthalmology
President

ALASKA STATE HOUSE OF REPRESENTATIVES

Session

(907)-465-4930
FAX# 465-3834
State Capitol
Room 416

Representative Cheryll Heinze

ECONOMIC DEVELOPMENT, TRADE AND TOURISM

CHAIR
HB 142

SPONSOR STATEMENT

The majority of eye surgery performed in the United States today is technologically advanced and is safer and more effective than ever before. The most common major eye surgery performed in the United States is cataract surgery; with more than 1.5 million cases a year. Cataract surgery has evolved to such an advanced state that many cases take less than 15 minutes to perform. The speed with which modern cataract surgery can be performed has tended to trivialize the seriousness of this surgery in the public's mind, causing patients to infer that it is risk free. No surgery is risk free, including short cases such as uncomplicated cataract surgery. However, complications do occur and can be serious. Permanent loss of vision and patient death are some of the more serious potential complications. It is important for postoperative care to be managed by an ophthalmologist familiar with the surgery and the potential complications.

Unfortunately, reduction of surgical time for cataract surgery has led to the appearance of so-called "cataract mills" where patients are referred in large numbers by an optometrist and, in return for a "co-management fee", the referring optometrist is then allowed to manage the patient postoperatively. The operating surgeon, in this setting, often meets the patient just minutes prior to surgery and takes no responsibility after surgery. In some cases this surgeon may travel from cataract mill

to cataract mill and is unavailable for any postoperative consultation or advice. The patient's follow-up care is therefore abandoned, by pre-arrangement, to the referring

Optometrist who is not qualified by training or experience to handle any serious complications resulting from the cataract surgery.

Another serious situation may arise as a result of the "cataract mill". Should the patient require hospitalization, the surgeon is unlikely to have local hospital privileges. The patient is then dumped on another ophthalmologist unfamiliar with the patient but now responsible for rendering critical care.

Co-management of eye surgery as currently practiced in Alaska is a recipe for sub-optimal patient care. House Bill 142 addresses the issue of postoperative care for eye surgery in Alaska, taking into account the unusual and sometimes-difficult medical and surgical challenges our state often poses in terms of isolation, limited medical resources and transportation difficulties.

Alaska State Legislature
HOUSE OF REPRESENTATIVES
House Finance Committee

AGENDA

April 23, 2003 - Wednesday

*HB 203 – AIDEA DIVIDEND

No Public Testimony. Heard and Held from previous meeting.

Rep. Hawker / David Brewster
Teleconference for Questions :
Sarah Fisher-Goad, AIDEA
Valerie Walker - Deputy Director Finance (teleconference)

HB 61 – OIL / GAS TAX CREDIT

Testifiers:
Rep. Chenault
JOHN A. BARNES, P.E., Unit Manager, Marathon Oil
Chuck Logsdon, Chief Petroleum Economist, Revenue
Mark Meyers, Director, Division of Oil and Gas, DNR

*HB 165 – COMMUNITY SCHOOLS

No Public Testimony except by invitation.
Testifiers:
Eddy Jeans, Manger, School Finance, DEED

FISCAL NOTE

STATE OF ALASKA
2003 LEGISLATIVE SESSION

Fiscal Note Number: 1
Bill Version: HB 142
(H) Publish Date: 4/2/03

Revision Date/Time (Note if correction):
Dept. Affected: DCED
Title: An Act relating to provider responsibility for ocular postoperative care; ....
BRU: Occupational Licensing (117)
Component: Occupational Licensing
Sponsor: Representative Heinze
Requester: House HESS
Component No.: 2360

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						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )	0.0	0.0	0.0	0.0	0.0	0.0

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other 1156 - Receipt Supported Services						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2003) cost: 0.0
Mark 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)*

HB 142 creates new responsibilities for physicians when providing ocular postoperative care. New funds are not required to implement this bill.

Prepared by: Jennifer Strickler, Administrative Manager
Phone (907) 465-2144
Division: Occupational Licensing
Date/Time 4/1/03 1:55 PM
Approved by: Edgar Blatchford, Commissioner
Date 4/1/2003
Agency: Department of Community & Economic Development

(Revised 9/2002 OMB)

COMMITTEE COPY

American Optometric Association

James N. Matson, O.D., P.C.
Jill L. Geering, O.D.
Doctors of Optometry

April 22, 2003

Representative Bill Williams
Chair, House Finance Committee
Fax 465-3793

Re: HB142

Dear Representative Williams:

I understand that there will be a hearing on HB 142 tomorrow, April 23, 2003. I am planning on attending and wish to testify against this bill. So that it may be entered into the official record, I am giving you a copy of my testimony.

It is my hope that you vote no on HB 142.

Sincerely,

Jill Geering, OD

800 Glacier Avenue
Juneau, AK 99801
(907) 586-9864

April 22, 2003

Arguments Against Alaska Co-Management Bill

1. Co-management of surgical patients by optometrists is already adequately regulated under Federal law. In 1980, Congress amended the Medicare statute to allow payment to doctors of optometry for cataract post-operative care. The report from the then Department of Health, Education, and Welfare upon which this legislation was based concluded, "The services appear to be effective in patient management, including the management of aphakic and cataract patients. They are reasonable, non-experimental, safe and generally acceptable to the vision/eye care community and the public." The Federal law is quite extensive in providing patient protections and should not be tampered with. States are avoiding doing this, and the Alaska bill would be an unwise first.
2. Federal law is premised on protecting patients from financial exploitation in co-management arrangements. Neither Federal law nor any state law has ever questioned the clinical competence of optometrists to co-manage patients, and optometrists have been doing so successfully for over twenty years. There is no public health justification for the Alaska co-management bill.
3. The Alaska co-management bill effectively eliminates optometrists from the co-management of patients by preventing them from being involved in patient care for 5 days following surgery. This is harmful to patients.
4. The Alaska bill forces patients to seek out less available and more expensive ophthalmological care for no legitimate health care reason. Again, the co-management regulation adopted by the Federal laws was not premised on patients being in any health care danger, but was premised on protecting patients from being taken advantage of financially. Both an optometrist's and an ophthalmologist's ordinary obligations not to commit medical malpractice would work to prevent any harmful clinical co-management decisions within the first five days of surgery. This bill adds nothing to those protections, and is a step backwards from Federal law in that it limits patient access to care and makes it more likely that patients will unnecessarily pay more for care (from ophthalmologists) – exactly what the Federal law was aimed at preventing.
5. Even if I believed that co-management should be limited, I would argue against this bill. It is full of technical flaws and ambiguities.
    a) While this doesn't specifically prohibit optometrists from performing post op care after the 5 day period, it is a barrier. It eliminates patient's freedom of choice, and creates fear. According to the bill (section C, number 5, and letter g), the patient is to be made aware of special risks that may happen to them if they enter into a co-management agreement. Since there are no special risks (as

determined by Congress over 20 years ago), I would like to see what such a description would say, because optometrists and other ophthalmologists, are licensed and qualified to perform such care.

b) There seems to be a double standard in regards to many of the exceptions. The Alaska bill shifts the determination of patient travel hardship onto the shoulders of the patient, which is an unworkable legal standard. The exemption for the surgeon's travel that says, "If the surgeon will not be available for postoperative care...as a result of the surgeon's personal travel, illness, etc....." is obviously self serving on the surgeons part. If the true intent of this bill is to protect the public, why is it unsafe and not good medicine for other well trained eye care professionals to co-manage in normal circumstances, but if a surgeon is going on vacation, then it is ok for others to co-manage safely?

c) The agreement can only be entered into if the surgeon confirms that the co-manager is qualified to treat the patient. This is not the surgeon's job, this is the licensing department's job. Does this mean that the surgeon must contact occupational licensing before entering into a co-management agreement?

d) The co-managing doctor cannot further delegate care to another. What if the co-managing doctor is sick, ill, or called out of town on an emergency and the surgeon is off on vacation? Any referral to a third doctor would violate this law, but the co-managing doctor is ethically bound to arrange care for that patient.

e) An exception is made to US Public Health Service doctors or US Armed Forces doctors who are volunteering without pay or other remuneration. This implies that patients are safe for co-managing if follow up care is free, but not safe if it isn't free? Or does this just mean that the ophthalmologists shouldn't have to provide free follow up care...but they are the only one who should provide follow up care if it is paid for?

f) Midwives are exempt. This bill would pass into law a provision that allows midwives to perform follow up care for someone who had cataract surgery.

As some of you may know, there is an unfortunate divide between ophthalmologists and optometrists in this state. Most of which is professional jealousy. Optometrists seek to move forward by way of improving on and learning new techniques to better serve the citizens of Alaska, including adding oral medications to our licensure. Ophthalmologists have opposed that. This bill is another attempt at limiting our scope of care and superseding the Alaska Board of Optometry. This bill would not only limit us, but it would move our profession back to the 1960's. I encourage you to vote no.

Alaska State Medical Association

4107 Laurel Street • Anchorage, Alaska 99508 • (907) 562-0304 • (907) 561-2063 (fax)

04/22/2003

House Finance Committee Members
Alaska State Legislature
State Capitol
Juneau, Alaska 99801

Re: HB 142– Ocular Postoperative Care

Dear Finance Committee Members,

The Alaska State Medical Association (ASMA) represents Alaska's patients and the physicians who care for them.

ASMA is writing to support HB 142. Appropriate postoperative care following ocular surgery by an "EYE MD", an Ophthalmologist, is imperative for good patient care.

Today's technology makes many surgical procedures, including ocular surgeries, appear to be routine. Most often, such surgeries have a high rate of success. So high, the public loses sight of the seriousness of the surgery and of the complications that might occur.

HB 142 provides for appropriate ocular postoperative care by the appropriate professional, the ophthalmologist (the "Eye MD").

Sincerely,

Jeanne Bonar, MD
President

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

(907) 465-3867 or 465-2450
FAX (907) 465-2029
Mail Stop 3101

State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM March 19, 2003

SUBJECT: Sectional Analysis (HB 142)

TO: Representative Cheryll Heinze

FROM: Terri Lauterbach
Legislative Counsel

You have requested a sectional summary of the above-described bill.

As a preliminary matter, please note that a sectional summary of a bill should not be considered an authoritative interpretation of the bill and the bill itself is the best statement of its contents. Since you have not expressed questions about any particular aspect of the bill, this summary is brief. Let me know if you have specific questions.

Section 1. Places limits on how and when a surgeon who performs eye surgery in this state may delegate responsibility to someone else for post-operative care of the patient.

Secs. 2 - 3. Require compliance with sec. 1 of the bill by certain people who are exempt from licensing as physicians.

Sec. 4. Adds definition of "knowingly," which is a term used in secs. 1 and 3 of the bill.

Secs. 5 and 7. Allow the State Medical Board to begin the regulations process before the rest of the bill takes effect.

Sec. 6. Applies the amendments made by the bill to eye surgery occurring on or after the effective date of secs. 1 - 4 of the bill.

TML:med
03-323.med

KETCHIKAN
Eye Care Center
Advanced Vision & Health Care for Your Family's Eyes

Rick D. Swearingen, O.D.
Erik D. Christianson, O.D.

TESTIMONY REGARDING HB 142

April 23, 2003

Members of Alaska House Finance Committee,

My name is Erik D. Christianson, OD and I am an optometrist in private practice in Ketchikan. I have practiced in Ketchikan since January 1990. Prior to that time I was the eye coordinator and staff optometrist in Barrow, Alaska from 1987-90. While I was in Barrow I was employed by the North Slope Borough Health Department.

HB 142 is a good example of poorly thought out legislation.

I am opposed to the spirit of this bill. By that I mean that entire premise on which it is founded is wrong. The premise is that post-operative care after eye surgery or co-management needs to be regulated. Co-management of surgical patients by optometrists is already regulated under federal law. No other state has this type of law. If you are regulating co-management between ophthalmologists and optometrists then why not other types of surgical specialties and the local doctors who will follow their patients. This is not the job of the legislature!!!

It questions the clinical competence of optometrists to co-manage patients. Optometrists have been performing this to a high level for more than 20 years. I have been a member of the Board of Optometry for 5+ years and we have never had a case brought us where an optometrist caused a patient harm.

It is an attempt to legislate clinical decision making on the part of ophthalmic surgeons. If a surgeon is performing "bad surgery" federal law, malpractice, referring providers, and the PATIENTS themselves will cause this surgeon to stop.

It is bad for rural Alaska in that it limits the potential choices available to these patients. Currently certain eye surgical procedures are performed at Ketchikan General Hospital (KGH) and the opthalmologists who perform them would have a hard time managing the 5 day time limit. I do not co-

351 Carlanna Lake Road
Ketchikan, Alaska 99901
907-225-2020
Fax: 907-247-2015

manage with these doctors except when their patients develop problems after they leave. In the 13 years I have been in Ketchikan I have had to only help out a handful of times. HB 142 would not allow me as an optometrist to help out within the critical first 5 days. Even though only 35 surgeries per year are done at KGH it offers a choice for those persons who have difficulty traveling or are cover by Medicaid or medicare and cannot afford travel.

Optometrists live where the patient lives. We are the eye care expert in rural Alaska limiting our ability to care for our patients is bad for these patients and the communities we serve.

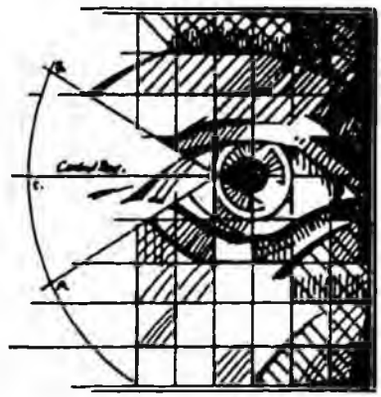
HB 142 is an attempt to limit patient access to care it is obviously special interest legislation, and is both anti-consumer and anti-patient.

Do not allow HB 142 to move forward.

Erik D. Christianson, O.D.
Secretary Alaska State Board of Examiners in Optometry
351 Carlanna Lake Rd
Ketchikan, AK 99901
907-225-2020

OLIVER M. KORSHIN, M. D.
DISEASES AND SURGERY OF THE EYE

ALASKA MEDICAL PLAZA
1200 AIRPORT HEIGHTS DRIVE, SUITE 310
ANCHORAGE, ALASKA 99508
(907) 276-8838
FAX (907) 258-0735



March 10, 2003

Representative Pete Kott
State Capitol
Juneau, Alaska 99801-1182

Dear Representative Kott:

I am writing to ask your support of HB 142, a bill to regulate ocular postoperative care in Alaska. The bill is also known as the "co-management bill."

Co-management means that a practitioner other than the operating surgeon provides postoperative care. Because co-management frequently involves splitting of the surgical fee between the surgeon and the provider of postoperative care, co-management arrangements have drawn the attention of the U. S. DHHS Office of the Inspector General in an ongoing national effort to assure that such arrangements do not violate federal anti kick-back statutes.

But co-management not only poses the potential for illegal kickbacks — perhaps more important, it can harm patients. Let me explain.

Eye surgery performed in the United States today has become so technologically advanced that it is safer and more effective than ever before. This applies particularly to cataract surgery, the most common major surgery performed in our country — more than 1.5 million cases a year. Cataract surgery has become so advanced that many cases take less than fifteen minutes, using tiny incisions and foldable intraocular lens implants. Patients go home almost immediately and not infrequently are able to see 20/20 that same day.

The speed with which modern cataract surgery can be performed, as well as its astounding success rate, have unfortunately trivialized the seriousness of this surgery in the public's mind, causing patients to infer that it is risk-free. This is rather like inferring that handling a high-performance jet fighter plane is risk-free. With high-performance jet planes — as with 21st century eye surgery — increased speed and increased performance sometimes mean that things can go very wrong very quickly. And they do.

In other words, modern cataract surgery is still subject to complications, some of them serious. Although serious complications occur infrequently, they do occur with statistical regularity. When they occur, often in the first 72 hours following surgery, they must be managed by a qualified ophthalmologist who is familiar with the surgery, its potential complications and how these complications must be managed.

The reduction in the time it takes to perform cataract surgery has led to the appearance of so-called cataract mills, to which patients are referred in large numbers by optometrists, who receive a co-management fee for following the patient after surgery, including the diagnosis and treatment of short- and long-term surgical complications.

Often the surgeon in a cataract mill does not see the patient until a few minutes before surgery. After surgery, the patient may never see the surgeon again. In fact, the surgeon may leave town a shortly after surgery, traveling to another cataract mill location (which may be out-of-state). He may not return for weeks or longer, and then it is not to see his post-operative patients, but to operate on the next wave of referrals. A patient's follow-up care is therefore delegated, *by pre-arrangement*, to the referring optometrist, who is not qualified by training or experience to manage the major complications of cataract surgery, some of which require additional and sometimes complex surgery to treat.

When the co-managing optometrist is presented with a serious complication of cataract surgery that may require admission to a hospital, he must "dump" the patient into the hands of a local ophthalmologist, as the mill surgeon has left town or, if in town, may not have local hospital privileges. The new ophthalmologist is suddenly responsible for rendering critical care a very ill patent fearful of going blind, whom he has never seen before and about whom he knows nothing.

Hence, co-management of eye surgery can be a recipe for sub-optimal postoperative care. House Bill 142 addresses this important patient safety issue while taking into account the unusual and sometimes difficult medical-surgical challenges our state poses in terms of isolation, vast distances and transportation difficulties.

How do I handle cataract surgery in my own practice? I stopped all cataract surgery last year, so I refer my patients who need cataract surgery to other local ophthalmologists. I refuse to co-manage: postoperative care is the *surgeon's* responsibility. I refer only to ophthalmologists who will provide *all* my patients' postoperative care — not just for 120 hours as stipulated in this bill, but for the entire 90-day "global" postoperative period. I believe this represents sound and ethical medical practice. One hundred and twenty hours is the bare minimum.

I urge you to support HB 142.

Sincerely,

Oliver Korshin

Oliver Korshin, M. D.

March 21, 2003

Alaska State Senators and Representatives

Dear Legislator Representative Wilson,

I am writing to ask for your support of HB 142 and companion bill SB 129, legislation to ensure that Alaska citizens have the necessary information regarding postoperative surgical eye care. The enactment of HB 142 and SB 129 is a positive step forward to enhance patient understanding of postoperative surgical eye care treatment.

This legislation sets forward clear rules as to the procedures that an ophthalmologist and optometrists must follow when a comanagement agreement is agreed upon. Just as importantly, this legislation informs the patient as to the type of care he or she will be receiving from each health care provider – the ophthalmologist and the optometrist. Patient protection is this legislation's objective. With enactment of HB 142 and SB 129, the ethical relationship between the ophthalmologist, the optometrist, and patient is once again paramount.

As a working pediatric ophthalmologist in Anchorage who attended the University of Alaska-Fairbanks, I have a perspective of the Alaska health care system both as a citizen and as a physician.

The delivery of quality health care is a challenge due to our state's size and rural nature. For example, I travel to our practice's satellite clinics in Wasila, Codova, Kodiak, and Homer. It is my goal to deliver quality and affordable pediatric ophthalmic care to urban and rural residents of our Great State. I have coordinated several research efforts including the 6 plus years, cooperative, charitable project to vision screen every preschool Alaskan called the "Alaska Blind Child Discovery." We have provided pre-school vision screening to over 14,000 Alaska children free of charge. I have also served as the Eye section Chief at Providence hospital for the last 11 years coordinating emergency eye call for much of the state.

>From my residency training at the Mayo Clinic and my practice in Anchorage with Ophthalmic Associates, I have learned the value of careful, open-referral and consultative medicine. Ophthalmic Associates is a subspecialty eye practice of optometrists (ODs) and ophthalmologists.

I mention referral and consultative medicine because as a legislator you must often feel that ophthalmologists and optometrists do not work well together. This is not the case. For example, Ophthalmic Associates is a subspecialty eye practice of ophthalmologists (MDs) and optometrists (ODs). We can and do work together to deliver quality patient eye care services.

However, there is what I would term a growing pressure for ophthalmologists and optometrists to enter into what is called "co-management" practice pattern in regards to postoperative surgical eye care that is not in the best interest of the patients.

Pediatric Ophthalmology and Strabismus. Ophthalmic Associates, a P.C.
542 West Second Avenue, Anchorage, Alaska 99501-2242 • fax 278-1705

From my professional observation of the increased pressure for these types of agreements, I believe HB 142 and SB 129 are needed and are in the patient's best health care interest.

I am not against all collaborative care arrangements between Alaska's optometrists and ophthalmologists. I have and will continue to collaborate with other optometrists; family physicians and ophthalmologists in the medical and long-term postoperative care of Alaskan citizens, to and referred patients from the Russian Far-East (charitable surgical care).

However, you must be made aware that the current practicing environment works to destroy ethical arrangements between optometrists and ophthalmologists and fosters comanagement relationships between optometrists and ophthalmologists that are not n the best long-term interests of patients. That is why I support HB 142 and SB 129.

The enactment of HB 142/SB 129 will ensure that if a physician chooses to comanage a patient, its will be for health care considerations, not for future referrals or some other economic consideration. This legislation is a positive step forward to improve patient understanding of postoperative surgical eye care treatment.

Sincerely Yours,

Robert W. Arnold

Robert W. Arnold, M.D.

Pediatric Ophthalmology and Strabismus, Ophthalmic Associates, a P.C.
542 West Second Avenue, Anchorage, Alaska 99501-2242 • fax 278-1705

KETCHIKAN
Eye Care Center
Advanced Vision & Health Care for Your Family's Eyes

Rick D. Swearingen, O.D.
Erik D. Christianson, O.D.

April 8, 2003
Representative Bill Williams
State Capitol
Juneau, AK 99801-1182

RE: HOUSE BILL 142; "An Act relating to provider responsibility for ocular postoperative care; and providing for an effective date."

Representative Williams,

I am writing to ask you to VOTE NO on Hou Bill 142. This bill is a camouflaged attempt by big city health care professionals (this time ophthalmologists) to protect their "turf" under the guise of delineating care. I filled Randy Ruaro in on the specifics. I appreciated his listening ear. In addition to this letter I am also enclosing a paper written by the American Optometric Association for their optometry members outlining "Optometric Postoperative Care".

Arguments Against Alaska Co-Management Bill

1. Co-management of surgical patients by optometrists is already adequately regulated under Federal law. The Federal law is quite extensive in providing patient protections and should not be tampered with. States are avoiding doing this, and the Alaska bill would be an unwise first.
2. Federal law is premised on protecting patients from financial exploitation in co-management arrangements. Neither Federal law nor any state law has ever questioned the clinical competence of optometrists to co-manage patients, and optometrists have been doing so successfully for over twenty years. There is no public health justification for the Alaska co-management bill.
3. The Alaska co-management bill effectively eliminates optometrists from the co-management of patients by preventing them from being involved in patient care for 5 days following surgery. This is harmful to patients especially in communities that do not have an ophthalmologist or have only itinerant surgeons.
4. The Alaska bill forces patients to seek out less available and more expensive ophthalmological care for no legitimate health care reason. Again, the co-management regulation adopted by the Federal laws was not premised on patients being in any health care danger, but was premised on protecting patients from being taken advantage of financially.
5. Technical flaws -- the Alaska bill shifts the determination of patient travel hardship onto the shoulders of the patient, which is an unworkable legal standard, and creates exceptions for the surgeon providing post-operative care that fly in the face of the bill's purported concern for patient welfare (for example, a personal travel exception for the surgeon – in case he wants to take a vacation after surgery?).

351 Carlanna Lake Road
Ketchikan, Alaska 99901
907-225-2020
Fax: 907-247-2015

6. Both an optometrist's and an ophthalmologist's ordinary obligations not to commit medical malpractice would work to prevent any harmful clinical co-management decisions within the first five days of surgery. This bill adds nothing to those protections, and is a step backwards from Federal law in that it limits patient access to care and makes it more likely that patients will unnecessarily pay more for care (from ophthalmologists) – exactly what the Federal law was aimed at preventing.

Feel free to contact me if you need someone to testify or need more information.

Regards,

Erik D. Christianson, O.D.
Cc: file

erik @ kaunet. net

OPTOMETRIC POSTOPERATIVE CARE

This paper discusses the proper role and responsibilities of providers in co-managing patients, consistent with federal regulations and ethical standards. For purposes of the paper, co-management is defined as two or more independently licensed health care professionals sharing responsibility for the diagnosis, treatment and management of a patient's medical or surgical condition.

Background

Doctors of optometry have been successfully co-managing patients with ophthalmic surgeons for many years. The federal government has long recognized the role of optometrists in providing this care. In 1980, Congress amended the Medicare statute to allow payment to doctors of optometry for cataract post-operative care. The report from the then Department of Health, Education and Welfare (HEW) upon which this legislation was based concluded, "The services appear to be effective in patient management, including the management of aphakic and cataract patients. They are reasonable, non-experimental, safe and generally acceptable to the vision/eye care community and the public."

Recently, the American Academy of Ophthalmology (AAO) and the American Society of Cataract and Refractive Surgery (ASCRS) have issued a joint position paper on this issue. The paper purports to offer guidelines on when co-management is ethical and proper and concludes that such situations should be an exceptional occurrence. This conclusion is not grounded in law, regulation, or the American Academy of Ophthalmology's own Code of Ethics. At the same time, government regulation of referral relationships does require providers to carefully assess such relationships to assure both compliance with federal requirements as well as good patient care. This paper seeks to offer guidance in this area.

Government Activity

Medicare Carriers

Two Medicare carriers have issued local medical review policies on the issue of co-management, Connecticut in 1998 and New York in 1999.

The Connecticut policy clearly states that co-management can occur whenever the patient chooses to return to the referring provider for necessary care. It is our understanding that the New York carrier intends to provide for such patient choice and is currently redrafting its policy to reflect this.

No other carriers have acted in this area. At least two other carriers have withdrawn more restrictive proposed policies following consultation with officials of the Health Care Financing Administration (HCFA).

Office of Inspector General (OIG)

On November 19,1999 the Department of Health and Human Services Office of Inspector General issued a final rule revising safe harbor protection under the Medicare Anti-Kickback statute. The rule outlined safe harbors for referral arrangements for specialty services. Noting a potential for abuse when the referring physician and the specialty physician receiving the referral split a global payment from a Federal health program, the IG rule specifically excluded such situations from the safe harbor. The rule made clear, however, that the IG did not intend for this action to be construed as meaning all such relationships violate the anti-kickback statute. Instead the rule stated that whether a particular referral situation violated the statute would depend on a case-by-case analysis of the facts and circumstances, including whether the specialty services are medically necessary, whether the timing of the referral back to the originating referral source is clinically appropriate and whether the services performed are commensurate with the portion of the global fee received.

AAO-ASCRS Paper

The AAO-ASCRS joint paper states that co-management should be an exceptional occurrence. As previously noted, no federal requirements support this claim. Nor does the American Academy of Ophthalmology's Code of Ethics. The AAO's advisory opinion on the code states

> "Ethical Rules 7 and 8 (Delegation of Service and Postoperative Care) would not preclude an Academy member from referring patients to a non-ophthalmological physician or allied health care personnel for those aspects of postoperative care that are not within the unique competence of the ophthalmologist (which include those aspects of postoperative care permitted by law to be performed by auxiliaries, and, for non-ophthalmological physicians, may also include additional functions), provided that the person is legally entitled and professionally trained, experienced, and qualified to provide the particular services."

There is no mention as to the frequency with which such care should occur. The Federal Trade Commission (FTC), which conditionally approved the AAO Code of Ethics at AAO's request, stated specifically "the rule would not prevent ophthalmologists from arranging for optometrists to provide post-operative eye care services consistent with s. e law." The Commission further concluded "Serious antitrust concerns would, of course, be raised by an ethical rule that unreasonably interfered with legitimate competition by ophthalmologists working in conjunction with non-physician health care professionals, or prevented optometrists or others from providing services they are legally and professionally qualified to provide."

Suggested Guidelines

Co-managed care should always adhere to the basic tenets of good patient care, the ethical responsibilities of providers, and governmental rules. The following suggested guidelines are offered to help providers meet these objectives.

- The selection of an operating surgeon for patient referral should be based on providing the best potential outcomes for that patient. Financial relationships between providers should not be a factor.

- The patient's right to choose the method of postoperative care should be recognized consistent with the best medical interest of the patient. Co-management of post-operative care should be determined on a case-by-case basis and not prearranged. For example, agreements to refer all patients back on a date certain should be avoided[1]. The patient should be advised prior to surgery of potential postoperative management options.

- The transfer of post-operative care must be clinically appropriate and depend on the particular facts and circumstances of the surgical event.

- Following surgery, transfer of care from the operating surgeon to an optometrist should occur when clinically appropriate at a mutually agreed upon time or circumstance; and such time should be clearly documented via correspondence and be included in the patient's medical record. For example, Section 4822 of the Medicare Carriers' Manual states that "Both the surgeon and the physician providing the postoperative care must keep a written transfer agreement in the beneficiary's record". This may be accomplished by including the appropriate information in the referral letter from the ophthalmic surgeon to the optometrist at the time of transfer of care.

- The operating surgeon and the co-managing optometrist should communicate during the post-operative period to assure the best possible outcome for the patient.

- Compensation for care should be commensurate with the services provided. Cases involving care for Medicare beneficiaries should reflect proper use of modifiers and other Medicare billing instructions.

Conclusion

The American Optometric Association believes that referrals for specialty services should be based on achieving the best possible outcome for the patient and not on financial relationships between providers. All health care professionals have an ethical obligation to patients for whom they are responsible to insure that medical and surgical conditions are appropriately evaluated and treated. Decisions to co-manage should be made on an individual basis and should always include proper and complete documentation and communication between providers. Co-management should occur only when these basic principles are followed.

This paper is provided for informational purposes. It suggests voluntary guidelines, which are not enforceable by AOA, for consideration by an individual practitioner in determining what co-management relationships are in his or her patients' best interests and are appropriate. Practitioners should exercise their professional judgment in applying these guidelines to the particular circumstances of their practice and to the specific needs of individual patients. This paper is not intended to, and does not, provide legal advice or a legal opinion with respect to Federal or state laws regulating co-management, or any specific co-management circumstances. Practitioners should consult with their own attorneys regarding any questions with respect to such legal matters.

Approved AOA Board of Trustees, April 27, 2000

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[1] Federal Register, November 19, 1999, page 63548

KETCHIKAN EYE CARE CENTER
351 CARLANNA LAKE ROAD
KETCHIKAN, ALASKA 99901

FAX TRANSMITTAL SHEET

RETURN FAX NUMBER (907) 247-2015

TO: RANDY RUDD

FROM: PD. CHRISTENSEN

DATE: March 8, 2003 NUMBER OF PAGES, INCLUDING COVER PAGE: 6

IF THERE ARE ANY PROBLEMS WITH THIS TRANSMITTAL PLEASE CALL (907) 225-2020.

NOTE:

HB 142

Thank you

Issue 1

February 2003

Alaska Optometry News

Alaska Optometric Association
1689 C Street, Suite 222
Anchorage, AK 99501

E-mail: akoa@alaska.com
Web: www.akoa.org

The State of Alaska has 98 practicing **Optometrists in:**

45	Anchorage
3	Bethel
1	Barrow
1	Dillingham
7	Eagle River
15	Fairbanks
1	Homer
6	Juneau
2	Kenai
2	Ketchikan
2	Kodiak
1	Kotzebue
2	Nome
1	North Pole
2	Sitka
2	Soldotna
5	Wasilla

And 27 practicing **Ophthalmologists in:**

20	Anchorage
2	Fairbanks
1	Homer
2	Juneau
1	Soldotna
1	Wasilla

Doctors of optometry, (O.D.) are primary health care professionals who examine, diagnose, treat and manage diseases and disorders of the visual system, the eye and associated structures, as well as diagnose related systemic conditions. They prescribe glasses, contact lenses, low vision rehabilitation, vision therapy and medications, as well as perform certain surgical procedures as regulated by state law.

An ophthalmologist (M.D.) practices eye care, specializing in consultation, treatment and surgery of the human eye and related structures.

Eye Opener: The external muscles that move the eyes are the strongest muscles in the human body for the job that they have to do. They are 100 times more powerful than they need to be.

PRIMARY EYE CARE: OPTOMETRY

Optometrists (O.D.) are independent primary health care providers that specialize in treatment of the eye and visual system by prescribing drugs, vision therapy, glasses, contact lenses, and other procedures according to various state laws. Optometry training is 8-9 years of college and graduate school for a doctor's degree, plus yearly continuing education required by state law. The training is the same medical model as dentists and physicians.

Primary Care providers, such as optometrists, podiatrists, dentists, advanced nurse practitioners, and family care MD's offer care for the majority of conditions, but refer to specialists for more complex Secondary Care or sub-specialists for most complex Tertiary Care. The entire medical community teams with specialists such as ophthalmologists, cardiologists, neurosurgeons, etc. Primary care is cost-effective, while specialty care is more expensive.

Optometrists provide 70-100% of the primary eye care services in Alaska, because they are more widely distributed geographically around the state. Many small communities had limited eye care in the past, but now have better access to optometric care.

PRIMARY EYE CARE	SECONDARY EYE CARE	TERTIARY EYE CARE
Conjunctivitis	Eyelid surgery	Reconstructive oculoplastic surgery
Eyelid infection (stye)	Eyelid tumor	Intraocular tumor
Anterior uveitis	Posterior uveitis	Vitreoretinal surgery
Corneal abrasion	Corneal laceration	Corneal transplant
Therapeutic treatment of glaucoma	Laser surgery for glaucoma	Filtering surgery for glaucoma
Foreign body removal-Anterior eye surface	Foreign body removal– Interior of eye	Foreign body removal with complications
Cataract care, pre-op & post-op	Cataract surgery	Severe complications of cataract surgery
Refractive surgery care, pre-op & post-op	Refractive surgery	Severe complications of refractive surgery

AMERICAN ACADEMY OF OPHTHALMOLOGY
The Eye M.D. Association

P.O. Box 7424
San Francisco, CA 94120-7424

655 Beach Street
San Francisco, CA 94109-1336

March 31, 2003

Dear House Health, Education and Social Services Committee Member,

As President of the American Academy of Ophthalmology (AAO) with a membership of approximately 27,000 ophthalmologists, I want to bring to your attention an important patient care issue relating to eye surgery.

Many of your constituents are at an age where their eyesight is deteriorating and are in need of medical care. Much of this medical care includes surgical procedures and other treatments that are a best provided by a medical doctor or a doctor of osteopathy. Surgical post-operative care clearly falls within this category.

HB 142 would eliminate abuses in the collaboration of surgical post-operative care in Alaska between providers. Specifically, this bill would eliminate incentives for entering into a collaborative post-operative care arrangement that is driven primarily by economic incentives such as an inducement for surgical referrals. I believe the only legitimate reason for entering into collaborative post-operative care arrangement are patient needs.

In February 2000, the American Academy of Ophthalmology published a paper on "Ophthalmic Postoperative Care." The provisions of HB 142 are consistent with the principles of this policy. Furthermore, I believe that the provisions of this bill are also flexible enough to allow physicians to provide the best possible care given the special geographic and climatic conditions unique to Alaska.

If you have any further question, please do not hesitate to contact me at 202-737-6662.

Michael R Redmond

Michael Redmond, MD
President

cc: Alaska State Legislature

Alaska State Medical Association

4107 Laurel Street • Anchorage, Alaska 99508 • (907) 562-0304 • (907) 561-2063 (fax)

04/10/2003

Honorable Cheryll Heinze
Honorable Robin Taylor
Alaska State Legislature
State Capitol
Juneau, Alaska 99801

Re: HB 142/SB 129 – Ocular Postoperative Care

Dear Representative Heinze and Senator Taylor,

The Alaska State Medical Association (ASMA) represents Alaska's patients and the physicians who care for them.

ASMA is writing to support HB 142 and SB 129. Appropriate postoperative care following ocular surgery by an "EYE MD", an Ophthalmologist, is imperative for good patient care.

Today's technology makes many surgical procedures, including ocular surgeries, appear to be routine. Most often, such surgeries have a high rate of success. So high, the public loses sight of the seriousness of the surgery and of the complications that might occur.

HB 142 and SB 129 provides for appropriate ocular postoperative care by the appropriate professional, the ophthalmologist (the "Eye MD").

Sincerely,

Jeanne Bonar, MD
President

Cc: Other members of the Alaska State Legislature

April 21, 2003

Alaska State House Finance Committee Members:

Dear Finance Committee: Co Chair Williams,

I am writing to ask for your support of HB 142, legislation to ensure that Alaska citizens have the necessary information regarding postoperative surgical eye care. The enactment of HB 142 is a positive step forward to enhance patient understanding of postoperative surgical eye care treatment.

This legislation sets forward clear rules as to the procedures that an ophthalmologist and optometrists must follow when a comanagement agreement is agreed upon. Just as importantly, this legislation informs the patient as to the type of care he or she will be receiving from each health care provider – the ophthalmologist and the optometrist. Patient protection is this legislation's objective. With enactment of HB 142,the ethical relationship between the ophthalmologist, the optometrist, and patient is once again paramount.

As a working pediatric ophthalmologist in Anchorage who attended the University of Alaska-Fairbanks, I have a perspective of the Alaska health care system both as a citizen and as a physician.

The delivery of quality health care is a challenge due to our state's size and rural nature. For example, I travel to our practice's satellite clinics in Wasilla, Codova, Kodiak, and Homer. It is my goal to deliver quality and affordable pediatric ophthalmic care to urban and rural residents of our Great State. I have coordinated several research efforts including the 6 plus years, cooperative, charitable project to vision screen every preschool Alaskan called the "Alaska Blind Child Discovery." We have provided pre-school vision screening to over 14,000 Alaska children free of charge. I have also served as the Eye section Chief at Providence hospital for the last 11 years coordinating emergency eye call for much of the state.

From my residency training at the Mayo Clinic and my practice In Anchorage with Ophthalmic Associates, I have learned the value of careful, open-referral and consultative medicine. Ophthalmic Associates is a subspecialty eye practice of optometrists (ODs) and ophthalmologists.

I mention referral and consultative medicine because as a legislator you must often feel that ophthalmologists and optometrists do not work well together. This is not the case. For example, Ophthalmic Associates is a subspecialty eye practice of ophthalmologists (MDs) and optometrists (ODs). We can and do work together to deliver quality patient eye care services.

However, there is what I would term a growing pressure for ophthalmologists and optometrists to enter into what is called "co-management" practice pattern in regards to postoperative surgical eye care that is not in the best interest of the patients.

From my professional observation of the increased pressure for these types of agreements, I believe HB 142 is needed and is in the patient's best health care interest.

I am not against all collaborative care arrangements between Alaska's optometrists and ophthalmologists. I have and will continue to collaborate with other optometrists; family physicians and ophthalmologists in the medical and long-term postoperative care of Alaskan citizens, tourists and referred patients from the Russian Far-East (charitable surgical care).

However, you must be made aware that the current practicing environment works to destroy ethical arrangements between optometrists and ophthalmologists and fosters comanagement relationships between optometrists and ophthalmologists that are not the best long-term interests of patients. That is why I support HB 142.

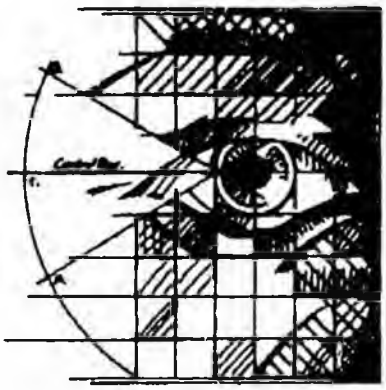
The enactment of HB 142 will ensure that if a physician chooses to comanage a patient, its will be for health care considerations, not for future referrals or some other economic consideration. This legislation is a positive step forward to improve patient understanding of postoperative surgical eye care treatment.

Sincerely Yours,
Robert W. Arnold, M.D. Robert W. Arnold

Pediatric Ophthalmology and Strabismus, Ophthalmic Associates, a P.C. 542 West Second Avenue, Anchorage, Alaska 99501-2242 • 907-276-1617, Fax, 278-1705

OLIVER M. KORSHIN, M. D.
DISEASES AND SURGERY OF THE EYE

ALASKA MEDICAL PLAZA
1200 AIRPORT HEIGHTS DRIVE, SUITE 310
ANCHORAGE, ALASKA 99508
(907) 276-8838
FAX (907) 258-0735



April 21, 2003

Representative Bill Williams
Co-Chair, House Finance Committee
State Capitol
Juneau, Alaska 99801-1182

Dear Representative Williams:

I am writing to ask your support of HB 142, a bill to regulate ocular postoperative care in Alaska. The bill is also known as the "co-management bill."

Co-management means that a practitioner other than the operating surgeon provides postoperative care. Because co-management frequently involves splitting of the surgical fee between the surgeon and the provider of postoperative care, co-management arrangements have drawn the attention of the U. S. DHHS Office of the Inspector General in an ongoing national effort to assure that such arrangements do not violate federal anti kick-back statutes.

But co-management not only poses the potential for illegal kickbacks — perhaps more important, it can harm patients. Let me explain.

Eye surgery performed in the United States today has become so technologically advanced that it is safer and more effective than ever before. This applies particularly to cataract surgery, the most common major surgery performed in our country — more than 1.5 million cases a year. Cataract surgery has become so advanced that many cases take less than fifteen minutes, using tiny incisions and foldable intraocular lens implants. Patients go home almost immediately and not infrequently are able to see 20/20 that same day.

The speed with which modern cataract surgery can be performed, as well as its astounding success rate, have unfortunately trivialized the seriousness of this surgery in the public's mind, causing patients to infer that it is risk-free. This is rather like inferring that handling a high-performance jet fighter plane is risk-free. With high-performance jet planes — as with 21st century eye surgery — increased speed and increased performance sometimes mean that things can go very wrong very quickly. And they do.

In other words, modern cataract surgery is still subject to complications, some of them serious. Although serious complications occur infrequently, they do occur with statistical regularity. When they occur, often in the first 72 hours following surgery, they must

be managed by a qualified ophthalmologist who is familiar with the surgery, its potential complications and how these complications must be managed.

The reduction in the time it takes to perform cataract surgery has led to the appearance of so-called cataract mills, to which patients are referred in large numbers by optometrists, who receive a co-management fee for following the patient after surgery, including the diagnosis and treatment of short- and long-term surgical complications.

Often the surgeon in a cataract mill does not see the patient until a few minutes before surgery. After surgery, the patient may never see the surgeon again. In fact, the surgeon may leave town a shortly after surgery, traveling to another cataract mill location (which may be out-of-state). He may not return for weeks or longer, and then it is not to see his post-operative patients, but to operate on the next wave of referrals. A patient's follow-up care is therefore delegated, *by pre-arrangement*, to the referring optometrist, who is not qualified by training or experience to manage the major complications of cataract surgery, some of which require additional and sometimes complex surgery to treat.

When the co-managing optometrist is presented with a serious complication of cataract surgery that may require admission to a hospital, he must "dump" the patient into the hands of a local ophthalmologist, as the mill surgeon has left town or, if in town, may not have local hospital privileges. The new ophthalmologist is suddenly responsible for rendering critical care to a very ill patent fearful of going blind, whom he has never seen before and about whom he knows nothing.

Hence, co-management of eye surgery can be a recipe for sub-optimal postoperative care. HB 142 addresses this important patient safety issue while taking into account the unusual and sometimes difficult medical-surgical challenges our state poses in terms of isolation, vast distances and transportation difficulties.

How do I handle cataract surgery in my own practice? I stopped all cataract surgery last year, so I refer my patients who need cataract surgery to other local ophthalmologists. I refuse to co-manage: postoperative care is the *surgeon's* responsibility. I refer only to ophthalmologists who will provide *all* my patients' postoperative care — not just for 120 hours as stipulated in this bill, but for the entire 90-day "global" postoperative period. I believe this represents sound and ethical medical practice. One hundred and twenty hours is the bare minimum.

I urge you to support HB 142.

Sincerely,

Oliver Korshin

Oliver Korshin, M. D.

HB 145

HOUSE COMMITTEE REPORT

(11)
Date Referred to Committee: May 8, 2003 **FURTHER REFERRALS:**

Date of Committee Action: 5/2/03

The FINANCE Committee considered: **HB 145**

HOUSE BILL NO. 145 **ATTY FEES: PUBLIC INTEREST LITIGANTS**

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

Recommends it be replaced with [ ] HCS *or* [✓] CS *for* HB 145 (7IN)
For Senate Bills with new title: [ ] Technical Title [ ] New Title: HCR_____ **[ ] Same Title [✓] New Title**

[ ] attach amendments
[ ] add new referral to _____Committee
[ ] Letter of Intent_____Committee

List of Abbrev for Depts.:
ADM
CED
COR
CRT
EED
DEC
DFG
GOV
HSS
LEG
LAW
LWF
MVA
DNR
DPS
REV
DOT
UA

NEW **FISCAL NOTES** *Assigned by Chief Clerk's Office				
List by Dept(s):	*FN#	Fiscal	Indet.	Zero

PREVIOUS **FISCAL NOTES**				
List by Dept(s):	FN#	Fiscal	Indet.	Zero
LAW	#1			✓
DOA	#3			✓

Signing with recommendations	Printed Last Name	DP	DNP	NR	AM
K. Meyer	Meyer			✓	
M. D. Hawker	Hawker			✓	
Bill Stoltze	STOLTZE			✓	
Beth A. Kerttula	KERTTULA		✓		
Ralph Rehbock	Rehbock		✓		
Carl E. Moses	MOSES		✓		
Mike Chenault	Chenault			✓	
[illegible]	Whitaker			✓	
[illegible]	FOSTER	X			
Chair: [illegible]	Harris			✓	
Chair: [illegible]	Williams	✓			

FISCAL NOTE

STATE OF ALASKA
2003 LEGISLATIVE SESSION

Fiscal Note Number: 1
Bill Version: HB 145
(H) Publish Date: 3/3/03

Revision Date/Time (Note if correction):
Dept. Affected: Law
Title "An Act relating to public interest litigants and to attorneys fees; and amending Rule 82, ...Civil Procedure."
BRU Civil Division
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						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

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)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

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 Daughhetee for Gregg D. Renkes, Attorney General
Date 1/27/2003
Agency Department of Law

STATE OF ALASKA
2003 LEGISLATIVE SESSION

BILL NO. HB 145

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/atyfee.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: 3
Bill Version: CSHB 145(JUD)
(H) Publish Date: 5/8/03

Revision Date/Time (Note if correction):
Dept. Affected: Administration
Title: An Act relating to public interest litigants.....
BRU: Risk Management
Component: Risk Management
Sponsor: Governor
Requester: (H) Jud
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						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

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)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

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 465-2180
Division: Risk Management
Date/Time 5/1/03 2:37 PM
Approved by: Mike Miller, Commissioner
Date 5/1/2003
Agency: Department of Administration

(Revised 9/2001 OMB)

Adopted
J. H moved
~~E.B. Objected~~

23-GH1064\H
Luckhaupt
5/8/03

CS FOR HOUSE BILL NO. 145( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-THIRD LEGISLATURE - FIRST SESSION

BY

Offered:
Referred:

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

A BILL

FOR AN ACT ENTITLED

"An Act prohibiting discrimination in the awarding of attorney fees and costs in civil actions or appeals to or against, or in the posting of bonds or other security by, public interest litigants; and relating to awards of attorney fees and costs in cases involving enforcement of constitutional rights; and providing for an effective date."

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

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

PURPOSE. (a) The judicially created doctrine respecting the award of attorney fees and costs for or against public interest litigants has created an unbalanced set of incentives for parties litigating issues that fall under the public interest litigant exception. 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. More importantly, application of the public interest litigant exception has resulted in unequal access to the courts and unequal positions in litigation.

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

(c) This Act does not preclude the enactment of specific statutes authorizing awards of costs or fees in particular situations, such as in AS 45.50.537.

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

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

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

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

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

(d) In calculating an award of attorney fees and costs under (c)(1) of this section,

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

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

(e) The court, in its discretion, may abate, in full or in part, an award of attorney fees and costs otherwise payable under (c) and (d) of this section if the court finds, based upon sworn affidavits or testimony, that the full imposition of the award would inflict a substantial and undue hardship upon the party ordered to pay the fees and costs or, if the party is a public entity, upon the taxpaying constituents of the public entity.

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

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

*** Sec. 4.** The uncodified law of the State of Alaska is amended by adding a new section to read:

APPLICABILITY. This Act applies to all civil actions and appeals filed on or after the effective date of this Act.

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

Offered 5/12
failed

AMENDMENT

OFFERED IN THE HOUSE BY REPRESENTATIVE BERKOWITZ

TO: CSHB 145 (FIN), Draft Version "H"

Page 1, line 1, through page 3, line 23:

Delete all material and insert:

"An Act relating to certain public interest litigation effecting natural resource permitting decisions and to expedited trials and appeals; and providing for an effective date."

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

*** Section 1.** AS 09.20 is amended by adding a new section to read:

Article 3. Expedited Trial.

Sec. 09.20.200. Expedited resolution for certain public interest litigation. In a civil action contesting a decision of 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 for which there was an opportunity for the public to comment to the agency before the final agency decision and to seek administrative review before the agency following the initial agency decision, the courts of this state shall provide expedited consideration of the action. If the action under this section proceeds to trial or oral argument, the trial or oral argument must commence not more than 120 days following the filing of the action unless the person filing the action agrees to a later date.

Renumber the following bill sections accordingly.

FISCAL NOTE

STATE OF ALASKA
2003 LEGISLATIVE SESSION

Fiscal Note Number: 1
Bill Version: HB 145
(H) Publish Date: 3/3/03

Revision Date/Time (Note if correction):
Dept. Affected: Law
Title "An Act relating to public interest litigants and to attorneys fees; and amending Rule 82, ...Civil Procedure."
BRU Civil Division
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						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

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)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

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 Daughhetee for Gregg D. Renkes, Attorney General
Date 1/27/2003
Agency Department of Law

STATE OF ALASKA
2003 LEGISLATIVE SESSION

BILL NO. HB 145

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/atyfee.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: 3
Bill Version: CSHB 145(JUD)
(H) Publish Date: 5/8/03

Revision Date/Time (Note if correction):
Dept. Affected: Administration
Title: An Act relating to public interest litigants.....
BRU: Risk Management
Component: Risk Management
Sponsor: Governor
Requester: (H) Jud
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						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

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)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

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 465-2180
Division: Risk Management
Date/Time 5/1/03 2:37 PM
Approved by: Mike Miller, Commissioner
Date 5/1/2003
Agency: Department of Administration

(Revised 9/2001 OMB)

THE
FOLLOWING
DOCUMENT(S)
ARE
POOR
ORIGINAL
COPIES

Testimony
House Finance
~~May 3, 2001~~
May 9, 2003

Dear _____:

Since before statehood, Alaska Civil Procedure allowed a prevailing party in a civil lawsuit to recover a portion of its attorney's fees. If the prevailing party recovered a money judgment, the party could automatically recover approximately ten percent (10%) of that judgment as an additional recovery for attorney's fees incurred. If the prevailing party was the defendant, the defendant recovered a portion (now 20%—30%) of its attorney's fees incurred. The purpose for the rule was and is to encourage settlement and to partially compensate parties who are forced to go to litigation to vindicate their rights or defenses.

Beginning in 1968, the Alaska Supreme Court developed what is now called the Public Interest Litigant Doctrine, which provided that if a prevailing party was considered a public interest litigant, the person recovered all of its attorney's fees. If the public interest litigant lost, it did not have to pay any of the other parties' attorney's fees. When the over one hundred cases that have applied this doctrine since 1968 are reviewed, it is clear that the Alaska Supreme Court has selected certain groups that it considers, in its political judgment, more worthy than other interests when the litigation involves public interest issues. Subsistence groups, native cultural interests, newspapers, environmental protection and conservation groups (but not miners), homeowners on zoning issues when attempting to prevent development (but not the developers), and sometimes commercial fishermen (but not when attacking the regulations on set netting) have qualified.

On the other hand, oil companies, miners, logging companies, trucking companies, developers, and labor unions have consistently been denied public interest litigation status on the grounds that in each case they had a "sufficient economic incentive to bring a lawsuit," which disqualified them.

The end result is that under the doctrine certain groups are preferred over others according to the political judgment of the Alaska Supreme Court, which political judgment does not necessarily coincide with the political views and values of the majority of Alaskans, as represented by their elected officials in the legislature. Comparing the groups that are accorded this special status to those who are denied it shows a very marked and distinct anti-development, pro-preservationist political slant.

Would have the effect of leveling the playing field so that no groups are accorded special treatment in the awarding of or immunity from attorney's fees according to their political characteristics. The applicable rule of civil procedure, Rule 82, still will permit the trial judge to either raise or lower the amount of attorney's fees awarded based upon a variety of specified factors, but all of which would be applied equally to all litigants.

May 9, 2003

~~May 1, 2001~~

For these reasons, the Alaska Support Industry Alliance strongly supports the passage of ~~Senate Bill 45~~, and asks for your help in accomplishing that result.

CSHB 145

Very truly yours,

ALASKA SUPPORT INDUSTRY ALLIANCE

By _____
Larry Houle
Its: General Manager

Alaska Support Ind. Alliance
4220 B St #200
Anchorage, AK 99503

Replaced by #3

FISCAL NOTE

STATE OF ALASKA
2003 LEGISLATIVE SESSION

Fiscal Note Number: 2
Bill Version: HB 145
(H) Publish Date: 3/3/03

Revision Date/Time (Note if correction):
Dept. Affected: Administration
Title: An Act relating to public interest litigants.....
BRU: Risk Management
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						
TOTAL OPERATING	*	*	*	*	*	*
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

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)						
TOTAL	*	*	*	*	*	*

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

(Revised 9/2001 OMB)

HB145

FRANK H. MURKOWSKI
GOVERNOR

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STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

February 28, 2003

The Honorable Pete Kott
Speaker of the House
Alaska State Legislature
State Capitol, Room 208
Juneau, AK 99801-1182

Dear Speaker Kott:

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

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 co ısideration and passage of this bill.

Sincerely,

Frank H. Murkowski
Governor

HB 145

Berkowitz

Public Interest Litigation
93-03

Type	Cases	FY	Cost	SubTotal
Redistricting/	SE Conf v. Hickel	93	635.8	
Reapportionment	SE Conf v. Hickel	95	106.9	
	2001 Redistricting	02	1,501.9	
	2001 Redistricting	03	240.9	
				2,485.5
Mental Health	Weiss v. State	93-03	4,578.7	
				4,578.7
Legislation	Bess v. Ulmer (same sex marriage)	99	50.2	
	Planned Parenthood (partial birth abortion)	01	102.7	
	Planned Parenthood (GR Med abortion)	02	228.0	
	ACLU v. State 96 campaign finance reform	02	107.8	
				488.7
CBR	Hickel v. Cowper (CBR) (amt for approp)	95	43.7	
	Cowper v. Knowles (CBR approp lang)	97	4.3	
				48.0
Prisoners	Cleary Case	95	82.0	
	Cleary Case	96	119.5	
	Cleary Case	97	85.9	
	Cleary Case	99	56.7	
	Cleary Case	00	13.2	
	Cleary Case	01	119.4	
	Cleary Case	02	9.3	
				486.0
Elections/Ballots	Kwethluk IRA v. Coghill (open polling places)	95	11.0	
Initiatives/Etc	O'Callaghan v. Coghill (open/closed primary)	97	25.0	
	Pullen v. Ulmer (FISH Initiative)	98	24.2	
	Dansereau v. Ulmer (94 gubernatorial election)	98	83.3	
	AK for Efficient Gov't v. State (ballot measure	03	24.0	
	#2 - capitol move)			
				167.5
Subsistence	Toksook Bay v. State (herring fishery)	95	33.3	
	Ken Sorenson v. State (moose hunting)	96	60.0	
	Payton v. State (Upper Yentna salmon)	98	54.7	
				148.0
Natural Resources	Stein v. State (placer mining)	93	14.0	
	Trustees for AK v. Gorsuch (coal mining)	94	39.8	
	Kuitsarak v. Swope offshor platinum Goodnews	94	37.9	
	SE AK Consv Council v. State (Kuiu Island)	95	44.7	
	Trustees for AK v. State (oil/gas lease best int)	96	42.8	
	Tuiksarmute v. Heinze (water permit mining)	96	6.2	
	Ninilchik Council v. State (o/g lease sale #78)	97	85.0	
	Port Graham/Nanwalek v. State (discharge Cook	98	24.0	
	Inlet platforms)			
	Kachemak Bay Soc v. State (o/g lease sale 85A)	99	37.0	
	Cook Inlet Keeper v. State (oil/gas lease sale)	01	81.7	
	NAEC/Sierra Club v. State (ROW electric line)	01	99.1	
	Greenpeace v. State (Northstar water permitting)	01	12.5	
	Gilbertson v. State (RS2477 easement)	01	2.2	
	Neighborhood Mine Watch v. State (ROW	03	22.2	
	Fairbanks Gold Mining)			
	Lynn Canal Consv v. State (reg uses state land)	03	20.2	
				569.3
Local Gov't	Ekwok/Lake & Pen Borough v. LBC (boundary)	95	51.4	
	Keane v. LBC (City of Pilot Point)	96	11.0	
				62.4
Misc.	Capital Information Group v. State (public docume	97	20.0	
	Alexie v. State (cultural adoption, child support)	00	34.7	
				54.7
TOTAL	(actual total is $9,090,422) (numbers rounded off)			9,088.8

based on Leg Research Report 4/21/03

LEGISLATIVE RESEARCH REPORT

APRIL 21, 2003

REPORT NUMBER 03.150

PUBLIC INTEREST LITIGATION IN ALASKA, 1993 - 2003

PREPARED FOR REPRESENTATIVE ETHAN BERKOWITZ

BY PATRICIA YOUNG, MANAGER

You asked us to identify public interest litigation before the Alaska court within the past ten years.[1] In addition to the name of each case, you asked for the year, the amount of the judgment, and a very brief description of the topic at issue.

As you know, a public interest litigant is a plaintiff who seeks to stop or to amend some development or policy of government rather than to achieve some private goal. Such a litigant must adhere throughout a civil suit to the same rules and procedures as every other litigant. The question of status as a litigant acting in the public interest arises only in the context of awards of attorney's fees and costs that accompany the decision in the case.

Neither the rules of court nor pertinent statutes directly address public interest litigants; however, by long-standing judicial practice, such litigants are exempt from the normal application of Civil Rule 82. Under this rule, the losing party in a civil action generally pays a portion of the reasonable attorney's fees of the prevailing party. If, however, the court makes a specific finding that a plaintiff qualifies as acting in the public interest, the plaintiff is exempt from paying the fees

[1] Please note the following limitations to our search. (1) There is no way to identify cases that settle before a judicial decision is reached. (2) Decisions issued by the superior court are not published, although because the legislature must appropriate funds for any judgment against the State, we can identify those public interest cases that result in such judgments. Aside from that record, however, there is no ready way to identify superior court cases that do not result in a judgment against the State, unless the decision is appealed to the Supreme Court and public interest status is at issue. (3) There is no ready system for identifying cases against municipal governments and other governmental bodies unless they are appealed to the Supreme Court and public interest status is at issue.

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Alaska Legislature
Legislative Research Services
w3.legis.state.ak.us/Research/research_home.htm

State Capitol
Juneau, AK 99801

of the prevailing party.[2] If the plaintiff prevails, the losing party pays full reasonable attorney's fees.[3]

Table 1 shows those cases before the Alaska court that the Department of Law and the Division of Legislative Audit identified as public interest cases resulting in judgments against the State, as well as the amount of fees paid. Table 2 shows those cases in which a public interest plaintiff lost and, therefore, paid no fees to the State, as well as cases involving governmental bodies other than the State. We identified these cases by searching the Lexis database of Alaska cases for the past ten years.

I hope you find this information to be useful. Please do not hesitate to contact us if you have questions or need additional information.

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[2] According to the Court in *Anchorage v. McCabe*, 568 P.2d 986 (Alaska 1977),

> The public interest exception to [Civil Rule 82] is designed to encourage plaintiffs . . . to raise issues of public interest by removing the awesome financial burden of such a suit.
>
> As a matter of sound policy, attorney's fees should not be assessed against public interest plaintiffs because awarding fees in this type of controversy will deter citizens from litigating questions of general public concern for fear of incurring the expense of the other party's attorney's fees.

[3] The criteria the court uses in weighing a plaintiff's private motivation against the extent of public interest involved appear among the annotations to Civil Rule 82 as follows: (1) Is the case designed to effectuate strong public policies? (2) If the plaintiff succeeds will numerous people receive benefits from the lawsuit? (3) Can only a private party have been expected to bring the suit? (4) Would the purported public interest litigant have sufficient economic incentive to file suit even if the action involved only narrow issues lacking general importance?

Table 1: Public Interest Cases and Fees Paid by the State, FY 1993 - FY 2003

Case	Description	Attorneys Fees
FY 93		
Stein v. State (Trustees for Alaska)	NPDES placer mining permits	$14,049
Trustees for Alaska v. Gorsuch	Coal mining permit	$39,890
S.E. Conference v. Hickel	Reapportionment	$635,868
	FY 93 Subtotal	**$689,806**
FY 94		
Kuitsarak v. Swope	Offshore prospecting permits for platinum in Goodnews Bay	$30,000
Kuitsarak v. Swope	Offshore prospecting permits for platinum in Goodnews Bay	$7,894
	FY 94 Subtotal	**$37,894**
FY 95		
Hickel v. Cowper	Interpretation of Article IX, Section 17 of the Alaska Constitution--"amount available for appropriation."	$43,756
S.E. Conference v. Hickel (Minimum required exclusive of attorneys fees)	Reapportionment	$106,928
Southeast Alaska Conservation Council v. State	DNR's granting of concurrence under section 906(k) of ANILCA through No-Name Bay, Kuiu Island	$44,705
Cleary v. Smith	Prisoners' rights	$82,047
Native Village of Toksook Bay v. State	Right to subsistence herring fishery	$33,385
City of Ekwok & Lake & Peninsula Borough v. Local Boundary Commission	Challenging boundary of Lake & Peninsula Borough	$51,407
Kwethluk IRA Council v. Coghill	Elections case regarding failure to open certain polling places in 10/94 elections	$11,063
	FY 95 Subtotal	**$373,290**
FY 96		
Trustees for Alaska v. State	Challenging DNR's best interest finding in O&G lease sale #55	$42,855
Tuiksarmute v. Heinze	Appealing decision by DNR Div of Water to extend water appropriation permits to mining company	$6,225
Cleary v. Smith	Prisoners' rights	$119,524
Keane v. LBC	LBC decision incorporating the City of Pilot Point	$11,038
Ken Sorenson v. State	Subsistence - moose hunting	$60,000
	FY 96 Subtotal	**$239,641**
FY 97		
Cowper v. Knowles	CBRF appropriation language	$4,331
O'Callaghan v. Coghill	Open/closed primary issue	$25,000
Cleary v. Smith	Prisoners' rights	$85,958
Capital Info Group v. State	Deliberative process executive privilege	$20,000
Ninilchik Traditional Council v. State	Cook Inlet Oil & Gas lease sale #78	$85,000
	FY 97 Subtotal	**$220,289**

Table 1: Public Interest Cases and Fees Paid by the State, FY 1993 - FY 2003 — Continued

FY 98		
Payton v. State	Upper Yentna River salmon subsistence	$54,780
Port Graham & Nanwalek v. State	"Zero discharge" in Cook Inlet from drilling platforms	$24,047
Pullen v. Ulmer	Challenging the Lt. Governor's certification of the F.I.S.H. Initiative for placement on the November 1996 ballot	$24,254
Dansereau v. Ulmer	1994 Gubernatorial election	$83,356
	FY 98 Subtotal	**$186,437**
Case	**Description**	**Attorneys Fees**
Bess v. Ulmer	Challenging same sex marriage constitutional amendment	$50,245
Cleary v. Smith	Prisoners' rights	$56,734
Kachemak Bay Conservation Society v. State	Cook Inlet Oil & Gas lease sale #85A	$37,050
	FY 99 Subtotal	**$144,029**
FY 00		
Cleary v. Smith	Prisoners' rights	$13,221
Alexie v. State	Effect of cultural adoption on child support obligation	$34,742
	FY 00 Subtotal	**$47,963**
FY 01		
Planned Parenthood v. State	Unconstitutionality of partial birth abortions	$102,725
Cook Inlet Keeper v. State	Challenge to DNR's best interest finding in oil & gas lease sale	$81,795
NAEC/Sierra Club v. State	Challenge to DNR's ROW permitting process for an electric transmission line	$99,102
Cleary v. Smith	Prisoners' rights	$119,379
Greenpeace v. State	Water permitting related to the Northstar project	$12,488
Gilbertson v. State	Challenge to DNR process of identifying RS2477 easements.	$2,263
	FY 01 Subtotal	**$417,751**
FY 02		
Planned Parenthood v. State	Abortion funding for the General Relief Medical Program	$228,062
Cleary v. Smith	Prisoners' rights	$9,295
ACLU v. State	Challenge to 1996 campaign finance reform legislation	$107,814
In Re 2001 Redistricting Cases v. Alaska Redistricting Board	Reapportionment	$1,501,967
	FY 02 Subtotal	**$1,847,137**

Table 1: Public Interest Cases and Fees Paid by the State, FY 1993 - FY 2003 — Continued

FY 03		
Neighborhood Mine Watch v. State, DNR and Fbks Gold Mining Inc.	Best interest finding for ROW issued & requirement to assess economic impacts to businesses neighboring the ROW	$22,242
Alaskans for Efficient Government v. State	Challenge to ballot measure 2 in re legislative session move	$24,000
Lynn Canal Conservation, Inc. v. State	DNR's list of generally allowed uses on state land must be promulgated by regulation	$20,260
In Re 2001 Redistricting Cases v. Alaska Redistricting Board	Reapportionment	$240,923
	FY 03 To Date	**$307,425**
All Years		
Weiss v. State	Mental Health Land Trust breach	**$4,578,758**
Total Payments FY93 - FY 03 (to date)		$9,090,422

NOTES: This table shows fiscal years in which judgments were paid, not necessarily years in which cases were decided. Not included are cases that settled out of court, and public interest cases that did not result in a judgment against the State (unless the decision was appealed to the Supreme Court and public interest status was at issue).

Amounts paid represent awards of attorney fees and exclude awards for costs, with the exception of the FY02 amount for *In Re 2001 Redistricting Cases*. In that consolidated case, the Redistricting Board and the Craig plaintiffs stipulated in superior court to the award of fees and costs in the amount of $173,922. A relatively small but unspecified portion of this amount represents costs. In every other regard, the court orders in this case were specific as to the amounts for fees and costs, and of those awards, costs represented approximately 11 percent of the total.

A statute that would eliminate the court's authority to award full attorneys fees under its own rules would not entirely eliminate instances in which the court could award full fees: some other state and federal laws allows for full fees. At this writing, federal law could have been a factor in determining fees awarded under *Cleary v. Smith*. In *Weiss v. State*, the plaintiffs received an appropriation of $3,500,000 for the land work. The appropriation did not go through the judgment process, which removes litigants from the public interest litigant category. That amount is therefore not reflected in the above nearly $4.6 million for *Weiss*.

SOURCE: Kathryn Daughhetee, Administrative Services Director, Department of Law, (907) 465-3673, and Pat Davidson, Legislative Auditor, Division of Legislative Audit, (907) 465-3830.

Table 2: Other Public Interest Litigation Before the Alaska Supreme Court, FY 1993 FY 2003

Case Name	Citation	Subject
Valleys Borough Support Comm. v. Local Boundary Commision	863 P.2d 232 (1993)	Incorporation of Borough
Municipality of Anchorage v. Citizens for Representative Governance	880 P.2d 1058 (1994)	Validity of petitions to recall school board members from office.
Eyak Traditional Elders Counsel v. Sherstone, Inc., 904 P.2d 420	904 P.2d 420 (1995)	Attorney's fees after voluntary dismissal of action to enjoin logging on land alleged to be ancestral village & burial grounds
Spenard Action Comm. v. Lot 3, Block 1, Evergreen Subdivision	902 P.2d 766 (1995)	Subsistence hunting and fishing--challenge to "all Alaskans" eligibility
Kodiak Seafood Processors Ass'n v. State	900 P.2d 1191 (1995)	Permit to a private fisher for exploratory fishing in closed waters
State v. United Cook Inlet Drift Ass'n	895 P.2d 947 (1995)	Subsistence hunting and fishing--challenge to "all Alaskans" eligibility
Kearn v. Local Boundary Commission	893 P.2d 1239 (1995)	Incorporation of city
Griswold v. City of Homer	925 P.2d 1015 (1996)	Validity of a city ordinance re zoning, and conflict of interest
Laverty v. Alaska Railroad Corp.	13 P.3d 725 (2000)	Extraction of gravel & Public Notice Clause, Alaska Const. art. VIII, § 10
Gwich'in Steering Comm. v. Office of the Governor	10 P.3d 572 (2000)	Deliberative process executive privilege (re ANWR lobbying activity)
Matanuska Elec. Ass'n Inc. v. Rewire the Bd.	36 P.3d 685 (2001)	Rural electric cooperative--removal of directors
Anchorage Police Dep't Emples. Ass'n v. Municipality of Anchorage	24 P.3d 547 (2001)	Substance abuse testing for police and fire department employees in safety-sensitive positions
Cabana v. Kenai Peninsula Borough	21 P.3d 833 (2001)	Whether classification of municipal land is a legislative decision or quasi-judicial and subject to appeal
Koyukuk River Tribal Task Force v. Rue	63 P.3d 1019 (2003)	Moose management

NOTES: Included are Alaska Supreme Court public interest cases against the State in which the plaintiff lost (i.e., no fees paid and, therefore the case is not included in Table 1). It also includes cases (both winning and losing) against other governmental entities that were appealed to the Supreme Court and for which status as a public interest litigant was at issue. Not included are cases that settled out of court and those public interest cases that resulted in judgments for attorney's fees against the State.
SOURCE: Lexis search of Alaska cases within the past ten years.

STATE OF ALASKA

FRANK H. MURKOWSKI, GOVERNOR

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

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April 21, 2003

Representative Lesil McGuire
State Capitol, Room 118
Juneau, AK 99801-1182

Re: HB 145: Attorneys fees: public interest litigants

Dear Representative McGuire:

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. Based 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: Debra T. Sehr
David W. Marquez
Legislative Liaison

DWM:CT:SZ

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 09.60.0 0 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.

GREATER ★ FAIRBANKS
CHAMBER
OF COMMERCE

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Introduced By: Governmental Affairs
Date Introduced: March 11, 2003
Date Passed: March 11, 2003
Date Transmitted: March 11, 2003

Resolution 03-0311

A RESOLUTION BY THE GREATER FAIRBANKS CHAMBER OF COMMERCE TO SUPPORT THE PASSAGE OF A BILL RELATING TO PUBLIC INTEREST LITIGANTS AND ATTORNEY FEES

WHEREAS a critical component to business development in the State of Alaska is ensuring that development projects, once permitted by the appropriate State Agencies, can proceed without delay; and,

WHEREAS groups opposed to development routinely file litigation with the sole objective of either preventing or delaying permitted development with absolutely no financial downside to them if they lose the litigation; and,

WHEREAS those groups who regularly oppose business development are not simply concerned citizen groups but rather special interest groups supported financially by national and/or international organizations whose stated mission is to prevent development; and,

WHEREAS the State of Alaska as well as industry and developers are forced to defend themselves in lengthy and costly litigation with little chance of recovering any costs or attorney fees even when they prevail in the litigation; and,

WHEREAS legislation, such as Senate Bill 97 introduced by Governor Frank Murkowski, to modify Alaska's existing rules and regulations by eliminating public interest litigant status in appeals of Administrative decisions, in which the party was afforded an opportunity for public input and administrative appeal, and by awarding fees and costs to the prevailing party in such litigation would ensure fairness and a level playing field for all litigants; and,

WHEREAS an additional legislative provision to require disclosure of funding sources by those who seek to qualify as litigants and/or who seek to file an Administrative appeal would permit those defending the litigation to know the identity of those who are actually supporting the litigation and the amount of that financial support; and,

WHEREAS such legislation would inhibit frivolous litigation by ensuring that there is a consequence to those who file such litigation; and,

WHEREAS such legislation is critical to promoting and achieving responsible business development in the State of Alaska;

Alaska Conservation Voters
Alaskans Building a Better Future

Unequal Access

Closing the Door on Public Interest Litigants (HB 145)

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PO Box 22151, Juneau Alaska 99802 / Ph. 907.463.3366 / Fax 907.463.3312 / www.acvoters.org

To: Representatives
From: Matt Davidson
Date: May 8, 2003

HB 145, currently under consideration in the Alaska State Legislature, would severely limit Alaskans' ability to challenge bad government decisions. **HB 145** changes the Supreme Court rules that allow public interest litigants to recover legal expenses for challenges of decisions made by the Departments of Natural Resources, Environmental Conservation, and Fish and Game. The current Rule 82 exemption is necessary to ensure that citizens of Alaska can challenge the government when it makes overzealous or ill-informed decisions.

Public Interest Litigants, by definition, are *not* motivated by an economic incentive, but rather by an interest in the resolution of a significant public policy issue. In 1974 the Alaska Supreme Court removed barriers that enabled only the rich to challenge bad government decisions. Passage of HB 145 will give government free reign to trample on the rights of citizens without threat of public interest litigant challenges of these decisions.

While it has been argued that HB 145 target suits by environmentalists, the bill does not single out these plaintiffs. All Alaskans, such as: fishermen, homeowners, communities, tribal councils, sportsmen, and health advocates impacted by poor decisions made by DNR, ADFG, and DEC are included in the bill. These types of challenges contribute to the checks and balances necessary for sound government decision-making.

All Sides Impacted

Unsound government decisions impact all points along the ideological and political spectrum. If not for the public interest rule, citizens, such as those cited below, would be required to pay tens of thousands of dollars to the State of Alaska in attorney's fees if they do not prevail.

Citizens for the Preservation of the Kenai River, Inc. v. Sheffield, 758 P.2d 624 (Alaska 1988): A group of boat-owners brought suit challenging the validity of a state regulation limiting horsepower of motorized boats on the Kenai River. If not for the public interest rule, the boat owners would have been required to pay tens of thousands of dollars to the State of Alaska in attorney's fees.

Payton v. State, 938 P.2d 1036 (Alaska 1997): Rural residents sued DNR for failing to establish a subsistence salmon fishery on the upper Yentna River. The Court remanded the decision to the Board of Fisheries for further consideration, and the prevailing plaintiffs were able to obtain their reasonable attorneys' fees under the public interest litigant rule.

Alaska Survival, Inc. v. Dept. of Natural Resources, 723 P.2d 624 (Alaska 1988): An organization of local residents filed suit regarding state land disposal of 32 agricultural homesteads.

Evak Traditional Elders Council v. Sherstone, Inc., 904 P.2d 420 (Alaska 1995): A traditional village elders council disputed logging plans regarding historic sites.

Unnecessary Changes

Existing law already protect against frivolous litigation. The courts are charged with deciding whether a plaintiff passes the public interest litigant test. Secondly, the courts already allow the courts to reduce a fee award for a variety of reasons in cases where the judge finds the requested award unreasonable. Attorneys are held accountable by the threat of significant fines for bringing frivolous claims.

Please vote against HB 145.

Wayne Anthony Ross

Law Offices of

ROSS & MINER

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Wayne Anthony Ross
Edward L. Miner
Michael Graper
Timothy Perers
Vince Curry

Curtis W. Patteson, Paralegal

8 April 2003

To Members of the 2003 Alaska Legislature:

Re: SB 97 and HB 145

Dear Legislator:

It is my understanding that the Alaska Legislature is considering Senate Bill 97 and House Bill 145 (or variants thereof) which would virtually eliminate the "public interest litigants" rule that shields Alaskans from punitive awards of attorneys fees when they act as private Attorneys General and bring suit to correct abuses of government. **These bills should be defeated in all their forms!**

I have participated, as an attorney and as a plaintiff, in a number of such suits.

In **Citizens for the Preservation of the Kenai River, Inc. v. Sheffield**, 758 P.2d 624 (Alaska 1988), my office represented a large number of power boating enthusiasts protesting a horse-power restriction on motor boats operating on the Kenai River. The State was trying to eliminate erosion to the banks of the Kenai caused by wakes from passing power boats. Although we pointed out that a faster boat that is able to travel "on the step" makes less wake than a slower boat that cannot "get on its step", we lost that suit. A few years ago, at least one State expert was quoted in the Daily News saying that we had been right about our position.

In **McDowell v. State**, 785 P.2d 1 (Alaska 1989), my office represented Mr. McDowell and several other plaintiffs in seeking to set aside the State's rural preference for Subsistence. The suit was brought on behalf of all Alaskans seeking to uphold Alaska's Constitution which provides for equal access to fish and wildlife resources in Alaska. We won that suit.

In **Alaska Gun Collectors Association v. State of Alaska and Tony Knowles et al**, I represented a group of Alaskans who objected to the Governor requiring that State surplus firearms be destroyed rather than sold at public auction. Suit was brought to seek an injunction prohibiting the destruction of such firearms. After some 50 firearms (some of which were highly collectable) were cut up with a welding torch, we amended our complaint to ask for monetary

damages on behalf of the people of Alaska against the Governor, personally, for willful destruction of State property. When that happened, the Governor called a moratorium on the destruction of surplus guns. After the Legislature enacted legislation prohibiting such destruction[1], the case settled with the Governor agreeing to end the destruction of surplus firearms, and the State paying a portion of my attorneys fees.

In several other cases I participated as plaintiff, along with other Republicans (and others) to challenge the State's campaign donation regulations. If I recall we won most, if not all, of those suits and all Alaskans (and especially Republican legislators and the Republican Party of Alaska) benefitted from such litigation.

None of those lawsuits would have been pursued had the specter of substantial attorney fees loomed on the horizon in the event we had lost those cases!

We ask that our citizens take an active interest in improving State government. Passage of this proposed legislation would have a chilling effect on such participation!

I urge you, most strongly, to defeat SB 97 and HB145, and all of their substitutes and amendments!

Sincerely,

Wayne Anthony Ross
Attorney at Law

[1]The legislation was spurred on by the publicity garnered from our lawsuit against the Governor.

HB 152

HOUSE COMMITTEE REPORT

(11)

Date Referred to Committee: March 19, 2003 **FURTHER REFERRALS:**

Date of Committee Action: 3/31/03

The FINANCE Committee considered: **HB 152**

HOUSE BILL NO. 152 **HEALTH FACILITY MEDICAID RATES/ADV. COM'N**

"An Act relating to payment rates under the Medicaid program for health facilities and to budgeting, accounting, and reporting requirements for those facilities; abolishing the Medicaid Rate Advisory Commission; and providing for an effective date."

Recommends it be replaced with [ ] HCS *or* [ ] CS *for* _____(_____)
For Senate Bills with new title: [ ] Technical Title [ ] New Title: HCR_____ **[ ] Same Title [ ] New Title**

[ ] attach amendments
[ ] add new referral to _____Committee
[ ] Letter of Intent_____Committee

List of Abbrev for Depts.:
ADM
CED
COR
CRT
EED
DEC
DFG
GOV
HSS
LEG
LAW
LWF
MVA
DNR
DPS
REV
DOT
UA

NEW **FISCAL NOTES** *Assigned by Chief Clerk's Office				
List by Dept(s):	*FN#	Fiscal	Indet.	Zero

PREVIOUS **FISCAL NOTES**				
List by Dept(s):	FN#	Fiscal	Indet.	Zero
DHSS	#1	✓		

Signing with recommendations	**Printed Last Name**	**DP**	**DNP**	**NR**	**AM**
MOVED	Hawken	✓			
Bill Stoltz	Stoltz	✓			
Carl Croft	CROFT			✓	
	Jaquish			✓	
Carl E. Moses	MOSES	X			
M. Whitaker	Whitaker	✓			
Chair:	Harris	✓			
Chair: W.K. Williams	Williams	✓			

FISCAL NOTE

STATE OF ALASKA
2003 LEGISLATIVE SESSION

Fiscal Note Number: 1
Bill Version: HB 152
(H) Publish Date: 3/5/03

Revision Date/Time (Note if correction):
Dept. Affected: Health & Social Services

Title: MEDICAID FACILITY PAYMENT RATES
BRU: Medical Assistance Admin
Component: Health Purchasing Group

Sponsor: RULES
Requester: GOVERNOR
Component No.: 243

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	(6.5)	(6.5)	(7.0)	(7.5)	(8.0)	(8.0)
Contractual	(3.1)	(3.1)	(3.2)	(3.5)	(3.6)	(3.6)
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	(9.6)	(9.6)	(10.2)	(11.0)	(11.6)	(11.6)
CAPITAL EXPENDITURES						
CHANGE IN REVENUES (0)						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts	(4.8)	(4.8)	(5.1)	(5.5)	(5.8)	(5.8)
1003 GF Match	(4.8)	(4.8)	(5.1)	(5.5)	(5.8)	(5.8)
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other(Specify Type-do not abbreviate)						
TOTAL	(9.6)	(9.6)	(10.2)	(11.0)	(11.6)	(11.6)

Estimate of any current year (FY2003) cost:
Mark 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)*

This bill would eliminate the need for expenditures that support commission members' travel, per diem and other related support costs; and contractual funding for issuing public notices and court reporting services.

Prepared by: Virginia Stonkus — Phone 465-1166
Division: Medical Assistance — Date/Time 03/03/2003
Approved by: Joel S. Gilbertson, Commissioner — Date 03/03/2003
Agency: Department of Health and Social Services

(Revised 9/2002 OMB)

COMMITTEE COPY

HB152

FRANK H. MURKOWSKI
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STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

March 5, 2003

The Honorable Pete Kott
Speaker of the House
Alaska State Legislature
State Capitol, Room 208
Juneau, AK 99801-1182

Dear Speaker Kott:

Under the authority of article III, section 18, of the Alaska Constitution, I am transmitting a bill to provide greater flexibility to the Department of Health and Social Services to set Medicaid payment rates for Alaska's hospitals, nursing home and other health care facilities.

The proposed bill would eliminate the Medicaid Rate Advisory Commission and place the responsibility for calculating and setting Medicaid payment rates for health care facilities under the general authority of the Department of Health and Social Services.

Historically, the Medicaid facility rate setting process has been extremely cumbersome and costly for both the state and health care facilities. The current rate-setting process is both a barrier to effective cost containment as well as problematic for assuring adequate reimbursement for Alaska's diverse mix of health care facilities.

Passage of this legislation will allow the department to develop in regulation a more flexible, cost-effective rate setting process that will, for the first time, allow the department to explicitly take into account the appropriations made by the legislature for the Medicaid program when setting rates.

I urge your prompt and favorable action on this measure.

Sincerely,

Frank H. Murkowski
Governor

STATE OF ALASKA

DEPT. OF HEALTH AND SOCIAL SERVICES

OFFICE OF THE COMMISSIONER

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March 20, 2003

Honorable Bill Williams
Co-Chair
House Finance Committee
Alaska State Capitol; Rm. 515
Juneau, AK 99801

Dear Representative Williams,

The Department of Health and Social Services respectfully requests a hearing in the House Finance Committee on House Bill 152 "An Act relating to payment rates under the Medicaid program for health facilities and to budgeting, accounting, and reporting requirements for those facilities; abolishing the Medicaid Rate Advisory Commission; and providing for an effective date."

This bill will provide greater flexibility to the Department of Health and Social Services to set Medicaid payment rates for Alaska's hospitals, nursing homes and other health care facilities. Changes in federal law in the past few years providing more flexibility in rate setting have not been taken advantage of in Alaska due to our own inflexible statute.

The proposed bill would eliminate the Medicaid Rate Advisory Commission (MRAC). Since the MRAC currently acts in an advisory capacity and the Commissioner has ultimate authority to set rates, elimination of the Commission and its attendant costs is appropriate.

Passage of this legislation will allow the department to develop in regulation a more flexible, cost-effective rate setting process that will, for the first time, allow the department to explicitly take into account the appropriations made by the legislature for the Medicaid program when setting rates. A fiscal note should be on file with the committee.

Your favorable consideration of this request will be appreciated.

Sincerely,

Elmer A. Lindstrom
Special Assistant to the Commissioner

Cc: Mike Tibbles, Legislative Director
Office of the Governor

Virginia Stonkus, Acting Director
Division of Medical Assistance