

ALASKA LEGISLATURE SPECIAL COMMITTEE/SUBJECT FILES 8672

2431.41 SCOMM 101A: CIVIL JUSTICE/TORT REFORM - HB 58, 1997 603

insurance, and litigation against the state.² The Governor appointed Judge Thomas Stewart, a retired superior court judge from Juneau, as task force chair.

The Governor charged the task force with four goals: to make the civil liability system more efficient and reduce frivolous litigation; to provide for fair but not excessive compensation for injured victims; to lower liability insurance rates; and to provide for reasonable punitive damages awards to deter practices that harm innocent Alaskans, without chilling the business environment or allowing windfall recoveries. He asked the task force to consider all options and develop a proposal for meaningful, responsible tort reform.

The twenty members of the task force worked through the fall of 1996 to meet these goals. The full task force met for a total of six days from early September to early December. Judge Stewart divided the work of the task force into committees on damages, procedures, and liability. These committees each conducted five half-day meetings in October and November to discuss the issues and to make and revise recommendations.

The Governor addressed the task force at its first meeting, urging members to take this opportunity to work out a reasonable set of proposals that would solve real problems and work to the benefit of all Alaskans. He urged the group to work by consensus as much as possible, to make sure that its recommendations were responsive to mainstream concerns. Accordingly, the task force adopted a voting procedure calling for a super-majority vote to pass a proposal out of committee or to adopt a full task force recommendation.³ For most of its recommendations, the task force was able to achieve a broad consensus.

The task force learned about the tort reform efforts in Alaska and other states. The task force received presentations from experts from the RAND Institute and Cornell School of Law. The members also conducted interviews, reviewed studies of civil justice reform efforts nationwide, and commissioned additional research and analysis of Alaska data. They conducted a series of hearings around the state to explain their proposals and obtain public testimony, and all of their meetings were open to and attended by the public. They met in committees, and as a group, to argue, listen, and work out their recommendations.

² The Governor also appointed a member of the Alaska Teamsters Union to represent the concerns of Alaska working people, but this member was unable to serve due to illness in his family.

³ At the committee level, it took four votes to pass out a recommendation to the full task force. Any member was free to request that an issue that had died in committee be reconsidered by the full task force, but no such request was ever made. With only a few exceptions, the committees made their recommendations by consensus. For full task force votes, a super majority meant 14 of 20 votes.

The task force members learned of a variety of concerns about the Alaska civil justice system. They heard that litigation is often prohibitively expensive and time-consuming. Many individuals and businesses with smaller claims are unable to find lawyers to take their cases, while defendants often agree to settle dubious claims to avoid the costs of going to court. Injured individuals find it difficult to receive what they consider fair and timely compensation for their injuries, while many individual and business defendants feel unfairly targeted because of their assets, not their responsibility for the injuries.

The task force recognized the inherent conflict between the need of injured parties for individualized justice that fits the circumstances of their cases and the need of members of the business community for a level of predictability that will allow them to know the value of cases and to purchase reasonably priced insurance.

The task force studied court statistics on cases filed in Alaska courts and commissioned a special study of tort cases that went to jury trial. This information showed no explosion in the number of tort cases filed, nor did it reveal a large number of juries returning high noneconomic or punitive damages. However, this information does not reveal the entire picture of tort case outcomes, because most claims are settled out of court. The task force concluded that further information is necessary for an informed public policy debate on tort reform. The task force did not find evidence of large numbers of frivolous lawsuits and concluded that, with some strengthening, the existing court rules are adequate to address the problem of lawyers who present frivolous claims or defenses.

The Governor asked the task force to consider liability insurance rates and ways to reduce them. The task force looked into how insurance rates are set and regulated, and into insurance reforms and rate rollbacks in other states. The task force found no evidence of a crisis in insurance cost or availability, nor did it hear from the insurance industry in the course of its debate. Because Alaska is a small market, rates for most lines of liability insurance are set according to the overall claims experience of an insurance company, not its experience within Alaska. Accordingly, the task force found no evidence that changes in Alaska law would affect Alaska insurance rates. The task force recommended enhanced data collection and reporting to provide the legislature and the public with the information they need to evaluate the effect of proposed civil justice reforms.

Based on its findings, the task force made a number of proposals it considered important to civil justice reform. The commentary and draft language of these proposals are found in Chapter 4 of this report. The task force also reviewed and rejected a number of ideas from previous tort reform efforts. It found that some of these ideas did not address real problems in Alaska's civil justice system, while others were unfair or created more problems than they solved.

Governor's Advisory Task Force on Civil Justice Reform

Discussion of these proposals is found in Chapters 5 and 6 of this report. The task force worked hard, in a short period of time, to create workable solutions to problems with the civil liability system, while sorting out recurring ideas that would not improve the process. The task force finalized its recommendations and presented them to the Governor on December 16, 1996.

Chapter 2

Previous Alaska Tort Reform Efforts

Most of the current tort statutes were enacted in 1962 to operate in conjunction with principles of common law. Many reforms have been made in the intervening years.

For injuries related to the design, planning, or construction of improvements to real estate, a statute of repose⁴ was enacted in 1967 as an exception to the general two-year statute of limitations. Under the 1967 statute of repose, a claim was barred unless brought within six years of the date of substantial completion of construction. An exception was made if the injury occurred in the sixth year – the claimant would have two years to file for that injury.⁵ Provisions specific to medical malpractice were added as Article 6 of AS 09.55. The new provisions listed the elements that needed to be proved to establish malpractice. A physician's standard of care was established to be that of physicians with the same expertise practicing in the same or a similar locality.

In 1970, the legislature passed the Uniform Contribution Among Joint Tortfeasors Act, AS 09.16.010 - 09.16.060, which provided for contribution so that each person who contributed to an injury (joint tortfeasor) was liable for an equal

⁴ A statute of repose cuts off the right of a claimant to bring a lawsuit after a specified time measured from the delivery of a product or the completion of work. A statute of limitation is the period of time after an injury has occurred in which a lawsuit must be filed.

⁵ In 1988, the Alaska Supreme Court invalidated the 1967 law on equal protection grounds because the statute discriminated between different kinds of defendants "based on their occupation or the nature of the work they perform." *Turner Construction Co. v. Scales*, 752 P.2d 467, 470 (Alaska 1988). The court mentioned but did not reach two additional issues: discrimination among classes of plaintiffs and due process issues under the Alaska Constitution. In 1994, the legislature passed a bill amending the statute of repose, AS 09.10.055. The bill contained findings of legislative purpose to justify the distinctions that the Alaska Supreme Court had criticized among classes of defendants. The bill extended the statute of repose to fifteen years. The state supreme court has not evaluated the current AS 09.10.055.

share of the damages despite the person's percentage of fault.⁶ Previously, each joint tortfeasor could be liable for paying all of a claimant's damages, without a right of contribution from other liable persons. In 1975, the supreme court changed the existing rule that a claimant could not recover any damages if the claimant was contributorily negligent; that is, if a claimant was also at fault for causing his injuries. Under the new rule, the claimant's damages were reduced by the percentage of the claimant's negligence (termed "comparative negligence.") *Kaatz v. State*, 540 P.2d 1037 (Alaska 1975) *appeal after remand* 572 P.2d 775 (1977)

The next flurry of activity took place during the 1975-76 legislative session. In 1975, after Governor Hammond vetoed a medical insurance bill, he created the Governor's Medical Malpractice Commission. The following year, a comprehensive bill was enacted. The Medical Indemnity Corporation of Alaska (MICA) was established as a public corporation. As a condition of licensure, physicians were required to obtain insurance from MICA; various other medical professions were also required to obtain insurance, but only from MICA if other insurance was found to be unavailable.⁷ The burden of proof for malpractice was amended to remove the "locality" restriction; AS 09.55.535 provided for voluntary arbitration of medical malpractice claims; and AS 09.55.556 addressed the liability of a health care provider who fails to adequately inform a patient of the risks and alternative treatments or procedures ("informed consent"). Expert advisory panels were established to provide the superior court with findings on medical malpractice cases. The bill required hospital peer review systems with attendant confidentiality and immunity for reviewers. Additionally, the new law provided for payment of future damages by periodic payment and allowed evidence of compensation from other sources ("collateral sources") to be considered by the court after the jury reached a verdict.

During the 1979-80 legislative session, the three tort-related bills that were filed all passed. AS 09.65.200 provides that a landowner of unimproved land is not responsible for injuries to a person who is not compensating the owner for use of the land and who is injured as a result of the natural condition of the land.⁸

⁶ In 1979, the supreme court invited the legislature to amend the law to provide for proportionate liability where each person would be responsible for the damages in proportion to their liability. *Arctic Structures, Inc. v. Wedmore*, 605 P.2d 426 (Alaska 1979).

⁷ Under ch. 177, SLA 1978, the mandatory insurance provisions were made voluntary. MICA was abolished in 1991. Ch. 14, SLA 1991.

⁸ The statute was amended by ch. 168, SLA 1988 to expand the definition of unimproved land to allow certain improvements, to preclude liability to a person who uses the land for free recreational use, and to exclude from this statutory immunity acts of gross negligence or intentional (continued...)

Under another bill, skiers assumed the inherent risks of skiing if the ski resort posted prominent signs warning of the inherent risks that were enumerated in the statute.⁹ Additionally, a bill was passed that suspends the running of the statute of limitations for persons who were incompetent as a result of mental illness.

Major tort reform occurred during 1986. The bill that passed was one of five "omnibus" bills filed that session. The most significant change was a cap on noneconomic damages¹⁰ of \$500,000, except for damages related to disfigurement or severe physical impairment. The bill provided for jury itemization of damages between past and present, and among economic, noneconomic, and punitive types of damages.¹¹ It also modified joint and several liability to apply some proportionality between the amount to be paid and the degree of fault, precluded damages for injuries during a claimant's commission of a felony, limited liability of nonprofit directors and officers, allowed reduction of a verdict by collateral source payments, limited awards of attorney fees to prevailing parties in certain contested cases, and provided for periodic payments of damage awards. The bill also amended provisions on offers of judgment, costs and attorney fees, and interest on judgments, including a new section on prejudgment interest. The bill codified the standard of proof for punitive damage awards of "clear and convincing evidence" that the state supreme court set in 1962 and the court's ruling on contributory fault.

During the 1987-88 session, Governor Cowper introduced a bill advancing further tort reform. The significant differences between the House and Senate versions could not be resolved. Two other "omnibus" bills failed to move out of committee.

In November 1988 the voters approved an initiative to eliminate "joint and several" liability – the common law doctrine by which multiple defendants are held both jointly and individually liable for the entire amount of damages awarded to a plaintiff, irrespective of each defendant's percentage of fault. The initiative repealed AS 09.16.010, which provided for a right to contribution among co-tortfeasors, and amended AS 09.17.080(d) to read, "[T]he court shall enter

⁸(...continued)
misconduct.

⁹ Ski area liability is now governed by the Alaska Ski Safety Act of 1994, AS 05.45.010 - 05.45.210. (Ch. 63, SLA 1994) The fourteen sections of the act precisely define the duties and responsibilities of skiers and operators. If a ski area fulfills all of its responsibilities, it is immune from liability for any accident in which a contributing factor was an inherent risk of skiing or the skier's failure to follow the enumerated skier duties.

¹⁰ Noneconomic damages include such losses as pain and suffering, loss of enjoyment of life, and disfigurement.

¹¹ Punitive damages are a separate amount of money awarded to punish or deter the defendant for outrageous conduct. They may be awarded in addition to an award of compensatory damages which are intended to restore the injured party to his or her position prior to the injury.

judgment against each party liable on the basis of several liability in accordance with that party's percentage of fault."¹² A provision in the initiative limiting attorney contingency fees was not placed on the ballot after it was disallowed by the Lieutenant Governor. (See *Citizens Coalition for Tort Reform v. McAlpine*, 810 P.2d 162 (Alaska 1991).)

In 1989, the House of Representatives created the "Liability Insurance Task Force" for the purpose of reviewing controversies concerning tort reform and to "determine how the state may more effectively regulate insurance and provide civil justice." In March 1990, the task force issued a final report containing findings but no recommendations. An "omnibus" bill filed in both the House and the Senate failed to make it to the floor for consideration.

In 1993, the state supreme court adopted a civil rule allowing the court to order mediation at the request of a party or on its own motion. Alaska R. Civ. P. 100. Mediation is intended to achieve informal resolution of legal disputes. The rule did not apply to certain matters involving domestic abuse.

Another "omnibus" tort bill, HB 292, was filed in 1993. After extensive hearings by the House Labor and Commerce Committee, it was not reported out of the House Finance Committee. The most recent "omnibus" tort bill, HB 158, was filed in 1995. This bill was passed by the legislature in 1996 and vetoed by Governor Knowles. This task force was then appointed by the Governor to develop proposals for changes to the current civil justice system.

A chronology of legislative tort reform bills from 1967 to 1996 is found in Appendix D of this report.

¹² In *Benner v. Wichman*, 874 P.2d 949 (Alaska 1994), the Alaska Supreme Court analyzed the changes to AS 09.17.080 and held that fault could only be allocated among parties who had been joined to the action. Thus, defendants may still be held liable for the fault of any tortfeasors who have not been joined in an action.

Chapter 3

Research and Public Comment

The task force worked to develop a strong base of information before making its recommendations. Governor Knowles asked the task force to

- 1) evaluate any changes in the volume and type of civil liability case filings in the Alaska Court System and in amounts awarded by juries as damages;
- 2) review statutory civil liability and insurance reform measures in other states and assess the effects of those reforms;
- 3) analyze recent proposals for civil liability and insurance reform in Alaska;
- 4) review Alaska case law and statutes and assess the need to amend existing statutes and court rules; and
- 5) invite written public comment and hold public hearings on civil liability, insurance reform, and related topics.

Studies and papers: A great deal has been written on the subject of civil justice reform. The task force staff assembled several notebooks of materials, including court system data, statutes and bills, journal and newspaper articles, empirical research results, scholarly analyses, governmental audits, advocacy from interest organizations, and results from previous task forces. The staff contacted a wide range of organizations and individuals: university professors, plaintiff and defense attorneys, consumer groups, research organizations, insurance groups, and lobbyists. The task force gave particular attention to prior Alaska tort reform proposals, Alaska statutes and rules, and recent tort reform efforts in other states.

Those who sent information included the Institute for Civil Justice at RAND, the Brookings Institute, the National Center for State Courts, the Alaska Judicial Council, the Alaska Legislative Research Agency, the American Bar Association,

the Alaska Bar Association, the American Medical Association, the Alaska State Medical Association, the Association of Trial Lawyers of America, the Defense Research Institute, the American Tort Reform Association, Alaskans for Liability Reform, Public Citizen, the Alaska Public Interest Research Group, the Insurance Research Council, the Insurance Information Institute, and the American Bar Foundation.

Tort reform experts: Two nationally recognized experts on civil justice reform addressed the task force at its first meeting. Dr. Deborah Hensler is the Director of the Institute for Civil Justice at RAND, an independent private research institute in California, and is also a professor of law and social science at the University of Southern California. Her research has focused on trends in civil justice litigation, alternative dispute resolution, mass torts, and compensation for physical injury. She holds a Ph.D. in political science from MIT.

Dr. Hensler discussed the three goals of tort law: compensation of losses from injuries; deterrence of the behavior which leads to injuries; and fairness or corrective justice. With respect to compensation, she described a 1989 RAND study of 26,000 households showing that only 10 percent used the liability system to deal with medical losses following accidental injury. The rate of claiming was up to 50 percent in auto accidents, and down to 5 percent in products cases. She said that some studies show the claiming rate was gradually increasing. In the 1980s, the greatest increase in litigation was in "mass torts" such as asbestos and silicone breast implants. The rate of compensation is uneven; generally, the higher the loss, the lower the percentage of recovery. Transaction costs, court costs, attorney fees, and other litigation expenses range from 33 percent for auto accidents to 60 percent for mass torts.

Dr. Hensler discussed the balance between the social costs and benefits of using the court system for deterrence of unsafe behavior, finding a mix of good and bad effects. With respect to fairness, the public's attitude toward tort reform reflects an ambivalent attitude toward the civil justice system in general: while people disapprove of frivolous lawsuits and greedy lawyers, they still feel that individuals who are at fault should pay, and people look to lawyers and the courts to make them do so.

Dr. Hensler also provided an overview of civil justice reform in the United States. She divided it into three parts: the tort reform movement, which concentrates on reducing incentives to litigate and reducing uncertainty about the outcomes; the procedural reform movement, which concentrates on reducing delays and the costs to all litigants; and the alternative dispute resolution movement, which attempts to increase access and reduce delay by providing alternatives to litigation. She discussed ongoing research efforts, particularly with respect to alternative dispute resolution.

Theodore Eisenberg is a professor of law at Cornell University. Professor Eisenberg has conducted a number of studies of the civil justice system, including recent work on punitive damages and litigation models. Professor Eisenberg spoke about research on jury behavior and the size of awards. He said some jury behavior does not follow popular perceptions: for instance, jury cases are on the court docket a shorter time than judge-tried cases, and plaintiffs are more likely to win in front of a judge than in front of a jury. He said that in studies of medical malpractice, the rate of claiming was much lower than the rate of negligence, as determined by independent panels of doctors. Professor Eisenberg also reviewed studies on punitive damages, showing that punitive damages are requested most frequently in business and contract cases and least frequently in medical malpractice and auto cases. In a study of federal cases where punitive damages were awarded, he found that they were closely related to compensatory awards, increasing as compensatory awards increase.

Alaska judges and practitioners: At the first meeting, Judge Brian Shortell, of the Anchorage Superior Court, discussed allocation of fault, statutes of limitation, medical malpractice cases, and damages. Supreme Court Justice Dana Fabe, chair of the court's civil rules committee, discussed the new Alaska Rules of Court pertaining to discovery and disclosure rules, including automatic disclosure of certain information, limitations on depositions and interrogatories, pretrial procedures, and sanctions. Teresa Williams, Assistant Attorney General, gave an overview of prior Alaska proposals to revise tort law, dating back to 1967.¹³

A number of other Alaska practitioners assisted the three committees in their work. The damages committee was aided in its discussion of wrongful discharge cases by Thomas M. Daniel and Barbara A. Jones, co-chairs of the Alaska Bar Association Employment Law Committee, who discussed current Alaska law and the Model Wrongful Termination Act. Daniel T. Quinn and John Suddock debated various proposed changes to the law regarding allocation of fault with the liability committee. The liability committee also met with Marianne Burke, director of the Division of Insurance, to learn about insurance rate-making and regulation and insurance reforms in other states. The procedures committee was assisted in many areas by Chris Christensen, staff counsel to the Alaska Court System, and Susanne DiPietro, staff attorney for the Alaska Judicial Council.

Court system data: The task force staff analyzed court system annual reports to determine if there have been any recent changes in filing. The number of personal injury and property damage filings has stayed fairly constant since

¹³ This history is included in this report in Chapter 2 and Appendix D.

1988.¹⁴ There has been a slight increase in the number of personal injury cases, while property damage, death, and malpractice claims have remained level. When the increase in personal injury claims is adjusted for the recent increase in the state's population, there is no apparent change in filing patterns. In 1993, Alaskans filed tort lawsuits at a rate of 159 per 100,000 population. This figure was at the low end of 28 states that the National Center for State Courts studied that year. The majority of personal injury cases filed in 1995 (58 percent) arose out of automobile accidents. Another 37 percent were general personal injury cases, and 5 percent were malpractice cases.¹⁵

Special study of Alaska tort trials: The task force asked the Alaska Judicial Council to study jury verdicts and awards of damages in Alaska tort cases. Teresa Carns and Susanne Di Pietro presented information on the type of cases that usually go to trial: 37 percent were automobile cases, 17 percent premises liability cases, and 13 percent medical malpractice cases, with the rest a mixture of employment, intentional tort, and product liability cases. They found that most plaintiffs were individuals or families, rather than organizations, while defendants were split between individuals and organizations.

The Judicial Council found that plaintiffs won at trial about half the time, although the rate at which plaintiffs won varied according to the location of the trial. They found that plaintiffs were more likely to win automobile and employment cases, while defendants were more likely to win malpractice and premises liability cases. They also found that Alaskan juries seldom allocate much fault to plaintiffs.

The Judicial Council looked in detail at damage awards: economic and noneconomic, past and future, and punitive. They found that damages are most frequently awarded for past economic losses, most commonly lost wages and medical expenses. Noneconomic damages constituted about one-third of the awards studied, about half of which was for past pain and suffering. Juries seldom made awards for loss of consortium, loss of enjoyment of life, or emotional distress. Punitive damages were requested in 27 percent of the cases, but awarded in 6 percent. In many cases, the amount of damages was quite low. In 58 percent of

¹⁴ Because of changes in the way the courts have categorized their cases, it is difficult to determine the number of tort filings before 1988. As the court computer system has come on-line, better data have become available. Since 1991, the courts have kept track of tort cases by eight different categories: automobile personal injury, automobile property damage, other personal injury, other property damage, wrongful death, medical malpractice, legal malpractice, and other malpractice.

¹⁵ Charts summarizing Alaska tort filings from 1988 to 1995 are found in Appendix B of this report.

superior court cases in which the juries returned awards of damages, each award was under \$50,000 (the superior court jurisdictional limit).¹⁶

Public opinion: The task force involved the public in its deliberations in a number of ways. All task force and committee meetings were open to the public, and time for public testimony was allowed at most of the meetings. Members of the public were present at all meetings, particularly staff and volunteers from the Alaska Public Interest Research Group. Many task force members heard comments from the public directly, and written comments were encouraged throughout the process.

After the committees made their draft recommendations, the task force scheduled a series of community forums to present the preliminary recommendations and hear public comment on them. Task force members held three- to four-hour community forums in Juneau, Bethel, Anchorage, and Fairbanks. They also held a statewide teleconference to receive comment from areas where no meeting was scheduled. The community forums were designed to serve multiple purposes: to give Alaskans a chance to learn more about civil law and litigation, to discuss the task force recommendations and other tort reform proposals, and to allow people to share their experiences and views with members of the task force. Approximately 120 people attended the forums.

The community forums were designed to encourage give-and-take between the task force members and the public. The first hour of each forum was a videotape of excerpts from the presentations of Dr. Hensler and Professor Eisenberg at the first meeting of the task force, providing a national overview of civil liability research. The videotape was followed by a brief introduction to the task force process and an overview of the preliminary recommendations.

Audience members were then asked to break into groups to discuss three typical litigation situations that raised many of the issues in front of the task force. There was a hypothetical building collapse that raised questions about limits on noneconomic damages and the statute of repose; a medical malpractice case that raised questions about hospital liability for emergency room physicians, whether children should be able to bring suit on their own behalf when they reach adulthood, and how frivolous lawsuits can be discouraged; and an automobile accident that raised questions about the ability of alcohol-impaired plaintiffs to sue for injuries they incurred as a result of their own intoxication and whether there should be limits on awards of punitive damages.¹⁷ After discussion, the groups shared their conclusions with each other. They learned about each other's differing

¹⁶ The full text of the Judicial Council study is found in Appendix C of this report.

¹⁷ The three situations, public comment on them, and summaries of general public testimony are found in Appendix A of this report.

perspectives and began to appreciate the difficult challenge facing those who are considering changes to Alaska civil liability law.

The group discussions were followed by public testimony. Fifty-six people testified in the various locations. Although the time for individual testimony had to be limited in Anchorage and Fairbanks because of the number of people signed up to speak, the task force stayed each night until all those who wished to speak had their chance. The audiences were a mix of people who had suffered negligent injuries, small business owners, doctors, engineers, lawyers, and interested citizens. Summaries of public testimony are found in Appendix A.

Most of the task force members attended at least one of the public meetings; some attended all of them. The results were reported back to the full task force before the task force voted on the committee recommendations. With the public comment in mind, as well as the results of prior research, reading, and group discussions, the task force made the recommendations found in the next three sections of this report.

Chapter 4

Proposals Adopted by Task Force

This chapter contains the affirmative recommendations of the task force to improve the civil justice system. Each of these recommendations was adopted by at least a two-thirds majority of the task force, in many instances by a unanimous vote. The recommendations are grouped by their primary purpose, although many address more than one goal.

To increase the predictability of case outcomes, the task force recommends

- structured caps on punitive damages
- further limitation on noneconomic damages
- a market rate of interest on judgments
- shorter statutes of limitation

To improve efficiency of the courts and access to justice, the task force recommends

- an alternative dispute resolution program
- improved superior court fast-track procedures
- streamlined district court procedures and higher jurisdictional limits
- provisions to encourage offers of judgment
- medical advisory panel improvements
- access to the medical advisory panel for state health care providers

To reduce frivolous lawsuits and defenses, the task force recommends

- increased fines for litigation misconduct by lawyers
- restrictions on suits for injuries suffered during a felony
- clarification of liability for intentional acts

To provide information for future public policy debate, the task force recommends

- collection of settlement information
- collection of more-detailed insurance information

Each of these recommendations is presented in specific statutory language, as it would appear in a bill to amend the Alaska Statutes or the Alaska Rules of Court. The statutory language is followed by commentary describing the intended effect of the change and the reasons for the task force recommendation. Purpose and effective date provisions are also included.

The task force members discussed a number of issues regarding wrongful termination from employment. In the short time it had available, the task force was unable to develop concrete recommendations, but it recommends further inquiry in this area.

Statutory language for the purpose section of the proposed legislation follows:

PURPOSE OF PROPOSED LEGISLATION

- * Sec. 1.** **PURPOSE.** It is the purpose of this Act to
- (1) reduce the time and costs associated with civil litigation for civil litigants;
 - (2) improve access to justice for individuals and small businesses;
 - (3) provide for fair but not excessive compensation for persons injured through the fault of others;
 - (4) increase the predictability of case outcomes to reduce inappropriate litigation and settlement behavior;
 - (5) collect information on the civil justice system to inform the public policy debate on tort reform-related issues;
 - (6) collect information on the insurance industry to inform the public policy debate on tort reform-related issues.

STRUCTURED CAPS ON PUNITIVE DAMAGES

* **Sec. 6.** AS 09.17.020 is repealed and reenacted to read:

Sec. 09.17.020.PUNITIVE DAMAGES. (a) In an action in which a claim of punitive damages is presented to the fact finder, the fact finder shall determine, concurrent with all other issues presented, whether punitive damages shall be allowed by using the standards set out in (b) of this section. If punitive damages are allowed, a separate proceeding under (c) of this section shall be conducted before the same fact finder to determine the amount of punitive damages to be awarded.

(b) In the initial phase of a trial in which punitive damages are claimed, the fact finder may make an award of punitive damages only if the plaintiff proves by clear and convincing evidence that the defendant's conduct

- (1) was outrageous;
- (2) was the result of malicious or hostile feelings towards the plaintiff; or
- (3) evidenced reckless indifference to the rights or safety of others.

(c) At the separate proceeding to determine the amount of punitive damages to be awarded, the fact finder may consider

- (1) the likelihood at the time of the alleged misconduct that serious harm would arise from the defendant's misconduct;
- (2) the degree of the defendant's awareness of that likelihood;
- (3) the amount of financial gain the defendant gained or expected to gain as a result of the defendant's misconduct;
- (4) the duration of the misconduct and any intentional concealment of it;
- (5) the attitude and conduct of the defendant upon discovery of the misconduct;
- (6) the financial condition of the defendant; and
- (7) the total deterrence of other damages and punishment imposed upon the defendant as a result of the misconduct, including compensatory and punitive damages awards to persons in situations similar to those of the plaintiff and the severity of the criminal penalties to which the defendant has been or may be subjected.

(d) At the conclusion of the separate proceeding under (c) of this section, the fact finder shall determine the amount of punitive damages to be awarded and the court shall enter judgment for that amount.

(e) Unless that evidence is relevant to another issue in the case, discovery of evidence that is relevant to the amount of punitive damages under (c)(3) or (c)(6) of this section may not be conducted until after the fact finder has determined that an award of punitive damages is allowed under (a) and (b) of this section. The court may issue such orders as necessary, including directing the parties to have the information relevant to the amount of punitive damages under (c)(3) or (c)(6) of this section available for production immediately at the close of the initial trial, so as to minimize the delay between the initial trial and the separate proceeding to determine the amount of punitive damages.

(f) Except as provided in (g) or (h) of this section or otherwise provided by law, an award of punitive damages may not exceed the greater of

(1) three times the amount of compensatory damages awarded to the plaintiff; or

(2) the sum of \$500,000.

(g) Except as provided in (h) of this section, if the fact finder finds that the conduct proven under (b) of this section was motivated by financial gain, it may award an amount of punitive damages not to exceed the greater of the limitation provided under (f) of this section or

(1) the average net annual income earned by the defendant for the five years before the date of the trial; or

(2) two times the amount of financial gain that the defendant received or expected to receive as a result of the defendant's misconduct.

(h) Notwithstanding the provisions of (g) of this section, if the fact finder finds that the conduct proven under (b) of this section was employment-related, including hiring, firing, transferring, promoting, demoting, or terminating an employee or employees, and

(1) affected one person, an award of punitive damages shall be subject to the limitation of (f) of this section;

(2) the employer engaged in a pattern or practice affecting more than one person, an award of punitive damages shall not exceed the greater of the limitations provided under (f) or (g) of this section.

(i) Punitive damages may not be awarded against a person or entity that is immune by law from awards of punitive damages.

*** Sec. 31.** AS 09.17.020, as repealed and reenacted by sec. 6 of this Act, has the effect of amending Alaska Rule of Civil Procedure 49 by requiring the jury to conduct a separate proceeding for the

determination of a punitive damages award after it has determined that punitive damages are allowed in a case.

Commentary

This proposal makes changes to AS 09.17.020 regarding punitive damages.

The task force considered at great length whether the law should cap punitive damages and at what level such a cap might operate. Some members felt that punitive damages have no place in today's judicial system, while others felt that punitive damages are an important part of the existing system. The damages committee heard evidence supporting both positions. Although punitive damages are infrequently assessed in Alaska, they create a sense of unpredictability for the parties. This unpredictability affects settlement behavior in a way that is not reflected in the judicial statistics.

The damages committee considered but did not reach consensus on the advisability of a simple multiplier of compensatory damages or a fixed dollar cap. These limitations met the predictability test, but seemed less valuable in meeting the fairness test, in certain situations. The task force believes strongly that any cap needs to account for the varying circumstances in which punitive damages are awarded. In some cases the profit earned by an individual's misconduct might be a proper measure of punishment. In others, however, profit is not a component of the wrongdoer's decision-making or actions.

Borrowing from the law of the State of Kansas, the task force's proposal provides multiple caps for various situations. The basic cap is three times the compensatory damages or \$500,000, whichever is greater (section (f)). This cap would be applied in most cases. However, in cases in which the defendants' offending conduct was clearly motivated by financial gain, the cap would be measured differently. It would be twice the profit earned from the misconduct, one year's net income based upon a five-year average, or the cap provided under section (f), whichever is higher. These alternative caps are more appropriate, fair, and predictable where a defendant conducted a business scheme or conspiracy to evade the law for financial gain.

The proposal also crafts an exception to exempt employment situations such as hiring, firing, and promoting. Conduct affecting a single employee would fall under the basic cap (three times compensatory or \$500,000). However, if a company had a pattern or practice affecting multiple employees, then either the alternative cap (one year's income or two times profit) or the basic cap, whichever is larger, could be used.

The task force considered whether part of any punitive damages award should be given to state government. The argument in favor of this proposal was that punitive damages exist to deter and punish the wrongdoer, not to compensate the injured person. It is important that the injured person receive enough of the award to have an incentive to pursue punitive damages when appropriate, but not receive enough to constitute a windfall. The argument against this proposal was that it is financially and psychologically very difficult for a plaintiff to bring a lawsuit and see it through to a verdict. Suits for punitive damages are already very complex and difficult cases to bring, and the task force was unwilling to make it more difficult to do so. It opted instead for the increased predictability that comes with the proposed cap.

FURTHER LIMITATION ON NONECONOMIC DAMAGES

* Sec. 5. AS 09.17.010 is amended to read:

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

(b) The amount of damages awarded by a court or a jury under (a) of this section may not exceed \$500,000 for each claim based on a separate incident or injury.

(c) The limit under (b) of this section does not apply to damages for severe disfigurement or severe physical impairment.

Commentary

This proposal makes changes to AS 09.17.010 regarding noneconomic damages.

Since 1988, Alaska law has imposed a \$500,000 limit on most jury verdicts for noneconomic damages, which include compensation for pain, suffering, loss of consortium, loss of enjoyment of life, and other noneconomic injuries. The cap may be exceeded only in instances of disfigurement or severe physical impairment.

The task force evaluated alternatives to the current cap and whether to impose an absolute cap that cannot be exceeded. It considered whether to delete the word "disfigurement" and whether "impairment" could be defined by statute. It looked at caps from other states, particularly a recent Ohio statute that ties noneconomic damages to life expectancy, imposing a cap for severe injuries of \$35,000/year times the person's life expectancy, or \$1 million, whichever is less.

Only nine states impose any cap on noneconomic damages, so Alaska already imposes greater restrictions on plaintiffs and provides greater certainty for defendants than most states. Studies of the effect of caps on insurance rates, particularly the California medical malpractice cap, have shown mixed results. The task force found no evidence that Alaska plaintiffs are receiving excessive compensation for noneconomic damages under the current cap, but it was concerned that lowering the cap might accord insufficient compensation to individuals with the most severe injuries.

While the terms "disfigurement and severe physical impairment" lack precision, the task force believed that attempting to define those terms (e.g., loss of two limbs, combination of deafness and blindness, etc.) inevitably would omit

injuries that warrant substantial compensation and create irrational distinctions between classes of injured victims. There is no evidence that Alaska courts have construed these terms in a manner that allows recovery of excessive damages for nonserious injuries.

While the full task force recommends no major change in the current cap, it agrees that adding the word "severe" to describe the word "disfigurement" would clarify that the cap can be exceeded only for very serious injuries.

MARKET RATE OF INTEREST ON JUDGMENTS

- * **Sec. 9.** AS 09.30.070(a) is amended to read:
(a) Notwithstanding the provisions of AS 45.45.010, the [THE] rate of interest on judgments and decrees for the payment of money, including prejudgment interest, shall be determined in accordance with (c) of this section [IS 10.5 PERCENT A YEAR], except that a judgment or decree founded on a contract in writing, providing for the payment of interest until paid at a specified rate not exceeding the legal rate of interest for that type of contract, bears interest at the rate specified in the contract if the interest rate is set out in the judgment or decree.
- * **Sec. 10.** AS 09.30.070 is amended by adding a new subsection to read:
(c) Except as otherwise provided in (a) of this section, the rate of interest on judgments and decrees for the payment of money is the rate for a five year constant maturity U.S. Treasury note published in the applicable Federal Reserve H.15 Statistical Release, plus one and one-half percent. This rate shall be the rate in effect as of the first business day of the month during which prejudgment interest begins to accrue under (b) of this section, and shall remain constant with respect to such claims until the judgment is satisfied. This rate of interest shall be determined by the Alaska Court System as of the first business day of every month.
- * **Sec. 12.** AS 09.50.280 is amended to read:
Sec. 09.50.280. JUDGMENT FOR PLAINTIFF; PUNITIVE DAMAGES. If judgment is rendered for the plaintiff, it shall be for the legal amount found due from the state with interest as provided under AS 09.30.070 [LEGAL INTEREST FROM THE DATE IT BECAME DUE] and without punitive damages.

Commentary

This proposal makes changes to AS 09.30.070 and AS 09.50.280 regarding interest on judgments.

The current statutory rate for interest on judgments is a fixed rate of 10.5 percent simple interest. This rate applies to both prejudgment interest (interest due to the plaintiff from the time the claim is filed until the court enters a judgment in the plaintiff's favor) and postjudgment interest (interest due from the time judgment is entered until it is satisfied).

The task force concluded that a fixed rate can create inappropriate incentives to delay or accelerate payment of a judgment or settlement, depending on the current interest rate environment. The task force considered various proposed changes to the award of interest, including eliminating prejudgment interest awards on future damages. Rather than change the structure of the various types of awards, the task force decided to change the fixed rate to a floating rate more responsive to current market conditions. The interest rate for an individual case is determined according to AS 09.30.070(b) and stays constant until the judgment is satisfied. It remains a simple interest rate.

The task force chose the five-year U.S. Treasury Note rate plus 150 basis points (1.5 percent) as the appropriate measure of interest. The five-year Treasury Note rate is a published rate that may be established by judicial notice and is a medium-term rate corresponding to the duration of many lawsuits. With the addition of 150 basis points, it fairly reflects the value of money to the plaintiff under prevailing market conditions. It equates to 7.35 percent as of December 2, 1996. The Alaska Court System shall post this rate as of the first business day of each month.

SHORTER STATUTES OF LIMITATION

- * **Sec. 2.** AS 09.10.050 is repealed and reenacted to read:
Sec. 09.10.050. CERTAIN PROPERTY ACTIONS TO BE BROUGHT IN SIX YEARS. Unless the action is commenced within six years, a person may not bring an action for waste or trespass upon real property.
- * **Sec. 3.** AS 09.10 is amended by adding a new section to read:
Sec. 09.10.065. CONTRACT ACTIONS TO BE BROUGHT IN THREE YEARS. Unless an action is commenced within three years, a person may not bring an action upon a contract or liability, express or implied, excepting those described in AS 09.10.040 or as otherwise provided by law.
- * **Sec. 4.** AS 09.10.070 is amended to read:
Sec. 09.10.070. ACTIONS FOR TORTS AND CERTAIN STATUTORY LIABILITIES TO BE BROUGHT IN TWO YEARS. A person may not bring an action (1) for libel, slander, assault, battery, seduction, false imprisonment, or for any injury to the person or rights of another not arising on contract and not specifically provided otherwise; (2) for taking, detaining, or injuring personal property, including an action for its specific recovery; (3) upon a statute for a forfeiture or penalty to the state; or (4) [(3)] upon a liability created by statute, other than a penalty or forfeiture; unless the action is commenced within two years.

Commentary

This proposal makes changes to AS 09.10 regarding statutes of limitation.

The task force recommends two changes in the statute of limitations found in AS 09.10.050. It recommends reducing the time to bring an action on a contract from six to three years, to promote the quick resolution of business matters in modern society. It also recommends reducing the time to bring an action for damage to personal property from six to two years, to bring it into line with actions for personal injury.

The task force recognizes that these statutes of limitations begin to run from "accrual" of the cause of action, the time the plaintiff knew or should have known of the injury, as governed by the discovery concept as it currently exists in Alaska case law. The task force does not recommend any changes with respect to tolling the statute of limitations during the minority or mental incompetence of the plaintiff.

The liability committee recommended that the time to bring an action for waste or trespass upon real property be reduced from six years to four years. Members of the task force, however, expressed concern about the difficulty of detecting trespass on remote lands and enforcing actions against trespassers in remote areas. After discussion, the task force decided to retain the current six-year statute of limitations for bringing an action for waste or trespass upon real property.

Alaska case law holds that legal malpractice actions are governed by the statute of limitations for contracts (currently six years), not the statute of limitations for negligence (currently two years). The liability committee recommended that the statute of limitations for legal malpractice actions be reduced to two years, to bring it into line with the statute of limitations for malpractice by doctors and other professionals. However, reducing the statute of limitations for contracts to three years would effectively reduce the statute for legal malpractice actions. Therefore, the task force concluded that no additional change in the statute of limitations for legal malpractice was necessary.

ALTERNATIVE DISPUTE RESOLUTION PROGRAM

* **Sec. 11.** A.S. 09 is amended to add a new chapter to read:
CHAPTER 42. ALTERNATIVE DISPUTE RESOLUTION.

Sec. 09.42.010. **PURPOSE.** The legislature finds that providing a formalized program of alternative dispute resolution procedures within the existing civil litigation system can promote the timely and efficient resolution of many civil disputes. To that end, the legislature enacts AS 09.42.010 - 09.42.050 to provide for an initial pilot program of alternative dispute resolution of certain civil cases.

Sec. 09.42.020. **PILOT PROGRAM FOR ALTERNATIVE DISPUTE RESOLUTION.** (a) The supreme court shall provide for a pilot program of no less than five years' duration for the submission of civil cases filed in the superior court, third judicial district, to alternative dispute resolution procedures. The program shall operate in accordance with the provisions of AS 09.42.010 - 09.42.050.

(b) The following types of cases shall not be included in the pilot program:

- (1) divorce and dissolution;
- (2) child custody and visitation;
- (3) other children's matters;
- (4) probate;
- (5) cases where no answer is filed.

Sec. 09.42.030. **STRUCTURE OF PILOT PROGRAM.** (a) The program established under AS 09.42.020 shall provide criteria for the screening of covered cases to determine if they are appropriate for referral to alternative dispute resolution. The criteria shall be constructed so that at least 50 percent of the covered cases filed in a calendar year are referred.

(b) The program shall provide for a list of qualified persons to whom cases may be referred and a schedule of the fees charged by these individuals. The court shall establish minimum qualifications for those persons. Under the program, parties shall be permitted by mutual agreement to choose a person from the panel or to choose a person not on the panel to conduct the alternative dispute resolution procedure. In the event that the parties cannot agree, the person to conduct the procedure shall be appointed from the panel by the trial court.

(c) The program shall provide that the parties to an alternative dispute resolution procedure shall share the costs of the procedure equally. A party found indigent under guidelines established by the supreme court shall be eligible to have that party's share of the costs borne at public expense. The costs borne

at public expense on behalf of an indigent party shall constitute a lien on any recovery by that party to be paid first out of the recovery.

(d) The program shall provide procedures and rules promoting the timely referral to and conclusion of the alternative dispute resolution procedure. The time from the filing of defendant's answer to the conclusion of the alternative dispute resolution procedure shall not exceed 100 days unless permitted by the trial court in exceptional cases and for good cause shown. Unless a longer period is agreed to by mutual consent of the parties, the alternative dispute resolution session shall be limited to no more than 12 hours.

(e) A person appointed to conduct an alternative dispute resolution procedure under the program established pursuant to AS 09.42.010 - 09.42.050 shall have judicial immunity to the same extent as a judge and shall abide by applicable rules of confidentiality established by the supreme court.

Sec. 09.42.040. EVALUATION OF PILOT PROGRAM. (a) The Alaska Judicial Council shall evaluate the efficacy of the program established pursuant to AS 09.42.010 - 09.42.050 annually. The evaluation shall address factors such as the speed with which cases are resolved, the satisfaction of the litigants, the expenditure of court resources, and the expenditure of litigant resources.

(b) The council shall work with the court system to create a system for efficient collection of information needed to evaluate the program. The council shall report the results of its evaluation to the legislature each year by March 31.

Sec. 09.42.050. DEFINITION. As used in AS 09.42.010 - 09.42.050, "alternative dispute resolution procedure" includes mediation and early neutral evaluation.

- * Sec. 33. AS 09.42, as enacted by sec. 11 of this Act, has the effect of amending Alaska Rule of Civil Procedure 100 by making the mediation process mandatory for certain civil cases in the superior court, third judicial district, and by expanding the scope of the rule to include other forms of alternative dispute resolution in addition to mediation.

Commentary

This proposal adds a new chapter to Alaska Statutes Title 9 regarding alternative dispute resolution.

In evaluating changes to the Alaska civil justice system, the task force had as primary goals a fairer and more efficient system more easily accessible by all Alaskans. With these goals in mind, the procedures committee reviewed research on alternative dispute resolution (ADR) programs around the country. Task force members were impressed by the results of programs in several jurisdictions and recommend that the legislature establish a pilot project to develop effective ADR programs in Alaska.

ADR programs seek resolution of disputes before they get to trial, and may use mediation, early neutral evaluation, or various forms of arbitration. Mediation is a non-binding form of dispute resolution in which a mediator helps the parties analyze their dispute and encourages them to reach an agreement. Early neutral evaluation is a process in which a well-informed neutral person evaluates the merits of a lawsuit and gives a frank assessment to the parties.

The reports the committee reviewed strongly indicated that ADR participants considered the programs helpful. Most were pleased with the process and would recommend it. Although ADR sometimes leads to early settlement of cases, it is not consistently cheaper for the courts or the litigants. However, the participants did not seem deterred by the costs of the program, and participant satisfaction was high. ADR is most successful if initiated as early in the litigation as possible.

Although the task force supports adding ADR programs to the options available to Alaskan litigants, it did not attempt to design a permanent program of alternative dispute resolution for the whole state. Not all cases are appropriate for ADR, and some types of cases may require different ADR approaches.

Instead, the task force decided to give the court system a chance to try some ADR approaches, to evaluate them relative to traditional trial-based dispute resolution, and to design a program that would best fit Alaska's system. Thus the task force recommends that a five-year pilot program be set up in the Third Judicial District, during which no fewer than 50 percent of the cases filed in superior court will be referred for mediation or early neutral evaluation. During the pilot program, the Alaska Judicial Council will be directed to evaluate the program annually and report its findings to the legislature. Since the Third Judicial District has the largest population and number of civil cases, and also has a diverse geographical area, limiting the pilot program to this area will provide a range of situations for evaluation.

The pilot program is being limited to the superior court and will exclude the following types of cases: divorce and dissolution, child custody and visitation, other children's matters, probate, and cases where no defendant answers the complaint. This limitation will give the court system an opportunity to evaluate the

impact of another task force recommendation, early civil trials in district court, before deciding whether ADR would be appropriate at the district court level.

One task force member voiced concern that this proposal would violate the equal protection clause of the Constitution and unfairly discriminate against some litigants by requiring some litigants to pay for ADR as part of the litigation, while litigants whose cases were not referred would not be required to bear those costs.

IMPROVED SUPERIOR COURT FAST-TRACK PROCEDURES

- *Sec. 20. The lead-in to Alaska Rule of Civil Procedure 16.1(c) is amended to read:

(c) **Motion to Set Trial and Certificate.** Unless otherwise ordered by the court, a [A] motion to set trial may not be filed until after the meeting of parties under Rule 16.1(n) has occurred and the scheduling order under Rule 16(b) has been issued [105 DAYS AFTER SERVICE OF THE SUMMONS AND COMPLAINT]. A party seeking to obtain a trial date must serve and file a motion to set trial together with a certificate, signed by counsel, stating:

- * Sec. 21. Alaska Rule of Civil Procedure 16.1(k)(4) is repealed.

- * Sec. 22. Alaska Rule of Civil Procedure 16.1(n) is repealed and reenacted to read:

(n) **Meeting of Parties.** Except when otherwise ordered, the parties shall, as soon as practicable after the exchange of initial disclosures required under Civil Rule 26(a)(1) and in any event at least 14 days before a scheduling conference is held or a scheduling order is due under Civil Rule 16(b), meet to discuss the nature and basis of their claims and defenses and the possibilities for a prompt settlement or resolution of the case and to develop a proposed discovery plan. The plan shall indicate the parties' views and proposals concerning:

(1) what changes should be made in the timing or forms of subsequent disclosures under the rules including a statement as to when the disclosures required under Civil Rule 26(a) were made;

(2) the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused upon particular issues;

(3) what changes should be made in the limitations on discovery imposed under these rules and what other limitations should be imposed;

(4) whether a scheduling conference is unnecessary;

(5) whether there will be dispositive or partially dispositive motions filed in the case and whether other deadlines should be set aside pending resolution of the dispositive or partially dispositive motions by the court; and

(6) any other orders that should be entered by the court under Civil Rule 16(b) and (c).

The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging and

being present or represented at the meeting, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the court within 10 days after the meeting a written report outlining the plan.

Commentary

This proposal amends Alaska Rule of Civil Procedure 16.1 to provide for a meeting of the parties and a pretrial conference.

The Alaska Rules of Court include new civil rules designed to streamline discovery and decrease the costs of litigation. The new rules provide for pretrial judicial conferences to assist in management of cases (Civil Rule 16) and for meetings of the parties to outline issues in the case and other matters requiring judicial attention (Civil Rule 26(f)). These rules help resolve pending disputes over discovery, jury instructions, trial exhibits, and deadlines. In cases where summary judgment is appropriate, the court can schedule resolution of the motion prior to imposing other pretrial deadlines. By requiring early judicial management and communication between the parties, these procedures encourage early resolution of issues without unnecessary expenditure of time.

However, Civil Rule 16.1 has preempted these rules for most Anchorage cases. Civil 16.1, the "fast-track" rule, is designed to reduce delay. Under Rule 16.1, the court gives fast-track cases little management or attention until the day of trial. Since most Anchorage civil cases are now assigned to fast-track procedures, the other rules are ineffective in reducing delay.

The task force believes that increasing the efficiency and reducing the cost of litigation are important steps in reforming the civil justice system. Therefore, the task force recommends amendment of Civil Rule 16.1 to provide for a meeting of the parties and a comprehensive pretrial conference.

**STREAMLINED DISTRICT COURT PROCEDURES AND
HIGHER JURISDICTIONAL LIMITS**

***Sec. 19.** AS 22.15.030(a) is amended to read:

(a) The district court has jurisdiction of civil cases, including foreign judgments filed under AS 09.30.200 and arbitration proceedings under AS 09.43.170, as follows:

(1) for the recovery of money or damages when the amount claimed exclusive of costs, interest, and attorney fees does not exceed **\$100,000** [\$50,000];

(2) for the recovery of specific personal property, when the value of the property claimed and the damages for the detention do not exceed **\$100,000** [\$50,000];

(3) for the recovery of a penalty or forfeiture, whether given by statute or arising out of contract, not exceeding **\$100,000** [\$50,000];

(4) to give judgment without action upon the confession of the defendant for any of the cases specified in this section, except for a penalty or forfeiture imposed by statute;

(5) for establishing the fact of death or cause and manner of death of any person in the manner prescribed in AS 09.55.020 - 09.55.069;

(6) for the recovery of the possession of premises in the manner provided under AS 09.45.070 - 09.45.160 when the value of the arrears and damage to the property does not exceed **\$100,000** [\$50,000];

(7) for the foreclosure of a lien when the amount in controversy does not exceed **\$100,000** [\$50,000];

(8) for the recovery of money or damages in motor vehicle tort cases when the amount claimed exclusive of costs, interest, and attorney fees does not exceed **\$100,000** [\$50,000];

(9) over civil actions for taking utility service and for damages to or interference with a utility line filed under AS 42.20.030;

(10) over cases involving protective orders for domestic violence under AS 18.66.100 - 18.66.180.

*** Sec. 27.** District Court Civil Rule 1(a)(1) is amended to read:

(1) The procedure in civil actions and proceedings before district judges and magistrates shall be governed by the rules governing the procedure in the superior court to the extent that such rules are applicable. **However, unless otherwise agreed by all parties or permitted by order of the court in exceptional cases and for good cause shown, discovery shall be limited to the disclosures**

required under Civil Rule 26(a) and to the taking by each party of the deposition of the opposing party (or parties) and of one additional person.

* Sec. 28. District Court Civil Rule 4 is amended by adding a new subsection to read:

(b) Unless otherwise permitted by order of the court in exceptional cases and for good cause shown, all parties shall file a memorandum to set the case for trial, as set forth in Civil Rule 40(b), no later than 180 days after service of the complaint on all parties to the case. The parties shall submit a joint memorandum to set the case for trial, which may state their separate positions if they do not agree concerning the information or estimates to be provided in the memorandum. The court shall set the trial to commence on a date no less than 30 and no more than 90 days after the filing of the memorandum to set the case for trial, unless a continuance is granted by the court pursuant to Civil Rule 40(e).

Commentary

This proposal makes changes to AS 22.15.030 and District Court Civil Rules 1 and 4 regarding district court procedure and jurisdiction.

The expense of civil litigation effectively restricts access to the justice system for many plaintiffs and defendants, particularly in cases involving relatively small claims. This provision streamlines the district court pretrial process, with the intention of reducing the cost of litigating such claims. It also increases the district court's jurisdictional limit to encourage more litigants to use that streamlined process and its strict accelerated trial schedule.

A substantial portion of litigation costs are incurred in pretrial discovery. The amendment to District Court Civil Rule 1(a)(1) would significantly limit discovery, absent agreement of the parties or order of the court. This limitation should reduce not only discovery costs but also the costs of other aspects of trial preparation and trial.

The requirement that trial be set for a date no later than 270 days after the service of the complaint is also partly intended to reduce litigation costs. The parties or their counsel cannot extend this trial deadline by agreement; only the court may grant a trial continuance, and only in exceptional circumstances. With a shortened pretrial period, parties will have to be more focused and economical in their pre-trial and trial efforts; they will also have to consider settlement possibilities with a sense of dispatch. Prompt judicial resolution of claims will provide numerous other benefits as well. Parties will have their day in court

sooner; the period of disruption of lives and business by litigation will be reduced; and the efficiency of the civil justice system will improve.

Finally, this provision increases the civil jurisdiction of district court to \$100,000 from its present \$50,000. This increase is considered appropriate given the economics of litigation and the desire to encourage plaintiffs to avail themselves of a more streamlined district court process.

Plaintiffs with limited financial resources may be unable to obtain representation in many cases – even those with substantial merit – involving potential recovery of less than \$100,000. Many defendants feel that they are coerced by the prospect of significant litigation costs into settling claims which they view as having little or no merit. To the extent streamlined district court procedures reduce litigation costs, they will alleviate these problems. Moreover, since many cases currently brought in superior court result in recoveries less than \$100,000, plaintiffs will have an incentive to accept that jurisdictional limit on their recovery and file more claims in district court to take advantage of a faster, less costly process. In those cases, defendants will have the benefit of greater certainty concerning their potential exposure and better defined boundaries for any settlement discussions.

PROVISIONS TO ENCOURAGE OFFERS OF JUDGMENT

* Sec. 8. AS 09.30.065 is amended to read:
Sec. 09.30.065. OFFERS OF JUDGMENT. At any time more than 10 days before the trial begins either the party making a claim or the party defending against a claim may serve upon the adverse party an offer to allow judgment to be entered in complete satisfaction of the claim for the money or property or to the effect specified in the offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service, and the clerk shall enter judgment. An offer not accepted within 10 days is considered withdrawn and evidence of that offer is not admissible except in a proceeding to determine the form of judgment after verdict. If the judgment finally entered on the claim as to which an offer has been made under this section is not more favorable to the offeree than the offer, the interest awarded under AS 09.30.070 and accrued up to the date judgment is entered shall be adjusted as follows:

(1) if the offeree is the party making the claim, the interest rate shall be adjusted as follows:

(A) if the offer was served no later than 30 days after both parties made the disclosures required by Alaska Rule of Civil Procedure 26(a)(1), the interest rate shall be reduced by five percent;

(B) if the offer was served more than 30 days after both parties made the disclosures required by Alaska Rule of Civil Procedure 26(a)(1), but more than 90 days before the trial began, the interest rate shall be reduced by three percent;

(C) if the offer was served 90 days or less but more than 10 days before the trial began, the interest rate shall be reduced by two percent [REDUCED BY FIVE PERCENT A YEAR];

(2) if the offeree is the party defending against the claim, the interest rate shall be adjusted as follows:

(A) if the offer was served no later than 30 days after both parties made the disclosures required by Alaska Rule of Civil Procedure 26(a)(1), the interest rate shall be increased by five percent;

(B) if the offer was served more than 30 days after both parties made the disclosures required by Alaska Rule of Civil Procedure 26(a)(1), but more than 90 days

before the trial began, the interest rate shall be increased by three percent;

(C) if the offer was served 90 days or less but more than 10 days before the trial began, the interest rate shall be increased by two percent [INCREASED BY FIVE PERCENT A YEAR].

* Sec. 24. Alaska Rule of Civil Procedure 68 is repealed and reenacted to read:
Rule 68. **Offer of Judgment.**

(a) At any time more than 10 days before the trial begins, either the party making a claim or the party defending against a claim may serve upon the adverse party an offer to allow judgment to be entered in complete satisfaction of the claim for the money or property or to the effect specified in the offer, with costs then accrued. The offer may not be revoked in the 10 day period following service of the offer. If within 10 days after service of the offer, the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service, and the clerk shall enter judgment. An offer not accepted within 10 days is considered withdrawn and evidence of the offer is not admissible except in a proceeding to determine costs. The fact that an offer is made but not accepted does not preclude a subsequent offer.

(b) If the judgment finally rendered by the court is not more favorable to the offeree than the offer, the prejudgment interest accrued up to the date judgment is entered shall be adjusted as follows:

(1) if the offeree is the party making the claim, the interest rate will be reduced by the amount specified in AS 09.30.065;

(2) if the offeree is the party defending against the claim, the interest rate will be increased by the amount specified in AS 09.30.065.

(c) If the judgment finally rendered by the court is not more favorable to the offeree than the offer, the court's award of attorney's fees under Civil Rule 82 shall be adjusted as follows:

(1) if the offeree is the party making the claim, the court shall adjust its award of attorney's fees to the offeree as follows:

(A) if the offer was served no later than 30 days after both parties made the disclosures required by Civil Rule 26(a)(1), the attorney's fees award shall be reduced by 50 percent;

(B) if the offer was served more than 30 days after both parties made the disclosures required by Civil Rule 26(a)(1), but more than 90 days before the trial began, the attorney's fees award shall be reduced by 30 percent;

(C) if the offer was served 90 days or less but more than 10 days before the trial began, the attorney's fees award shall be reduced by 20 percent;

(2) if the offeree is the party defending against the claim, the court shall adjust its award of attorney's fees to the offeror as follows:

(A) if the offer was served no later than 30 days after both parties made the disclosures required by Civil Rule 26(a)(1), the attorney's fees award shall be increased by 50 percent;

(B) if the offer was served more than 30 days after both parties made the disclosures required by Civil Rule 26(a)(1), but more than 90 days before the trial began, the attorney's fees award shall be increased by 30 percent;

(C) if the offer was served 90 days or less but more than 10 days before the trial began, the attorney's fees award shall be increased by 20 percent.

(d) When the liability of one party to another has been determined by verdict or order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer of judgment, which shall have the same effect as an offer made 90 days or less but more than 10 days before trial begins, if it is served not less than 10 days prior to the commencement of hearings to determine the amount or extent of liability.

- * **Sec. 32.** AS 09.30.065, as amended by sec. 8 of this Act, has the effect of amending Alaska Rule of Civil Procedure 68 by altering the manner in which interest under AS 09.30.070 is adjusted when a judgment is not more favorable to the offeree than the offer.

Commentary

The proposal makes changes to AS 09.30.065 and Alaska Rule of Civil Procedure 68 regarding offers of judgment.

Under present law, either a party making a claim or the party defending against a claim may make an offer to the adverse party to allow judgment to be entered in complete satisfaction of the claim. If the adverse party rejects the offer, and the judgment ultimately rendered is less favorable than the offer, present law imposes a penalty on the party by increasing the rate of prejudgment interest for successful plaintiffs by 5 percent and decreasing it for successful defendants by 5 percent. It also provides for additional attorney fees for defendants who prevail on an offer of judgment but provides no corresponding attorney fee provision for a

prevailing plaintiff. The offer of judgment enhancements or penalties are the same whether the offer is made early or late in the case.

The task force's proposal attempts to equalize the attorney fee provisions for prevailing plaintiffs and defendants. It also makes the attorney fee enhancements or penalties greater when the offer is made earlier in the process to induce parties to make their best offers early rather than on the eve of trial.

MEDICAL ADVISORY PANEL IMPROVEMENTS

*** Sec. 14.** AS 09.55.536(c) is amended to read:

(c) Not more than 30 days after selection of the panel, it shall make a written report to the parties and to the court, answering the following questions and other questions submitted to the panel by the court **in sufficient detail to explain the case and the reasons for the panel's answers:**

(1) **Why did the claimant come to medical care** [WHAT WAS THE DISORDER FOR WHICH THE PLAINTIFF CAME TO MEDICAL CARE]?

(2) **Was a correct diagnosis made? If not, what was incorrect about the diagnosis** [WHAT WOULD HAVE BEEN THE PROBABLY OUTCOME WITHOUT MEDICAL CARE]?

(3) Was the treatment **or lack of treatment** [SELECTED] appropriate [FOR THE CASE]? **If not, what was inappropriate about the treatment or lack of treatment?**

(4) **Was the claimant harmed (injured) during the course of evaluation or treatment or by failure to diagnose or treat** [DID AN INJURY ARISE FROM THE MEDICAL CARE]?

(5) **If the answer to Question 4 is "yes", what** [WHAT] is the nature and extent of the medical injury?

(6) What specifically caused the medical injury?

(7) Was the medical injury caused by unskillful care?

Explain.

(8) If a medical injury had not occurred, **what would have been the likely outcome of the case** [HOW WOULD THE PLAINTIFF'S CONDITION DIFFER FROM THE PLAINTIFF'S PRESENT CONDITION]?

*** Sec. 15.** AS 09.55.536(f) is amended to read:

(f) Discovery may not be undertaken in a case until the report of the expert advisory panel is received **or 60 days after selection of the panel, whichever first occurs.** However, the court may relax this prohibition upon a showing of good cause by any party. If the panel has not completed its report within the 30-day period prescribed in (c) of this section, the court may, upon application, grant it an additional 30 days.

*** Sec. 25.** Alaska Rule of Civil Procedure 72.1(g) is amended to read:

(g) **Discovery.** Except by leave of court, no discovery may be conducted until the report of the panel has been filed or until **60 days after selection of the panel** [80 DAYS HAVE ELAPSED FROM THE DATE THE CASE IS AT ISSUE], whichever is first to occur,

unless discovery is further stayed for good cause by order of the court.

- * **Sec. 34.** AS 09.55.536(f), as amended by sec. 15 of this Act, has the effect of amending Alaska Rule of Civil Procedure 72.1(g) by changing the duration of the stay on further discovery when an expert advisory panel is appointed to evaluate a health care malpractice claim.

Commentary

This proposal makes changes to AS 09.55.536 and Alaska Rule of Civil Procedure 72.1 regarding the reporting requirements of expert advisory panels.

Under present law, in a personal injury or death action based on negligent provision of services by a health care provider, the court may appoint a three-person panel to help it understand the health care practices at issue. The panel may examine medical records, interview witnesses, consult with specialists and medical treatises, and physically examine the injured person. It then makes a report to the court, attempting to answer certain questions set out in the statute.

Some task force members interviewed a number of concerned people who generally agreed that the statutory questions should be revised, particularly to cover omissions. The task force determined also that panels must be assembled and report more quickly if the report is to be useful to the court. Despite imperfections, the Alaska State Medical Association does not want the system of expert advisory panels abandoned. Accordingly, the task force recommends revised questions and expedited reporting of answers to improve the usefulness of the panel system.

The task force also recommends that the Alaska State Medical Association, the Alaska Bar Association, and the Alaska Court System work together to review the process of recruiting and selecting panel members in order to speed the process.

**ACCESS TO THE MEDICAL ADVISORY PANEL FOR
STATE HEALTH CARE PROVIDERS**

- * **Sec. 13.** AS 09.55.536(a) is amended to read:
- (a) In an action for damages due to personal injury or death based upon the provision of professional services by a health care provider, including a person providing services on behalf of a governmental entity, when the parties have not agreed to arbitration of the claim under AS 09.55.535, the court shall appoint within 20 days after filing of answer to a summons and complaint a three-person expert advisory panel unless the court decides that an expert advisory opinion is not necessary for a decision in the case. When the action is filed the court shall, by order, determine the professions or specialties to be represented on the expert advisory panel, giving the parties the opportunity to object or make suggestions.
- * **Sec. 16.** AS 09.55.536 is amended by adding a new subsection to read:
- (l) This section applies regardless of whether the parties in the action or the health care provider whose professional services are the subject of the action is in the public or private sector.

Commentary

This proposal makes changes to AS 09.55.536 regarding the availability of expert advisory panels to state health care providers.

The State of Alaska Department of Corrections and its employees are frequently sued for alleged medical malpractice stemming from the health care provided to inmates while incarcerated. This proposal clarifies existing law that the State and its employees and health care providers have the same access to an expert advisory panel in these medical malpractice actions as medical malpractice defendants in the private sector. This clarification is sought because some trial courts do not refer such cases to expert advisory panels.

INCREASED FINES FOR LITIGATION MISCONDUCT BY LAWYERS

- * **Sec. 26.** Alaska Rule of Civil Procedure 95(b) is amended to read:
- (b) In addition to its authority under (a) of this rule and its power to punish for contempt, a court may, after reasonable notice and an opportunity to show cause to the contrary, and after hearing by the court, if requested, impose a fine not to exceed **\$10,000.00** [\$1,000.00] against any attorney who practices before it for willful failure to comply with these rules or any rules promulgated by the supreme court.

Commentary

This proposal makes changes to Alaska Rule of Civil Procedure 95(b), regarding fines for attorney misconduct.

Public discussion of tort reform often has focused on a need to deter "frivolous" lawsuits. Alaska law already provides significant deterrents to such cases. Under Alaska court rules and cases, if a claim is frivolous, the court can require the person asserting it to pay the other party's full, reasonable attorney fees incurred in defending against the claim.

The task force considered and rejected the provisions of the final version of HB 158¹⁸, passed by the legislature last year, which were put forward for the purpose of deterring frivolous litigation. None of those provisions would likely have had any significant additional deterrent effect. Each provision had fundamental flaws and, if enacted and used by litigants, would seriously complicate and expand litigation, imposing additional burdens and expenses on the parties.

The task force also considered and rejected provisions of Section 21 of final HB 158, which would have required mandatory sanctions for purported attorney misconduct. The federal courts adopted a similar mandatory sanction requirement as part of Federal Civil Rule 11 in 1983. After a few years' experience and an explosion of related litigation over sanctions, the federal courts eliminated that mandatory sanction requirement. Alaska would likely experience the same problems if it were to adopt such a mandatory sanction requirement.

The consensus of the task force is that little litigation is wholly frivolous, lacking a reasonable basis in law and fact. However, some litigation conduct –

¹⁸ The version vetoed by the Governor was SCS CSHB 158(RLS) amS (ct rls fld S).

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e.g., motions made or positions taken – lacks substantial merit or is otherwise improper. Judges polled thought that sanctions currently available to punish such conduct are adequate. Under the current rules a court may require a party (or his or her attorney) to pay costs and attorney fees to another party faced with frivolous or otherwise improper litigation conduct; the court also may punish litigants and attorneys with contempt sanctions for such conduct.

The current rules also allow a court to impose a fine of up to \$1,000 on an attorney for his or her misconduct. This provision amends Civil Rule 95(b) to increase the maximum fine to \$10,000. The purpose of the increase is to allow a court greater discretion to impose a fine appropriate to the seriousness of the misconduct, in an amount sufficient to punish and deter appropriately a particular offending attorney.

RESTRICTIONS ON SUITS FOR INJURIES SUFFERED DURING A FELONY

- * **Sec. 17.** AS 09.65.210 is repealed and reenacted to read:
Sec. 09.65.210. DAMAGES RESULTING FROM THE COMMISSION OF A FELONY. (a) A person who suffers personal injury or death may not recover damages for the personal injury or death if the injuries or death occurred while the person
- (1) was engaged in the commission of a felony, and the person has been convicted of the felony, including conviction based on a guilty plea or plea of nolo contendere, and the felony substantially contributed to the personal injury or death;
 - (2) was engaged in the commission of an unclassified felony or a class A or class B felony for which the person was not convicted if
 - (A) the felony substantially contributed to the injury or death;
 - (B) the person was not acquitted of the felony;
- and
- (C) the felony is proven by the defendant in the civil trial by clear and convincing evidence; or
 - (3) was fleeing from the commission of an unclassified felony or a class A or class B felony, or was being apprehended for an unclassified felony or class A or class B felony, if
 - (A) the felony or flight or the person's conduct during the apprehension, as the case may be, substantially contributed to the injury or death;
 - (B) the person was not acquitted of the felony;
- and
- (C) the felony is proven by the defendant in the civil trial by clear and convincing evidence.
- (b) This section does not affect a right of action under 42 U.S.C. § 1983.

Commentary

This proposal makes changes to AS 09.65.210 to expand the affirmative defense against plaintiffs injured during or after commission of a felony.

State law currently provides an affirmative defense against convicted felons suing to recover for injuries they suffered while committing felonies. Recently, however, cases have arisen that are not covered by this defense; for example, cases involving persons who were fleeing from commission of felonies, or were being

apprehended for felonies, when the flight or the persons' conduct during apprehension substantially contributed to their injuries. Cases have also arisen in which felonies were committed and were substantial causes of the injuries, but the persons were never charged because of death or reasons unrelated to the criminality of their conduct.

This amendment extends the affirmative defense to this type of case if the defendant in the civil trial proves the felony in the civil trial by clear and convincing evidence. If the defendant can prove the injured person was involved in a felony, the injured person cannot get a judgment against him or her. The task force chose a standard of proof higher than the ordinary civil burden because of the serious nature of the accusation and the substantial shift in the burden of proof that an affirmative defense creates. The task force limited its amendments to more serious felonies to avoid creating a disproportion between the seriousness of the offense and the seriousness of the injury in some cases. The task force decided that the affirmative defense should not apply to persons who are actually acquitted at trial.

CLARIFICATION OF LIABILITY FOR INTENTIONAL ACTS

* Sec. 7. AS 09.17.900 is amended to read:

Sec. 09.17.900. DEFINITION. In this chapter "fault" includes acts or omissions that are in any measure negligent, [OR] reckless, or intentional toward the person or property of the actor or others, or that subject a person to strict tort liability. The term also includes breach of warranty, unreasonable assumption of risk not constituting an enforceable express consent, misuse of a product for which the defendant otherwise would be liable, and unreasonable failure to avoid an injury or to mitigate damages. Legal requirements of causal relation apply both to fault as the basis for liability and to contributory fault.

Commentary

This proposal amends AS 09.17.900 to clarify its applicability to intentional acts.

This proposal clarifies that a percentage of fault in civil lawsuits may be allocated to intentional acts as well as to negligent or reckless acts. Because the current statute speaks of negligent or reckless acts, plaintiffs have argued that fault cannot be allocated to intentional tortfeasors.

For example, plaintiffs sometimes sue the State for negligent supervision of a probationer who intentionally shoots the plaintiff. The plaintiff may fail to name the probationer as a defendant and attempt to allocate all fault to the State. This amendment clarifies the State's right to name the probationer as a third-party defendant and to have fault allocated against him or her for his or her intentional acts. This avoids the incongruous result of allocating fault to those who are negligent, but not to those who act intentionally.

SETTLEMENT INFORMATION

- * **Sec. 18.** AS 09.68 is amended by adding a new section to read:
- Sec. 09.68.130. **COLLECTION OF SETTLEMENT INFORMATION.** (a) Except as provided in (c) of this section, the Alaska Judicial Council shall collect and evaluate information relating to the compromise or other settlement of all civil litigation. The information, including the case name and file number, a general description of the claims being settled, the dollar amount of the settlement, to whom it is to be paid, and any nonmonetary terms, shall be collected on a form developed by the council for that purpose.
- (b) The information received by the council under (a) of this section is confidential. This restriction does not prevent the disclosure of summaries and statistics in a manner that does not allow identification of particular cases or parties.
- (c) The requirements of (a) of this section do not apply to domestic relations, probate, or small claims cases or to children's proceedings under AS 47.10.
- * **Sec. 29.** Alaska Rule of Appellate Procedure 511 is amended by adding a new subsection to read:
- (e) **Settlement Information.** When a dismissal under (a) or (b) of this rule is the result of compromise or other settlement between the parties, the parties shall submit to the Alaska Judicial Council the information required under AS 09.68.130. A dismissal by agreement under (a) of this rule must be accompanied by a certification signed by the attorneys of record for all parties that the information required under AS 09.68.130 has been submitted to the Judicial Council. A dismissal by the appellant or petitioner under (b) of this rule must be accompanied by such a certification signed by the appellant's or petitioner's attorney of record. The requirements of this subsection do not apply to domestic relations, probate, or small claims cases or to children's proceedings under AS 47.10.
- * **Sec. 23.** Alaska Rule of Civil Procedure 41(a) is amended by adding a new paragraph to read:
- (3) **Scheduling Order.** When a voluntary dismissal under this rule is the result of compromise or other settlement between the parties, the parties shall submit to the Alaska Judicial Council the information required under AS 09.68.130. A notice of dismissal under (1)[a] of this subsection must be accompanied by a certification signed by or on behalf of the plaintiff that the

information required under AS 09.68.130 has been submitted to the Judicial Council. A stipulation of dismissal under (1)[b] of this subsection must be accompanied by such a certification signed by or on behalf of all parties who have appeared in the action. The requirements of this paragraph do not apply to domestic relations, probate, or small claims cases or to children's proceedings under AS 47.10.

Commentary

This proposal makes changes to AS 09.68, Alaska Rule of Civil Procedure 41(a), and Alaska Rule of Appellate Procedure 511 regarding collection of settlement information.

This proposal requires most civil litigants who settle cases to file information about the settlements before the courts will formally dismiss their cases. The vast majority of cases are settled without trial, and the task force recognizes the importance of understanding the effect of civil liability laws on settlement behavior. Accordingly, it recommends that the Alaska Judicial Council collect and analyze settlement information in a strictly confidential manner.

The outcome of cases that proceed to trial or to final resolution on appeal is a matter of public record. As a result, interested persons can learn about the size of liability verdicts in tort cases and analyze their significance in considering tort reform strategies. In fact, the Judicial Council conducted such a study at the task force's request. However, cases that end with verdicts comprise only a small part of the total tort cases, and thus may not accurately reflect the effect of tort liability laws on case outcomes in Alaska.

In considering various tort reform-related proposals, the task force was frustrated by the lack of settlement data. Recognizing that no enforceable mechanism presently exists by which data on settlements in civil litigation can be collected and analyzed, the task force adopted the recommendation of the procedures committee to require mandatory submission of settlement information before a case can be formally closed. To assure confidentiality and for administrative simplicity, the parties will file this information directly with the Judicial Council, with a separate certification to the court that the information was filed. The Judicial Council is directed to perform its analysis in a way that provides the legislature, the courts, and the public with useful information about civil cases in general or in the aggregate, without revealing identifying characteristics of individual cases.

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Although the task force recognizes that state legislation cannot require parties litigating in federal court in Alaska to make comparable disclosures of settlement information, the task force suggests that the Judicial Council explore whether the Federal District Court might consider adopting changes to its local rules of practice to allow collection of the same information in federal cases.

COLLECTION OF MORE-DETAILED INSURANCE INFORMATION

- * **Sec. 30.** **INSURANCE REPORT.** (a) The division of insurance shall compile information necessary to evaluate
- (1) the impact of the measures enacted in this bill on the availability and cost of insurance in the state; and
 - (2) the financial health and profitability of the insurers' business in the state.
- (b) Beginning June 1, 1999, the information compiled under (a) of this section shall be reported to the legislature annually.
- (c) The division of insurance shall adopt regulations requiring insurers doing business in the state to provide information necessary for the division to carry out its responsibilities under (a) of this section. Information shall be for Alaska and shall include premiums, claims paid, expenses of claims, and an allocation of investment profits or losses by line of business written in Alaska. Information shall be compiled in a way that protects the identity of individual insureds.
- (d) The division of insurance may consult with the Alaska Judicial Council when determining what information to require under (c) of this section and when carrying out the compilation required under (a) of this section.

Commentary

This proposal creates a new, uncodified provision requiring compilation of insurance information.

One of the Governor's stated goals for the task force was to develop recommendations that would lower liability insurance rates, and the task force developed many of its proposals with the goal of lower insurance rates in mind. The task force found no evidence of an insurance crisis in cost or availability, nor did it hear from the insurance industry during the course of its debate. Because Alaska is a small market, rates for most lines of insurance are set according to the overall claims experience of an insurance company, not its experience within Alaska. The task force found no evidence that changes in Alaska law would affect Alaska insurance rates. However, it concluded that more information was needed to judge whether any correlation exists between the measures enacted and the liability insurance rates charged to Alaska individuals and businesses.

Therefore, the task force recommends that the Division of Insurance adopt regulations requiring most insurers to report information regarding premiums and claims, by line of business written in Alaska. Recognizing that looking only at

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procedures. This delay gives the court system time to develop screening criteria for cases and a pool of qualified mediators. The Alaska Judicial Council has until March 31, 1998, to make its first report on the program.

The change in pre- and postjudgment interest (secs. 9, 10, and 12) applies to those cases for which prejudgment interest first begins to run under AS 09.30.070(b) on or after the immediate effective date of those provisions. The rate of postjudgment interest is the same as the rate of prejudgment interest for each case.

Under the proposal for collection of settlement data, the requirement that the Judicial Council develop a form to receive this information (sec. 18) will apply on or after the immediate effective date of the proposal. However, it will take the Judicial Council some period of time to develop the form and establish the internal procedures it needs to collect this information. Accordingly, the effective date of the related court rule changes (secs. 23 and 29) is delayed until January 1, 1998, so that the council can establish its procedures in an orderly fashion. The requirement will apply to all cases dismissed on or after that date, regardless of when they were filed or when the cause of action accrued.

Under the proposal for collection of insurance data (sec. 30), the Division of Insurance is required to adopt regulations requiring insurers to provide information to the division and to present that information in an annual report to the legislature. The division's duty to start the regulatory process begins on the immediate effective date of the proposal, while the first report is scheduled for June 1, 1999.

WRONGFUL DISCHARGE - WARRANTS FURTHER INQUIRY

A suit for wrongful discharge from employment can be based on contract theories, on state and federal laws governing discrimination and harassment, and on related tort theories such as intentional infliction of emotional distress. The task force considered whether state law should impose a cap on the number of years for which a discharged employee can collect lost future wages ("front pay").

Members of the damages and liability committees met with the co-chairs of the Employment Law Committee of the Alaska Bar Association, who represented employee and management concerns. The task force considered the Model Wrongful Termination Act and the complex interaction of current state and federal laws affecting employment. It saw no compelling reason to address the front pay issue in isolation, but concluded that the ancillary claims that often accompany employment-related litigation may impose unwarranted burdens on employers.

Accordingly, the task force recommends that the issue of a cap on front pay in wrongful discharge employment cases be addressed in the broader context of employment law, along with the collateral and intangible claims that plaintiffs often raise in such cases. Avenues of future inquiry might include statutory language similar to provisions of the federal civil rights law, a statutory definition of employment at will, review of issues related to the covenant of good faith and fair dealing, and consideration of the collateral claims of protected classes.

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Chapter 5

Proposals Rejected by Task Force

This chapter contains three proposals that were approved by the liability committee or taken up directly by the task force, but were rejected in a vote by the full task force. The commentaries describe each proposal, the arguments in support of it, and the reasons the task force voted against it.

These proposals recommended

- imposition of a 10-year statute of repose for design and construction defects and other forms of negligence
- allowing allocation of fault to people who are not parties to the action
- barring recovery by intoxicated plaintiffs who were at least half the cause of their own injuries

STATUTES OF REPOSE

AS 09.10.055(a) currently provides for a 15-year statute of repose for personal injury, death, or property damage actions based on a defect in the design or construction of a building. In a split vote, the liability committee recommended reducing the period of repose for design and construction actions from 15 to 10 years. It also recommended extending the protections of the statute to most other tort actions, with exceptions for actions relating to exposure to hazardous substances, intentional acts or acts of gross negligence, fraud or fraudulent misrepresentation, defective products, intentional concealment of the potential cause of action, and undiscovered foreign objects in the body having no therapeutic purpose, as well as where longer periods were provided by contract.

At the public hearings, the task force presented a hypothetical scenario in which a negligently designed building collapsed 12 years after construction, severely injuring a person inside. Although most people commenting on this scenario supported the general concept of a statute of repose, the sentiment of the majority was that the period of liability should be the same as the reasonable useful life of the building, which in most cases would be longer than 10 years. The public did not consider important the fact that a potential defendant might not be able to obtain insurance to cover accidents occurring many years after the negligent acts; the general sentiment was that professionals who face potential liability must accept that risk as a cost of doing business.

A chart summarizing the current statutes of repose for design and construction in other states was distributed to the task force, showing that the statutory period in most states is 10 years or less. Nonetheless, several members had serious reservations about reducing the statute of repose for design and construction actions from 15 to 10 years, in part because the 15-year statute of repose was recently enacted. While recognizing that any statute of repose is arbitrary by nature, several members expressed concern with the proposed reduction, especially given the hardship this could cause to children injured at a young age who would lose their right to recovery while still quite young. It was also noted that the Alaska Supreme Court has called into question the validity of any statute of repose. See *Hanebuth v. Bell Helicopter Int'l*, 694 P.2d 143, 147 (Alaska 1984), in which the court stated: "It is profoundly unfair to deprive a litigant of his right to bring a lawsuit before he has a reasonable opportunity to do so."

For purposes of discussion, the task force considered an amended proposal that would apply both to design and construction and to other torts based on negligence, but would remain at 15 years and would be tolled during periods of minority and incompetence. Members continued to express concern about the

fairness of any statute of repose. After extensive discussion and consideration of the issue, the motion to adopt the amended changes to the statute of repose failed.

ALLOCATION OF FAULT

The current law governing the allocation of fault in a tort action derives from a ballot initiative the voters approved in 1988, which eliminated joint and several liability and provided for liability based on each person's percentage share of fault for the injury. Defendants are responsible for a plaintiff's injuries only in proportion to their fault. If a careless driver of a car with incorrectly designed steering injures someone, the jury might find the careless driver 80 percent responsible and the car manufacturer 20 percent responsible. Assuming that both defendants were able to pay, the injured person would collect 80 percent from the driver and 20 percent from the car manufacturer. If the careless driver had no insurance or other resources, the injured person would collect only 20 percent. Under this law, the Alaska Supreme Court has held that fault may be allocated only to parties to the suit. The injured person sues the person or business he believes is responsible. If the defendant thinks someone else is wholly or partially at fault, the defendant adds that person to the suit as a defendant. 7

Some on the task force believed that defendants should be allowed to allocate fault to other people responsible for the injuries, regardless of whether those people could be required to appear in court and defend the lawsuit. The fundamental argument for the proposal is that the principle of paying in proportion to fault is sound, and fault must be allocable to nonparties (people not involved in the lawsuit) to make the principle work. In some cases, the person or entity at fault cannot be added to the suit. Examples are employers (suits are sometimes barred by workers' compensation statutes), the State (the State has sovereign immunity against some claims), bankrupt individuals and businesses (suits are barred by an automatic stay), and people outside the jurisdiction of the court (for instance, a potential defendant in another state). In other cases, the plaintiff may have chosen not to name the person most at fault if that person is unable to pay any judgment. The named defendant must then bring that person into the lawsuit and thus run the risk of paying for attorney fees and costs if the person is found not to be at fault. Based on these arguments, the liability committee recommended that fault be allocable to nonparties, provided that the defendant identify them early in the litigation so that the plaintiff could choose to add them. ||

However, others on the task force felt that an additional wrongdoer should be added to the lawsuit by the defendant, not the innocent victim. Allocation of fault to nonparties is a foreign concept to American courts, which depend on the adversarial process to arrive at the truth. If a defendant is allowed to argue that

someone not present in court is responsible for the harm to the plaintiff, the plaintiff is forced to present his own case and to defend the "empty chair." Some members were also concerned that the proposal would increase the number of additional defendants, thus increasing the cost and complexity of litigation for all concerned.

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Under the committee's proposal, a defendant could name as many additional defendants as the defendant chose. The plaintiff would feel compelled to sue as many of them as possible, even if he or she felt they were only tangentially involved, to avoid having to defend the empty chair. Yet if the plaintiff then added these defendants and lost (because he or she was right and their involvement was minimal), the plaintiff would be responsible for paying the costs and attorney fees of people he or she did not want to sue. Many task force members felt that if the primary defendant thought others were partially responsible for the injury, that defendant should bear the costs and risks of suing.

The law is particularly complicated with respect to workers' compensation. For example, an employee injured on the job by a defective machine cannot make a claim against the employer if covered by workers' compensation, but can claim against the machine manufacturer. The manufacturer may believe that the primary cause of the injury was the employer's failure to maintain the machine, not the fault of the machine itself. Since fault cannot be allocated to the employer in this case, the machine manufacturer might have to pay all the damages even if only partially at fault. However, the injured employee is also barred from suing the employer. If the manufacturer were allowed to allocate fault to the employer, and the employer had no reason to defend against the allocation, the injured worker would receive only a partial recovery even though not at fault at all. The problem is compounded by the fact that workers' compensation laws give the employer a lien on any recovery the injured worker receives from the manufacturer.

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Under the complicated configuration of the current law, the task force faced a choice between the risk that some wrongdoers may be required to pay more than their fair shares of the fault and the risk that an innocent victim may be denied a full recovery. Given this choice, the task force felt that the law should be left as is and did not adopt this proposal.

ALCOHOL- AND DRUG-IMPAIRED PLAINTIFFS

The liability committee considered the problem of lawsuits filed by people who are partly responsible for their own injuries because their judgment or coordination was impaired by alcohol or drugs. It discussed whether a new section should be added to AS 09.65 to create a defense to such lawsuits, but ran out of

Proposals Rejected by Task Force

time to finalize a proposal. The full task force asked staff to develop such a proposal, but ultimately rejected it.

The proposal was based on a Michigan statute creating an absolute defense to a lawsuit where the plaintiff was impaired by alcohol or drugs. If the defendant could show that the accident was more than half the fault of the intoxicated plaintiff, the plaintiff would recover nothing. The proposal incorporated the presumption of .10 for alcohol intoxication. The defense applied only to operation of motor vehicles, snowmachines, boats, and aircraft. Members rejected an amendment to broaden the defense to cover all injuries. The proposal did not allow this defense to be used by license holders selling alcoholic beverages.

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Some members believed that ordinary rules of comparative negligence are appropriate for this situation, and that a jury would not be sympathetic to such a plaintiff. Others thought that there could be a number of situations where good public policy would hold the defendants responsible for at least part of the intoxicated plaintiffs' injuries. Accordingly, the task force did not adopt this proposal.

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Chapter 6

Proposals Rejected in Committee

This chapter contains proposals that were discussed by the committees and rejected. The commentary describes the issues the committees considered and the reasons why they decided not to recommend changes in the current law.

These issues were

- setting standards for qualifications of expert witnesses
- imposing a sliding scale for contingency fees
- converting claims against state employees to claims against the state
- changes relating to collateral benefits
- changes relating to periodic payments

This chapter also includes one proposal, limiting hospital liability for contractors, that was originally approved by the liability committee and later withdrawn. The commentary describes the proposal and the reasons it was withdrawn by the committee.

SETTING STANDARDS FOR QUALIFICATIONS OF EXPERT WITNESSES

Current law generally restricts the jury to consideration only of testimony by expert witnesses in determining whether the standard of care has been breached in a malpractice case. The judge determines if a proposed witness has sufficient expertise to qualify as an expert. The proposed expert must have enough knowledge, skill, experience, training, or education to help the jury understand the evidence or determine a fact at issue. A witness need not possess a particular license or academic degree to qualify as an expert.

The procedures committee considered various proposals that would have set standards for expert witnesses, including requiring board certification and state licensing. The committee determined that the courts already have an appropriate amount of discretion to determine who is an expert in a particular field and heard no evidence indicating that the courts are not exercising this discretion appropriately. Restrictions on testimony might result in parties having to retain more expensive, possibly non-Alaskan, experts. The committee unanimously recommended no change in current law; as a result, the task force did not take up this issue.

IMPOSING A SLIDING SCALE FOR CONTINGENCY FEES

The procedures committee considered whether to implement a sliding scale for contingency fees by plaintiffs' lawyers. Some states employ a sliding scale for contingency fees in all personal injury cases, while others use one for medical malpractice cases only. These scales are graduated by the size of the award (allowing the attorney a lower percentage as the award gets bigger) and sometimes by the stage to which the case proceeds (allowing a higher percentage for a case that goes to trial than for one that settles early on). The committee looked at studies on the effect of such limitations and found no conclusive evidence of any positive impact on the civil justice system.

The committee discussed the difficulty of devising a scale sufficiently flexible to govern the different levels of risk, time, and expense involved in different types of cases. The committee also noted the complexity of litigation, where work tends to be done in spurts that may not correspond to the stages used in the sliding scales. The committee unanimously agreed not to pursue a sliding scale for contingency fees in Alaska; as a result, the task force did not take up this issue.

CONVERTING CLAIMS AGAINST STATE EMPLOYEES TO CLAIMS AGAINST THE STATE

The procedures committee considered a proposal to provide that claims against state employees be converted to claims against the state, similar to the procedure used under the Federal Tort Claims Act. The effect of this provision would be to make claims against the state the sole avenue for pursuing claims based on the actions or inactions of individual state employees, provided the employee acted within the scope of employment.

The State often must defend lawsuits against state employees for actions or inactions taken as part of their employment, even where the State cannot otherwise be sued. For example, state employees are not immune from actions for assault or false arrest, while the State is immune under AS 09.50.250(a)(3). The Federal Tort Claims Act cures a parallel dichotomy by substituting the United States for the employee upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident. Claims against the responsible employee individually then become claims against the government, and defenses available to the government become applicable, as long as the employee was acting within the scope of employment.

The procedures committee had concerns about the claims that could be lost under this proposal, particularly possible punitive damages claims against a state employee. The committee did not have sufficient time to consider the issue and did not pass it out of committee; as a result, the task force did not take up the issue.

CHANGES RELATING TO COLLATERAL BENEFITS

Under AS 09.17.070, a jury determines the plaintiff's losses without knowing that the plaintiff's insurance company already has paid some expenses (like medical bills). A subrogation clause in the insurance policy often requires a plaintiff to repay the insurance company, and state law similarly requires repayment of workers' compensation and Medicaid. When the plaintiff recovers from sources that do not have a right to subrogation, the defendant may ask the court to reduce the plaintiff's recovery by that amount. The plaintiff may then request an offset for insurance premiums paid and for attorney fees spent in obtaining the recovery. The court performs the calculation, after the verdict.

The damages committee considered whether the jury should be informed that someone else already has paid the plaintiff's medical bills and lost wages. The committee saw no evidence that the existing law leads to injustice through double recoveries or windfalls to plaintiffs, nor any inherent benefit in having juries

perform a calculation that judges now do as a matter of law. The committee also saw no reason to interfere with the subrogation rights of insurers and state programs. The committee noted that although restricting recovery of collateral benefits might reduce the costs of liability insurance, it would be at the cost of increasing the price of health insurance and other forms of coverage. The committee unanimously concluded that the current law should be left as it is; as a result, the task force did not take up the issue.

CHANGES RELATING TO PERIODIC PAYMENTS

The damages committee considered whether to revise AS 09.17.040(d) and (e) governing the award of periodic payments for future damages. Periodic payments, also called "structured settlements," are commonly used in settling litigation as a compromise between the parties' perception of the present value of the case. Periodic payments allow the defendant to purchase an annuity or pay in installments, while providing the plaintiff with a steady source of assured income.

When a court or jury awards damages, a prevailing plaintiff may request that future damages be made by periodic payments to the maximum extent feasible, rather than by a lump sum payment. The court may require the losing defendant to post security to ensure that funds are available as periodic payments come due, although the court may not require security if an "authorized insurer" acknowledges its obligation to discharge the judgment. Although a losing defendant may negotiate for future damages to be paid in installments, it has no right to insist that the judgment be paid that way.

The damages committee considered whether current law should be changed with respect to the posting of security, and discussed whether defendants should have the right to insist on periodic payments of future damages. The committee concluded that once a judgment is entered, it should be paid after judgment or appeal. The committee agreed that a plaintiff should not be forced to accept payments in installments, due to the risk of nonpayment and uncertainty over future needs. After considering the relative risk to both parties under current practices, the committee unanimously concluded that no change was needed in the current law; as a result, the task force did not take up the issue.

HOSPITAL LIABILITY FOR CONTRACTORS

Under current law, hospitals are liable for the negligent acts of emergency room physicians working on contract. Many emergency room physicians are independent contractors, not employees of the hospital, and it has been suggested

that the hospital should not have to bear the responsibility of directly supervising them. The liability committee considered the nature of the work and the employment relationship, the reasonable expectations of patients, the costs of malpractice insurance, and public comment on the issue.

The committee initially recommended that hospitals be relieved of liability for the negligence of contract emergency room physicians, but be required to require the physicians to carry malpractice insurance as a condition of their contracts. The liability committee recommended that the physicians be required to purchase malpractice insurance with limits of \$1 million per claim, \$3 million annual total claims. The hospitals would also have been required to exercise reasonable care in determining whether the physicians were qualified to practice in the hospitals and to review the physicians' standards of practice on a regular basis. The committee considered whether the hospitals should be required to post or publish notices explaining the limits of their liability. It concluded that such a requirement would be meaningless, given that patients use emergency rooms when they need immediate attention and their options for going elsewhere are usually limited.

However, questions were raised about whether the insurance limits were high enough and whether they would remain appropriate under changing economic conditions. The committee was also concerned about exonerating hospitals of liability in the emerging environment of managed care and the changing relationships between doctors and hospitals. The committee reconsidered its recommendation and asked consent that it be withdrawn. The task force therefore did not take up the issue.

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Chapter 7

Considerations for the Future

The task force has labored to create several improvements to the civil liability system, while sorting out recurring ideas that will not improve the process. However, the task force had limited time available and was unable to address comprehensively all the issues raised. Areas of continuing concern include the following.

Access: The time and expense of civil litigation effectively restrict access to the justice system. Individuals and businesses with smaller claims are often unable to find lawyers to take their cases, while defendants often agree to settle dubious claims to avoid the cost of going to court. Although a number of task force recommendations are designed to promote faster, less expensive litigation and alternatives to litigation, the concern remains that many people with legal problems will be unable to solve them in an appropriate way. Continuing efforts are needed to increase the flexibility of the civil justice system and to expand the options available to people seeking help with a legal problem. Efforts are also needed to increase the affordability of legal services, so that individuals and small businesses with valid claims and defenses can afford to pursue them.

Workers' compensation and employment: The task force in its public hearings heard a significant amount of concern over the ability of the workers' compensation system to pay injured workers promptly and fairly, as well as concern about the complex interaction between workers' compensation law and general tort law. The task force also heard concern from employers about the number of years for which a discharged employee can claim lost future wages and the number of collateral claims (such as harassment and infliction of emotional distress) that can accompany a suit for wrongful discharge from employment. Employment law involves a number of interrelated state and federal statutes that the task force was unable to address in the short period of time it had available.

Data collection and evaluation: As part of its efforts to improve access to justice, the task force recommended an extensive program of alternative dispute resolution to resolve cases early in the litigation. Although alternative dispute resolution programs are well established in other jurisdictions, the Alaska program will need to be evaluated on a yearly basis to ensure it is serving the purposes for which it was designed, to make modifications, and to see whether it should be made available statewide.

Because settlement information is confidential, little is currently known about how most cases are concluded and why. The task force recommends that settlement data be collected and evaluated on an ongoing basis, to allow a complete understanding of current and future tort reforms. Similarly, the task force was frustrated by the lack of insurance information available and recommends that the Division of Insurance collect the information necessary to evaluate the impact of tort reform measures on the availability and cost of insurance in Alaska. The legislature can then take this information into account as the total picture of civil liability law and insurance becomes available.

The task force confronted a large number of interrelated issues in a short period of time. It has sought a careful balance among the many interests affected by civil liability law. Its proposals are designed to decrease the costs of resolving cases, discourage frivolous litigation, promote fair compensation for injured parties, promote the predictability of outcomes, improve information available to decision-makers, and increase access to justice for all Alaskans. It presents its work as a balanced set of proposals that will solve real problems and work to the benefit of all Alaskans.

Appendix A

Summary of Public Comment - Statewide Call-in and Community Forums

The Task Force on Civil Justice Reform held a statewide call-in and four community forums around the state to give Alaskans a chance to learn more about civil liability law and litigation, discuss key issues and varying perspectives, and share their concerns.

Each community forum included a presentation on the task force activities and preliminary recommendations, small group discussions of typical civil litigation situations that were intended to raise participants' understanding of the competing interests involved in tort law and litigation, and an opportunity for public comment. Task Force Chair Thomas Stewart, Dr. Rodman Wilson, and other members attended each of the community forums, which were held in Juneau, Bethel, Anchorage, and Fairbanks.

The summaries are intended to give a flavor of what the task force heard from the public in the community forums, but they are not comprehensive. The discussion scenarios used in the forums are included at the end of this section.

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Statewide Call-In: Wednesday, November 13, 1996

Task Force Members Participating: Judge Thomas Stewart, Chair; Jeff Feldman, Don Slone, Steve Williams, Dr. Rodman Wilson, Bruce Botelho, Jeff Bush, Brad Thompson

Attendance: 3 testifying, 3 listen-only

Public testimony:

Robert Cowan, Kenai resident – attorney, representing the Exxon Valdez Plaintiffs Committee

- Oil companies may reorganize behind shell companies that have no assets, which makes approaches that base awards on corporate assets ineffective
- In response to concerns about HB 158, legislators had said it would not have applied to federal cases, which he felt should be explicitly stated in any new suggestions for legislation.
- Punitive damage limits should not apply to mass disaster suits; and, the proposed interest rate is not high enough to deter large corporations.
- Allocation of fault gives defense an incentive to "hide in the bushes", would harm the plaintiff.
- Questioned the impact of a statute of repose on situations where there was a continuing trespass or nuisance, e.g., leaking gasoline tanks.

Sylvia Sullivan, Valdez – representing Alaskans for a Just Society

- Concerned about the lack of labor representation on the task force.
- In proposal to limit the ability of felons to sue, there should be an exclusion if excessive force was used.
- Doesn't like the concept of sovereign immunity for the state
- Doesn't agree with caps on awards in wrongful termination cases and the requirement that contracts be written. The Department of Labor is not enforcing existing provisions that require contracts.
- In proposal to limit the right of alcohol-impaired plaintiff to sue, sometimes another party (e.g., bartender) may be partially responsible for the person being alcohol impaired.

Philip Squires, Kenai – president, United Cook Inlet Driftnetters Association

- Expressed concern about insurance rates, particularly for fishermen, who are small business owners operating in a hazardous environment. He noted that the preliminary recommendations include no mandatory decrease in insurance rates, which he thought was supposed to be a selling point of tort reform.
- Concerned about the oil shippers reorganizing under different "corporate veils" and the effect this may have on cases, particularly from the perspective of the Cook Inlet fishery, which is heavily impacted by the oil industry. He indicated there has been inadequate bonding for businesses and that the 13,000 permit holders are not adequately protected.
- [Mr. Feldman asked whether the punitive damages awarded in the Exxon Valdez case are indicative of a problem that needs to be fixed.] The proposed limits on punitives that are related to corporate assets would not have affected the case if there were adequate reporting, good records, etc. Exxon does not seem to be showing much remorse and there do not appear to be major changes in corporate behavior as a result of the punitives.
- Concerned that in cases such as Exxon, if the state gets a share of punitives it is being "doubly compensated" since it had already settled its case with the company.

Juneau Community Forum: Thursday, November 14, 1996

Task Force Members Participating: Judge Thomas Stewart, Chair; Marlene Johnson, Vice Chair; Dr. Rodman Wilson, Bruce Botelho, Jeff Bush, Brad Thompson

Attendance: About 22 people

Comments on Situations:

Situation A: Earthquake

- Opinion was split on whether there should be a cap on noneconomic damages, but they should not be tied to economic damages – i.e., a person with a higher pre-injury income should not automatically get higher non-economics as well.
- Thought this suit should be allowed, but maybe there should be some repose, such as the normal life of a building.

Situation B: Medical Malpractice

- Patients should have protection one way or another – either by hospital carrying insurance or doctor doing it. Suggested that maybe the hospital could purchase the insurance for the doctor and then charge doctor for it.
- The patient should not be made to suffer because of the labor relationship chosen by the hospital.
- Hospital should have some responsibility for overseeing the work of the doctor.
- Injured children should be allowed to sue for themselves upon majority if there is really a continuing problem. Concern re what the child's parents were doing and why they hadn't sued earlier.
- If the claim against the doctor is found to be frivolous, the burden should be on the lawyer, not on the client.

Situation C: Automobile Accident

- General feeling that car owner was liable – he had a duty to society that he did not meet when he lent his car. There was a question about whether the drunk driver was to be included within that definition of "society".
- Question whether if you know someone has a record you are responsible for his history.
- Discussion of punitive damages and whether criminal law wouldn't take care of a situation like this. Divided on whether the state or other government should get a share of punitives.

Public Testimony:

Everest Wilhelmsen

- Concern that existing statutes, and any proposed changes, shouldn't protect government too much and allow government to act without impunity.

Joe Sonneman – attorney

- Concern re false claims of "frivolousness" – some government agencies say that any dispute is "frivolous." There should be some penalty for false claims of frivolousness.
- Does not think that mandatory dispute resolution will work. Mediation only works when parties are agreeable to it and otherwise is a useless exercise. American society as a whole is competitive and Americans are not prone to compromise.
- Concern re relationship to legislature, particularly in light of Speaker Phillips' comments. Task force should involve legislature early on. [Judge Stewart informed him that Representative Porter and Senator Ellis sit on the task force.]
- Questions whether there is a real problem with tort litigation in Alaska. Cited statistics from the National Center for State Courts that show Alaska's filing rate

dropped from 402 cases/100,000 people in 1985 to 144/100,000 in 1995. Because of previous reforms and because of the "English rule" for attorney fees, filings have dropped. The down side of this is that some meritorious cases may not be filed because of the fear of losing attorney fees and this may interfere with the constitutional right of access to the court system.

- Does not think that government should get a portion of punitive damages. However, if this does happen the plaintiff's attorney should be paid based on the total amount of the award.

Dixie Hood – marriage and family therapist

- Supports ADR strongly and has used it successfully in her practice to help couples avoid court disputes
- Concern re makeup of task force – hadn't know about legislative participation; there are no consumer representatives or persons without a commercial interest in defending reform. [Judge Stewart explained about extensive AKPIRG involvement.]
- In general, she supports no fixed caps and letting juries decide within guidelines and with good instructions from judge, particularly as judge has right to overrule the jury and reduce awards.

Jim Wilson – small business owner, representing Coastal Helicopters

- Thinks there should be a limit on noneconomic damages, but doesn't know what it should be.
- Opposed to any punitive damages – should resort to criminal justice system if necessary.
- Expressed concerns about "ambulance chasing" attorneys and some recent experiences he has had. [Attorney General Botelho informed him about possibility of Bar Association complaints.]

David George – attorney

- Should be no statutorily defined caps; jury should have complete discretion. It is presumptuous of legislators to think they can establish the value of people's lives and disruptions to them. If caps are reduced, the youngest people will be hit hardest.
- Re allocation of fault – the "empty pocket" problem should be that of the defendants, not of the plaintiff. The burden to find all the guilty parties should not lie on the plaintiff.

Bethel Community Forum: Monday, November 18, 1996

Task Force Members Participating: Judge Thomas Stewart, Chair; Dr. Rodman Wilson, Jeff Bush

Attendance: 11 people

Comments on Situations:

Situation A: Earthquake

- Some people's threshold of pain is higher
- If Grace recovers fully, 5 people think there should be a cap, one opposed
- Grace should recover more damages from an intentional tortfeasor, then just ask what's the maximum amount the tortfeasor can pay
- If Grace permanently injured, 3 think there should be a limit, 3 opposed depends if juries often award too much - if few verdicts over \$500,000, would vote against a cap
- If gross negligence, like building code violation, should be no repose

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- how long? useful life of house, 30 years
- It's irrelevant whether architect is retired, doesn't have insurance

Situation B: Medical Malpractice

- Hospital receives money for those services – why can't hospital indemnify doctor? let doctor and hospital sort it out, not put burden on plaintiff
 - If hospital to be liable, would have to hire someone to watch every operation - acting independently - if review, hospital has done everything it can
- [Dr. Wilson: most hospitals require insurance; but the two big Anchorage hospitals don't]
- Hospital shouldn't be responsible in single case, but if multiple instances might indicate a problem
 - Half think hospital should be liable, most think doctor should be required to have insurance
 - Minors should be allowed to sue when become adults
 - I can't bring a lawsuit because I'm not rich
 - In the villages, people now prefer using courts instead of elders
 - Some of this stuff seems outrageous; above and beyond the good life
 - The lawsuit can be as damaging as the injury - I've been a good person, but I could get destroyed by a lawsuit, what I've worked for all my life, maybe divorced

Scenario C : Automobile Accident

Should a drunk driver be able to sue the friend who lends him the car? no

Should the drunk driver be able to sue the State for poor road maintenance? audience split

Should suit be barred if the plaintiff was intoxicated?

- Intoxication raises more questions than it answers
- How significant a role it plays depends on the facts of each case; it already comes in through allocation of fault
- What happens if intoxicated and in jail? they're supposed to be taking care of him
- Maybe same thing could have happened even if he was sober, and how would you know?
- Have to defend the lawsuit anyway to find out comparative fault
- Might not need punitive damages: he's going to jail, so he's not going to be driving anyway
- I'm here to express my displeasure to being called constantly for jury duty, every year, seems out of hand - so, I think there should be a jury trial, but there's too much jury duty here in Bethel - plus jury instructions are hard to understand, need an easier way to explain them [Dr. Wilson: other countries use judges]
- I think it would be better if law weren't so complicated, why ordinary person can't plead his own case
- Too many attorneys in the legislature, making a job for themselves
- Should there be a limit on punitive damages: 1 yes, 3 no
- Should the state get a share: 4 yes, one 100 percent
- Prefer loser pays system - lots of costs to the state to try cases

Public Testimony:

Joerene Hout: - small business owner and senior citizen

- Feel something needs to be done - I like what I heard you addressing - I feel vulnerable to lawsuits
- I'm ambivalent about some of the issues: want people to be adequately compensated, but don't want to see people destroyed in the process
- Insurance is a significant cost, certain amount of anxiety. Have rental income property: did an eviction, immediately hit with slip and fall lawsuit

Summary of Public Comment

Gale Power

- Cap on pain and suffering at \$300,000 is so minimal - absolutely shouldn't be a cap at all
- Hospitals should be responsible for contractors - could contract out nursing to get out from liability
- Concern is smells like big business and insurance - not for the little guy
- Not sure hospitals should be responsible for everything, but should have some responsibilities

Michele Power

- I just went through a tragedy- if someone said my pain was only worth a certain amount, I'd be outraged - should be a local jury that knows about my situation, not someone sitting in an office 1,000 miles away
- Caps will hurt little people, especially bush people - will make cases less attractive to attorneys, may not be able to recover. Most people in bush are not able to bring lawsuits on their own - don't have the sophistication to shop for an attorney if first one doesn't take the case - same for restrictions on attorney fees
- Hospitals should have responsibility for allowing doctor to be there - you don't choose the doctor, hospital does - might be a long time before you find out that doctor wasn't competent

Myron Angstman - Attorney

- Because I live in a small town, I've taken more fender-benders than most lawyers - often minor injuries, handled through native hospital, few compensatory injuries people I represent will never come here to talk to you. once their cases are closed, they don't want to talk about it - the people who should talk to you are people who will be injured next year
- One of my clients was injured at the Denver airport - reduced maintenance because about to shut down, so they left a hole in the moving walkway - kid fell in, hand mangled, couldn't shut off for two minutes - between caps and immunities, what she's getting for the mangled hand is an insult - allows slipshod work for financial reasons
- We shouldn't create a whole group of people who think they've been taken by the system
- Doctors don't dare testify against each other, because ostracized by other doctors - a few years ago, doctors voted to remove chair of medical association for testifying
- Crucial to note that insurance rates have gone down, no evidence of problems
- Never had a punitive damage case, so too rare to care about
- Lower cap on noneconomic damages - current cap is onerous but can be lived with, but certainly shouldn't be lowered
- Bush Alaska - not a huge cash economy - subsistence losses have been treated as noneconomic losses - can convert to economic losses, but it's really about not living the way you used to live
- No problem with flexible interest rate
- People pay for their collateral benefits, shouldn't be punished for foresight - although not a big issue in Bethel
- Periodic payments: plaintiff would be stuck with collection, risk of bankruptcy
- ADR: becoming the rule now - rule that sends cases to ADR or settlement conferences would be great - the earlier the better - mediators becoming more professional
- Streamlining bigger cases: great if you can do it, but most of these rules come with their own entanglements - especially here, where have small capacity to absorb a big case

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- Frivolous lawsuits: not a big problem, what we have is adequate
- Smaller cases should be streamlined, smaller jury would be OK
- Here we abuse our jurors, see the same ones year after year - anything to reduce that burden would be good - six enough for a civil case, even in superior court
- Setting attorney fees in contingency fee cases - we often find that our fees are less than those - I've made contingent fees that wouldn't pay your airfare home - it's a special problem here because hard to keep lawyers living in rural Alaska, people can't support private lawyers out of their pockets - only the contingency fee system keeps private lawyers available for the other kinds of cases. also, my clients don't complain - don't dispute my fees, so why should state interfere? already can't keep up with high-priced defense lawyers in Anchorage
- Allocation of fault: 1986 tort reform has forced defendants to sue as many people as they can, so I sue one person, wait to see who's still standing at the end. Plaintiff used to go find the culprit, now defense has to do it, makes cases longer and far more complicated. Defendants will go after 5 percent contribution, plaintiff won't do it.
- Criminal suing for injury: very tough cases to win, but sometimes the wrong to the criminal is worse than the crime, but won't make much difference
- Alcohol impaired: hard to hit right percentage, juries usually see through that
- Statute of limitations: drop a couple for contract doesn't matter
- Statute of repose: understand some balance, but there are some situations where want extreme care, because expected to last 20-30 years

Lisa Waters – secretary to an attorney

- Described her experience with her 2 ½ year old son, whose hand was caught in an unshielded moving sidewalk at the Denver airport 2 years ago, causing the child to lose three fingers. He received the maximum allowable under Colorado law, \$150,000. This left only approximately \$23,000 for "pain and suffering" after medical bills and legal expenses were paid. She did not think this was fair. She does not favor limits on awards in any category.

Chris Provost - attorney; wife is a physician

- Thinks that the tort system is faulty because defense attorneys get too much and victims get too little.
- Believes that all emergency room physicians should have insurance.
- Favors early dispute resolution through mediation or mechanisms.

Lucy Jones-Sparck

- In Alaska Native cases, definitions of expert witnesses should be revised to include people who are experts in their culture, not only those with a college degree
- Attorney fees in contingency fee cases should be set by statute.
- Non-discrimination should be the rule in allocating fault among multiple defendants.
- Criminal should not be able to sue unless there were extreme malicious actions.
- Re statute of repose – Natives do not know they have the right to sue because the Western system of justice is alien to them. Until the year 2020 or so, they should have a longer time to bring suit and then after that there should be some limit.
- There should be different ways to deal with dangerous persons, as opposed to those who are known to be responsible but may use drugs socially.

Anchorage Community Forum: Tuesday, November 19, 1996

Task Force Members Participating: Judge Thomas Stewart, Chair; Julian Mason, Dr. Rodman Wilson, Senator Johnny Ellis, Jeff Feldman, Judy Brady, Steve Williams

Attendance: approx. 65

Comments on Situations:

Situation A: Earthquake

Cap on noneconomic damages

- Generally support no limit on pain and suffering
- Most said no cap - dissent said there needs to be a limit, life not fair, cost of compensation passes loss on to everybody
- Inappropriate for governing body to limit compensation
- Show of hands—
 - cap on pain & suffering if full recovery - 14
 - cap on pain & suffering if permanently disabled - 12
- cap if strict liability, not if gross negligence or intentional

Statute of repose

- Most said not limit to 10, but might stop at 40 or 50
- Depends on useful life of building or other item
- 15 years not enough for a building, unless built for shorter design life
- Depends on what is known at the time
- Some feel people need an absolute right to go to court: not right to win, but right to sue
- Others feel things wear out, not always designed to last

Loss of consortium

- Should people be able to sue? 20 say yes
- Should there be a cap? 15 say yes

Situation B: Medical Malpractice

Hospital liability for emergency room doctor

- Majority felt should be able to sue hospital, minority felt independent contractor should be responsible; most thought doctor should be required to carry insurance.
- Hospitals are cheap, hire the cheapest doctor to moonlight, not certified
- Suggested alternatives: state pool for malpractice, state consumer review board, malpractice insurance for other professions, health care reform to reduce litigation

Suing when reach adulthood

- All of group, including doctor, said should be able to sue when becomes an adult; audience agrees
- 18-year-old might get \$1 million, blows it in a year, ends up on Medicaid - should go into a trust as a matter of law
- Trial lawyer: my clients often like a structured settlement
- nobody wants to be on Medicaid, 18-year-olds don't know their rights, lifestyle radically changed, all family members affected even after child becomes an adult
- Setting up trust discriminates against handicap. we don't have the right to assume we know better than 18-year-old - I know 50-year-olds that blow money too

Situation C : Automobile Accident

Should the victim be able to sue person who lends car to drunk driver? yes

Should drunk driver be able to sue friend for lending him the car? no

Should drunk driver be able to sue the state for negligent maintenance?

- Group 1 says yes, 5-4, but weak case
- Group 2 says no, should drive according to conditions

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Should victim be able to sue the drunk driver for punitive damages? unanimously yes

Should victim be able to sue the friend for punitive damages? yes

Should she be able to sue the car manufacturer? yes

Should a share of the punitive damages go to the state? no -- only one says yes, 100 percent

- Greater windfall if it goes to the state
- The word "windfall" makes it sound like it's easy to get money, but it's not
- Increasing predictability in California didn't decrease rates

[Mr. Mason: there are two well-documented points of view about what happened in California]

In general, people favored mediation and consumer review board

Favor cap on punitives? about one fourth of audience raise hands

What should it be based on?

- Already has to be outrageous or reckless conduct, clear and convincing evidence
- Corporate America running for cover
- We should address how to reduce frivolous lawsuits
- Attorneys should be liable for half the attorney fees

Public Testimony Comments/Concerns:

Bonnie Nelson - AKPIRG volunteer

- Thanks for your work - would have liked disabled people on task force
- need health care reform - administrative solutions would cut costs, protect consumers
- need to protect good doctors and architects, but can't hurt consumers in doing it
- favor mediation, consumer protection

Daryl Nelson - AKPIRG volunteer

- Have been listening to task force for 3 months - you're not thinking about person who's injured and their families
- Have an injured family member whose wife had to give up her career to take care of him; should take things such as this into account when calculating economic damages
- Child that's hurt should be able to sue once becomes an adult - might be hard for defendant, but child will be dealing with the problem for the rest of their lives
- No cap on noneconomic damages - every situation is different

Frieda & Horace Curtis

- We've had legal problems for last ten years that have cost us over \$60,000; have told the state about it, but they don't do anything; insurance division doesn't care
- Not for tort reform at all

Steve Conn - AKPIRG executive director

- Asked crowd, How many in favor of cap on punitive damages? about 2-1 say no
 - cap on noneconomic damages? about 2-1 say no
 - how many know me? about 1/3, so not all from AKPIRG
- Alaska has already have a lot of tort reform -- one of only 9 states with a cap on noneconomic damages
- Already have a loser pays system
- Problem is a fundamental lack of access to justice in the civil law system - hope you'll recommend a new task force to governor to study that
- Any barriers to right to jury should be viewed cautiously
- Never seen a process with less allowance for public testimony; glad to see the turnout

Jeff Rubin - Plaintiff and business attorney

- Has reviewed task force work; what concerns him most is allocation of fault provision
- Allocating fault to nonparties violates basic tenets of our justice system - allows people to enter into collusive agreements to shift blame to someone who won't have to pay, because of statute of limitations or some other reason
- Jury assigns fault to person who rolls over and accepts it, to help other defendants get off
- Idea that caps lower insurance rates is erroneous - more important is enforcement of safety standards and regulation of insurers, to prevent accidents and bad-faith conduct

Les Gara - Attorney and AKPIRG board member

- Victim should get full compensation - everybody agrees with that
- What if there's a frivolous lawsuit? you recommend they pay full attorney fees and fine - that's great, so now let's talk about meritorious suits
- Punitive damages: shouldn't put mom-and-pop businesses out of business and your proposal covers that
- Worried about wrongful termination suits: difficult to bring, no reason to make harder, threat to job security of every worker in state - not receiving huge amounts of money - I turn away a lot of legitimate cases
- Allocation of fault: your proposal sets up a shell game - plaintiff will be responsible for attorney fees of people he doesn't think are liable. This won't provide full compensation, but full employment act for attorneys

Scott McIntire - AKPIRG volunteer on workers' compensation issues

- Workers' comp is the original tort reform act; evaluations say it's an abysmal failure; should investigate it, not incorporate it
- Allocation of fault to employer, presumption of compensability don't work
- caps don't go up with inflation

Lee Schlosstein - Board of Trustees of Alaska Medical Association

- Caps do make rates go down, as in California, where insurance costs are half of NY or Florida
- Group submitted written testimony

Donna Brooks

- Task force has failed to look at access to legal help for victims
- Can't get professionals to testify against each other, which increases costs
- ADR a good first step

Ross Brudeneis - Alaska State Medical Association, chair of expert advisory panel committee

- We believe the panel system works
- Only have anecdotal information, but would like to analyze the data accumulated over last 20 years, would like to fund a study - have only looked at first 110 cases, not the next 450 - would like to know if it does any good - in the meantime would like to keep it going
- Would like to speed it up, with a little task force with bar association, medical association, courts to look at it
- Most cases get a report in 6 months, which isn't fast enough

Theresa Obermeyer

- Don't see any state troopers here; I'm at a loss without them
- Comments are about federal courts: three federal nonjury trials, jailed 29 days - it's your tax dollars at work

Steve Theno - engineer, Professional Engineers in Private Practice

- PEPP supports responsible tort reform, for citizens and economy

Governor's Advisory Task Force on Civil Justice Reform

- Support:
 - 1) should be a certificate of merit to allow lawsuit to proceed
 - 2) reasonable statute of repose
 - 3) reasonable cap on punitive damages
 - We're small businesses, not corporate America
- Paul Lott* - welding engineer
- Hope debate doesn't get dominated by political self-interest
 - Took nine months to get workers' comp, shouldn't be that difficult
 - You should look at NAFTA; you should define medical injuries
- Lori Johnston*
- Think you should trust the juries, because it's us, your neighbors; if you think we're too stupid, educate us
 - It is perverse to lower amount of pain and suffering without finding ways to reduce pain and suffering, because insurance companies don't pay out what they should
 - You could keep the pain and suffering and punitives if I could get the medical care
 - Look at reason why there are so many lawsuits - because insurance companies are not doing their jobs
- Soren Wuerth* - citizen, Common Roots
- Disappointed in makeup of task force; all members have financial interest in outcome, no one of color, no one disabled
 - Disappointed that only 7 out of 21 members here tonight
 - Oppose statutes of limitations and repose, caps
- Jim Sykes*
- Shouldn't make decisions until everyone understands the issues and have some basis for the decision and can reach consensus
 - Time is too limited for testimony, tonight and during task force; don't want to see people's rights limited
 - Want to see consumer boards: respect doctors, but citizens should be on boards too
 - Caps will be distinct advantage to big business to estimate if cost of wrongdoing is worth the cost of doing harm
 - Does that mean that Exxon won't have to worry any more? it might as well use single-hulled tankers
 - Recommend that ideas be circulated for another year to let us talk about it, urge legislature not to go forward
- Oren Seybert* - Alaska Air Carriers Assn. & Peninsula Airways
- Concern is with regional air carriers, who have serious problem getting insurance, because of punitive damages; jury awards are driving insurers out of state
 - Settlements are 3 times compensatories to avoid juries
 - There is a definite correlation between verdicts and rates
 - Many areas totally dependent on our services of the air carriers
 - In recent plane crash at Lake Hood: carrier only had \$150,000 insurance per seat because couldn't afford any more; if put cap in place, will lower rates, and then those victims could be compensated
- John Haxby*
- Frivolous lawsuits are hard to define
 - Plaintiff and defense attorneys should divide the costs
 - Should eliminate or limit contingency fee
 - If attorney malpractice statute of limitations is dropped from 6 to 2 years - should reduce everybody else to that too [Mr. Feldman: This just brings statute of limitation for attorney malpractice into line with that for other professionals.]

Summary of Public Comment

Catherine Doss - victim of being rear-ended by drunk driver

- Hard to establish economic loss for self-employed person
- Important not to weaken rights of citizens
- When you're sick, hard to fight or advocate for yourself
- My experience is that there aren't a lot of frivolous lawsuits
- Agree you should keep this process open

Sandy Sanderson - President of Alaska Independent Blind & member of national organization doing litigation on behalf of blind

- Why are legislators doing this?
- Professionals always cover for themselves
- My mother was a victim of malpractice; my son is fighting his doctor & his insurance company. He will have to leave the state and see some other doctor to keep from being disabled for the rest of his life
- Why should we protect these people?
- Workers comp has done more harm than good
- Remember who did this tort reform business when you vote

Lynn Correl - VP of Alaska Independent Blind

- Has been interested in this for several years
- Is sure that Rep. Porter, her representative, has good intentions, but he's assuming that everyone is playing fair, and she thinks they're trying to get rich
- This is a disability rights issue, not a get-rich plan for doctors, lawyers and insurance companies
- Have to stop bailing out insurance companies and lawyers, use the money for people who can't afford it - pool of money for people who need to litigate, not settle
- Can be too sick, too much in pain, too much in grief to do anything about it
- Embarrassed how this task force hasn't listened to public

Steve Sims - Plaintiffs' personal injury lawyer

- Concerned about mediation proposals - I don't think I should be told when to do it - maybe I need to talk to witnesses first so the parties know what will say before we mediate
- No fault insurance doesn't work
- Need to trust juries, need to have trials to establish baseline values on cases so 95 percent of cases can be settled - 12 people to really think about the case
- mandatory disclosure (discovery) just adds problems
- My views not necessarily shared by other trial lawyers

Tanya Braslavsky - engineer

- Professional engineers support your work, mandatory mediation
- Not trying to get away with bad practice
- No amount of money can compensate for losing your health; insurance doesn't solve problems, just buys out a poor practitioner
- Money is better spent not on insurance, but on regulatory enforcement and professional boards - higher board fees would be OK - education
- Fear of litigation doesn't make someone a better practitioner; insurance and lawsuits don't make anyone more secure

Denny Victor - car accident victim

- This system not perfect, but better than what's being proposed
- Limits won't help anyone - what would help would be if insurance companies would pay when they're supposed to instead of having to litigate to get paid - my attorney spent 10 years on a contingency fee to get recovery -
- Arbitrary limits would restrict people's right to sue and get paid - not fair

Governor's Advisory Task Force on Civil Justice Reform

- Let juries decide what an injury is worth, not someone in Juneau to decide
- David Booth*
- Disabled in 1990: awarded \$2500 for bad knee; hard to get workers' comp; went into depression, lost everything
 - Showed task force what you get when you depend on workers' comp and the food bank [two rotten carrots and a loaf of bread]
- Harry P. Lang*
- My purpose here is not to hear what you have done but to say what not to do that I believe is non-equitable and leads to injustice.
 - Do not try to fix a good civil legal justice system that works.
 - This was done with the workers' compensation system about 10 years ago and that system does not work at all. The same points of argument were set forth at that time as are now being used for tort reform. None of the promises materialized:
 - Rates did not come down
 - Speedy remedies did not happen
 - Insurers deny medical care
 - Insurers can behave in bad faith
 - Much money in public assistance and medical is expended for insurers to achieve their unjust enrichment.
 - Please do not fix what now works.

Fairbanks Community Forum: Wednesday, November 20, 1996

Task Force Members Participating: Judge Thomas Stewart, Chair; Dr. Rodman Wilson, Bruce Botelho, Charlie Cole

Attendance: approximately 25 people

Comments on Situations:

Situation A: Earthquake

Should there be a limit on recovery for pain and suffering? split vote

- Give juries credit for following instructions, should be individualized and not set by legislature
- Outrageous cases you hear about are few
- Should be a limit in civil law just like for criminal penalties
- Look at McDonald's coffee verdict, what juries can do without accountability

What if permanent paralysis? 5-1 say no limit on loss

Should victim be able to sue architect for negligence?

- Within twelve years is reasonable time to sue
- There needs to be an end to it at some point, but it should be in range of 15-25 years
- Doesn't matter that he retired, whether he has insurance
- Should determine life of construction, carry insurance for that long
- Market should produce tail coverage to meet the need

Situation B: Medical Malpractice

Should person be allowed to sue the hospitals as well as the emergency room doctor? yes

- Hospital provides the service, advertises it
- ER doctors come and go, should be able to find hospital

Should hospital require doctor to carry insurance?

- Some say yes, if hospital not liable
- No incentive for victims to sue if not insured, so doctors shouldn't be forced to carry insurance – it makes them bet against themselves
- Generally feel people shouldn't be forced to purchase insurance, but want patients covered in this situation, so if it's not the hospital, it has to be the doctor
- Individual shouldn't be able to hide behind corporation, but doctors at least are responsible for own actions

Should minor be allowed to sue when she turns 18?

- Yes: children can't initiate lawsuits

Does it matter why her parents decided not to sue?

- Some say yes, some no - depends on the facts
- Doesn't matter if doctor has retired, but hospital should still be on the hook

Should defendants be able to countersue for a frivolous lawsuit?

- Maybe, but it would be like getting blood from a turnip

Situation C : Automobile Accident

Should a friend who lends a car to friend with DWI record and license suspension be liable? yes

Should drunk driver be able to sue his friend? no

Should drunk driver be able to sue state for negligent road maintenance?

- Mostly no - if sober, would be a different story

Should plaintiff be able to sue friend for punitive damages if knows about suspension and record?

- Split – yes, if appears drunk when he borrows the car

Should a portion of punitive damages go to the state?

- One yes: it's punishment, not compensation
- Four no: need incentive to sue, plaintiff bore the brunt of injury and suit

Public Testimony Comments/Concerns:

Mike Prax

- Governor should be taken to task for vetoing a bill, just to create a task force that recommends the same things
- ADR mechanisms already available in the market, no impediments to using them - let people decide through the marketplace whether to use them, although we tend to go to court too soon
- Governor is usurping legislature's function to make these laws
- No mandatory insurance: we get the impression that suing an insurance company, not an individual
- Share of punitive damages to state OK because it's the state's business to punish
- Should be able to countersue attorney for frivolous lawsuit; attorneys use threat of protracted legal process to extract settlements, defendant ought to be able to hold attorney accountable

Bart LeBon - Board of Directors of State Chamber of Commerce

- We supported HB158, disappointed when it was vetoed, we've responded with an initiative to put on ballot [describes provisions of initiative]
- theory behind limiting punitives to \$300,000? is to limit exposure for those conducting business in Alaska

[Mr. Cole: why shouldn't businesses be subject to what jury decides?]

- company already suffers loss of reputation, lower company value
- juries can get swayed by emotion of event
- should be limited like length of sentence, which legislature sets

Allan Cheek - attorney

- Initiative doesn't apply to punitive damages award in Exxon Valdez - I view this as an admission that sometimes a large award is appropriate

Governor's Advisory Task Force on Civil Justice Reform

- Think it's strange that legislature should limit citizens' right to render justice, usurp jury function
- Have any businesses gone out of business as a result of large punitive awards?
[Dr. Wilson: potential for punitive awards affects decisions of physicians, nature and length of practice, although not a crisis in availability][Attorney General Botelho: Judicial Council found no punitive damage awards in medical malpractice suits]

Randy Griffin -

- Insurance rates: governor wanted to be sure that savings of insurance companies would be passed on to consumer - I think the free market will take care of this
- Punitive damages should go to the state: pay back to society, not indenture defendant to the plaintiff

[Mr. Cole: costs of pursuing a punitive damages claim are high - should plaintiff be able to get state help in suing?]

- Cost of lawyers should be returned to the plaintiff, maybe an additional 25 percent, with the rest to the state

Albert Parrish - Plaintiffs' attorney

- Every time you set a limit, a fact situation will come along that will make you feel it's unfair
- Idea is to make person whole - limits don't match that goal, but juries can
- Letting defendant lay off fault on nonparty: shouldn't be able to make an argument with no one there to oppose it
- Currently have mandatory automobile insurance - idea there is not to keep driver from being sued, is there to help injured person get compensated - we're twisting system so it doesn't work to provide the compensation

[AG Botelho: what's inherently more fair about requiring defendant to bring in additional defendants?]

- If defendant can lay off blame on someone who hasn't been sued, will have to prove a negative, that third party defendant is not liable

[AG Botelho: why shouldn't plaintiff bear responsibility to sue someone else if defendant says he's not negligent?]

[Dr. Wilson: appears to AMA that complaints already name everyone in sight, plus John Does]

- Amazed that insurance companies don't bring in more third parties under current law

Robert Bruce Stevenson - burn injury victim [passed around photos of his second and third degree burns]

- Hit by wall of flame from explosion of 500 gallons of propane
 - tank ruptured because of mishandling
 - three of us burned quite badly, several million dollars in damage
- There are a lot of hazards waiting out there for Alaska workers
 - took four years to get a settlement, took even longer to heal
 - I suffered post-traumatic stress syndrome
 - I had to go back to work at the same spot, watch casual handling of tanks again
- System finally worked, but took four years
- Really wanted to go to court, thought that would be psychologically healthy for me, but if defendant or workers' comp had come to me in the hospital and said what can we do to make it right, could have settled it in 6 months
- If anyone thinks there should be a limit to pain and suffering, take a look at these photographs

Summary of Public Comment

- Think about what it would be like to get dunked in a hot bath and scrubbed with a wire brush when you have no skin - you wish you were dead - no amount of morphine could do the job

Douglas Yates

- Tort reform gives power to insurance companies and HMOs
- There has been a publicity campaign to convince Alaskans that litigation is out of hand - idea is that reform will lower insurance rates and medical costs
- Only 10 percent of those injured in medical malpractice cases attempt to sue
- Anecdotes about frivolous lawsuits go unquestioned
 - most cases are for very limited damages
 - plaintiff loses half the time
 - punitive damages are rare, often small
- HB 158 is part of a well-coordinated attack designed to strip Alaskans of rights, tilt balance toward corporate defendants, less protection for citizens

April Rodgers

- I agree with the question, should changes be made to state's immunity from suit? But I don't want the answer to be more immunity
- With no accountability there's no caring - individuals are supposed to care about other people, but state doesn't have to

Scott Calder

- This discussion gives only passing mention to state's liability
- I think using these scenarios is a way to use up our time rather than let us testify about what we care about - let us talk about our own real cases
- State should prevent and alleviate injuries, not cause them
 - should set a good example for private enterprise
- Move toward ADR is desirable
- Bad idea for state to be immune
- State shouldn't require mediation, should just provide a good example
- Not all problems can be solved by hiring a lawyer and fighting about it, good to get individuals involved

Lou Anne Maxwell - mediator in private practice

- Don't want to see citizens cut off from civil justice system
- Putting limitations on recovery is unfair
- I don't trust corporations more than courts or juries
- Some corporations don't blink at \$300,000; some executives feel they have no personal exposure; corporations should be liable for punitive damages
- Glad to see ADR recommendations - need to be alternatives to court
- Can't force people into it, other than to give it a try
- People don't understand mediation, think it's meditation or medication
- I don't see it as another layer, should work out to be less expensive if more efficient, so parties should pay unless indigent
- Need to have standards for mediators

Janet Baird - Fairbanks board member of AKPIRG

- Public access to meetings: concerned about lack of publicity - tiny notice in newspaper, no coverage by paper
- These are serious issues: real injuries to real people
- Women's health issues often have to do with bad products, need recourse for serious injuries
- Look at whole person: losing your job isn't just a monetary proposition, there are psychological and family issues too - so dividing damages up like this makes no sense

Governor's Advisory Task Force on Civil Justice Reform

- Opposed to limits on damages
- Punitive damages: information is that this is not a problem
- Case hasn't been made for a cap
- Individuals are at a disadvantage dealing with large corporations, and reform shouldn't restrict people from fair treatment
- Redress of injury should be the goal, not the profits of insurance companies

Chris Bataille - Attorney

- Your videotape confirms my experience in Fairbanks that punitive damages are very rare, reduced on appeal
- This bill removes awards of noncompensatory damages from province of jury; inconsistent with allowing jury to decide who to convict of murder, who to sentence to death
- If award goes to state, plaintiff should get full attorney fees
- If take on Exxon or Texaco, will be an expensive process
- Would still have Pintos on the road without punitive damages
- Outrageous, shocking, fraudulent behavior: should pay for it, or serves no social purpose to find them liable for it
- Judicial settlement conferences effective, results in high rate of settlement, as good as mediation
- Should determine if insurance companies are making excessive profits - this is the third tort reform, and rates haven't gone down yet

[Judge Stewart: nothing we do in Alaska has any effect on insurance rates]

- Then why make these changes? if going to do them a favor, should have something in exchange
- HB 158 allows wrong-doers to escape responsibility
- The accessibility problem is in the fact that insurance companies not evaluating claims fairly, not court costs

Jodi Olmsted - President of Parents Concerned for Reform

- We are parents wronged by social services workers
- State workers are immune, make decisions without any recourse
- Should be video recording of child allegations of abuse
- Like to see more attention to people being dragged through the system; people are paying for abuses of the state
- Need settlement information - people settle for wrong reasons

Sybil Skelton

- Should pay mediators with the punitive damages the state collects

Coert Olmsted

- No crisis in torts, much less in Alaska
- Even if there were, caps aren't the answer
- Runs against many deep principles regarding amount of corporate profits - those are communist ideas and would be immediately rejected
- Cap premiums instead: have a single payer with actuarial rates
- Insurance is a scam, offers no real protection - shouldn't be a private function

Leslie Simmons - member, Alaska Dispute Settlement Association

- Supports the 5-year mediation/early neutral evaluation pilot project.
- ASDA, a nonprofit organization is working on a collaborative effort to develop credentialing and standards for neutrals. The team developing these standards for practitioners represent multiple geographic regions and multiple professions. The subcommittee's goal is to have their practitioner recommendations completed by February 15, 1997.