

ALASKA LEGISLATURE SPECIAL COMMITTEE/SUBJECT FILES 8672

2431.44 SCOMM 101A: CIVIL JUSTICE/TORT REFORM - HB 58, 1997 606

1986) (insufficient evidence of prior knowledge or of similar incidents or of other outrageous conduct). Upon a proper showing, punitive damages may also be recovered in wrongful repossession cases, Murray v. Feight, 741 P.2d 1148, 1158 (Alaska 1987); Alaska Statebank v. Fairco, 674 P.2d 288 (Alaska 1983), for intentional interference with contract and intentional infliction of emotional distress, Oaksmith v. Brusich, 774 P.2d 191 (Alaska 1989), and for fraudulent misrepresentations, Great Western Savings Bank v. George W. Easley Co., J.V., 778 P.2d 569 (Alaska 1989). Punitive damages may also be awarded for bad faith failure to pay maintenance and cure to a person entitled to this remedy, Weason v. Harville, 706 P.2d 306 (Alaska 1985), and for an insurer's tortious breach of the duty of good faith and fair dealing towards its insured, State Farm Fire and Casualty Co. v. Nicholson, 777 P.2d 1152 (Alaska 1989).

Punitive damages are not recoverable for breach of contract unless the conduct constituting the breach constitutes an independent tort for which punitive damages are recoverable. Wien Air Alaska v. Bubbel, 732 P.2d 627, 631 (Alaska 1986), quoting Restatement (Second) of Contracts § 355, comment A (1981). Punitive damages may not be awarded for breach of the implied covenant of good faith and fair dealing in an employment contract. ARCO Alaska, Inc. v. Akers, 753 P.2d 1150 (Alaska 1988).

If a tort by an employee renders the employer liable for compensatory damages and the employee's actions justify a punitive damage award, the employer is liable for punitive damages whether or not the employer authorized or ratified the tortious conduct. Alaskan Village, Inc. v. Smalley, 720 P.2d 945 (Alaska 1986). One partner may also be held vicariously liable for punitive damages based on the acts of the other partner. Murray v. Feight, 741 P.2d 1148 (Alaska 1987).

Punitive damages are not recoverable against the State of Alaska. See AS 09.05.280 and University of Alaska v. Hendrickson, 552 P.2d 148 (Alaska 1976). Punitive damages may not be awarded against municipalities absent statutory authorization. Hazen v. Municipality of Anchorage, 718 P.2d 456 (Alaska 1986); Richardson v. Fairbanks North Star Borough, 705 P.2d 454 (Alaska 1985). Punitive damages may not be recovered from the estate of a deceased tortfeasor. Doe v. Colligan, 753 P.2d 144 (Alaska 1988).

Effective May 1986, the legislature enacted AS 09.17.020 requiring that an award of punitive damages must be supported by

clear and convincing evidence. Because that standard of proof is likely not to be applicable to any other theory of recovery alleged, the standard of proof is included in the instruction on punitive damages instead of making it a second instruction on standard of proof.

The Alaska Supreme Court has discussed the clear and convincing standard of proof in two cases: Waks v. State, 375 P.d 136, 138 (Alaska 1962) and Saxon v. Harris, 395 P.2d 71 (Alaska 1964). In Waks, supra, the issue was the burden of proof upon claimants to recover money which has already escheated to the state and in Saxon, supra, the issue was whether clear and convincing evidence is required to establish fraud. In holding that the burden of proof was preponderance of the evidence, the Supreme Court distinguished between the two burdens and defined both.

In Providence Washington Insurance Co. v. City of Valdez, 684 P.2d 861 (Alaska 1984), the Alaska Supreme Court held that public policy did not bar construing a liability insurance policy to cover punitive damages awarded against a government entity or punitive damages awarded on the basis of vicarious liability. In LeDoux v. Continental Insurance Co., 666 F. Supp. 178 (D. Alaska 1987), the court held that under Alaska law, claims for punitive damages against individuals for their own acts were covered by an insurance policy.

ALASKA STATUTES

TITLE 9. CODE OF CIVIL PROCEDURE

CHAPTER 17. CIVIL DAMAGES AND APPORTIONMENT OF FAULT

Sec. 09.17.070. Collateral benefits.

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

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

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

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

(c) If the total amount of collateral benefits introduced as evidence under (a) of this section exceeds the total amount that the claimant introduced as evidence under (b) of this section, the court shall deduct from the total award the amount by which the value of the nonsubrogated sum awarded under (a) of this section exceeds the amount of payments under (b) of this section.

(d) Notwithstanding (a) of this section, the defendant may not introduce evidence of

(1) benefits that under federal law cannot be reduced or offset;

(2) a deceased's life insurance policy; or

(3) gratuitous benefits provided to the claimant.

(e) This section does not apply to a medical malpractice action filed under AS 09.55.

ALASKA STATUTES

TITLE 9. CODE OF CIVIL PROCEDURE

CHAPTER 17. CIVIL DAMAGES AND APPORTIONMENT OF FAULT

Sec. 09.55.536. Expert advisory panel.

(a) In an action for damages due to personal injury or death based upon the provision of professional services by a health care provider 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.

(b) The expert advisory panel may compel the attendance of witnesses, interview the parties, physically examine the injured person if alive, consult with the specialists or learned works they consider appropriate, and compel the production of and examine all relevant hospital, medical, or other records or materials relating to the health care in issue. The panel may meet in camera, but shall maintain a record of any testimony or oral statements of witnesses, and shall keep copies of all written statements it receives.

(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:

- (1) What was the disorder for which the plaintiff came to medical care?
- (2) What would have been the probable outcome without medical care?
- (3) Was the treatment selected appropriate for the case?
- (4) Did an injury arise from the medical care?
- (5) 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?
- (8) If a medical injury had not occurred, how would the plaintiff's condition differ from the plaintiff's present condition?

(d) In any case in which the answer to one or more of the questions submitted to the panel depends upon the resolution of factual questions that are not the proper subject of expert opinion, the report must so state and may answer questions based upon hypothetical facts that are fully set out in the opinion. The report must include copies of all written statements, opinions, or records relied upon by the panel and either a transcription or other record of any oral statements or opinions; must specify any medical or scientific authority relied upon by the panel; and must include the results of any physical or mental examination performed on the plaintiff. Each member shall sign the report and the signature constitutes the member's adoption of all statements and opinions contained in it; however, a member may, instead of signing the report, submit a concurring or dissenting report that complies with the requirements of this subsection. A member may not attest to any portion of the report as to which the member is not qualified to give expert testimony.

(e) The report of the panel with any dissenting or concurring opinion is admissible in evidence to the same extent as though its contents were orally testified to by the person or persons preparing it. The court shall delete any portion that would not be admissible because of lack of foundation for opinion testimony, or otherwise. Either party may submit testimony to support or refute the report. The jury shall be instructed in general terms that the report shall be considered and evaluated in the same manner as any other expert testimony. Any member of the panel may be called by any party and may be cross-examined as to the contents of the report or of that member's dissenting or concurring opinion.

(f) Discovery may not be undertaken in a case until the report of the expert advisory panel is received. 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.

(g) Members of a panel are entitled to travel expenses and per diem in accordance with state law pertaining to members of boards and commissions for all time spent in preparing its report. If a panel member is called upon as a witness at trial or upon deposition, the member is entitled to payment of an expert witness fee, which may not exceed \$150 per day. All expenses incurred by the panel shall be paid by the court. However, in any case in which the court determines that a party has made a patently frivolous claim or a patently frivolous denial of liability, it shall order that all costs of the expert advisory panel be borne by the party making that claim or denial.

(h) Parties to the case and their counsel may not initiate communication out of court with members of the panel on the subject matter of its inquiry and report or cause or solicit others to do so, except through ordinary discovery proceedings.

Civil Rule 72.1. Expert Advisory Panels in Health Care Provider Malpractice Actions.

(a) **Identification of Action.** Either party in a health care malpractice action subject to AS 09.55.536 may request that the court appoint an expert advisory panel to evaluate the claim. The request should identify the specialty of the health care provider named as defendant. Either party may recommend that the court appoint specific professions or specialties to the expert advisory panel.

(b) Appointment of Panel.

(1) After the case is at issue and a party has requested the appointment of an expert advisory panel (or the court has raised the issue), the court shall nominate a three person panel and notify the parties of the names, professions and specialties of the persons so nominated. The court may initially nominate alternate panel members if it believes nominees may be disqualified. Within 10 days after service of this notice, either party may move to disqualify a nominee, citing the reasons for the motion. The other party may submit an opposition within five days after service of the motion for disqualification. No reply may be filed.

(2) The nominated panel members must inform the court within 10 days of the notice of appointment of any financial relationship with a party or party's attorney, of any other reason which would cause the nominee to be biased in the case or present an appearance of bias, and of any other reason why the nominee cannot serve on the panel. The court shall disqualify a nominee if the nominee is biased for or against a party or if a conflict of interest raises a substantial appearance of bias.

(3) If additional nominees are required, the parties must be given the opportunity to recommend nominees' professions or specialties and move to disqualify as provided above.

(c) Submission of Medical Records.

(1) Within 30 days after service of the court's initial panel nominations, the plaintiff and each health care provider defendant shall serve on other parties one legible copy of all discoverable medical records in such party's possession, custody, or control. Original exhibits which are impractical or impossible to copy must be made available to all parties for review. Medical reports of consultants retained by a party for the advancement or defense of the case and medical literature must also be served on other parties if such literature or reports is to be submitted to the panel.

(2) Each party shall file with the Clerk and serve on each other party a list of all medical records, medical reports and medical literature which the party will transmit or make available to the panel.

(3) Medical records include medical records of hospitals, physicians, or other health care providers, addressing an issue of health relevant to the plaintiffs' complaint, whether generated before or subsequent to

the event giving rise to the claim and whether generated by the health care provider named in the complaint or by other health care providers. Medical records also include autopsy reports and exhibits such as x-rays and slides.

(4) Upon agreement of the parties or order of the court, and after a reasonable time for inspection, each party shall submit to each member of the panel one legible copy of such party's medical records, medical reports and medical literature, and notify the panel members of the availability and location of original exhibits for which submission to the panel is impractical or impossible. If the plaintiff serves the defendant with medical reports of consultants, the defendant has 30 days to serve medical reports of its consultants on the plaintiff. Thereafter, the reports may be submitted to the panel. Any additional reports may be submitted only with leave of the court.

(5) A party may file and serve on each member of the panel a notice advising the panel of further relevant medical records of which the noticing party does not have possession, custody or control.

(6) In the event a party fails or is unable to submit relevant medical records to the panel, and the panel is unable to obtain access to such records by reason thereof, any party or the panel may apply to the court for leave to obtain such records by court order. The court may delay further proceedings until the panel is provided with the additional medical records.

(7) Within 30 days after service of the court's initial panel nominations, each party shall serve upon the panel and all other parties the information and materials required to be disclosed under Rule 26(a)(1)(A), (B), (C), and 26(a)(2).

(d) **Preliminary Findings of Fact and Conclusions of Law.** A party may move the court to resolve issues of fact or law prior to submission of the case to the panel, or to furnish instructions of fact or law to the panel. Submission of the case to the panel will be deferred pending determination of the motion by the court.

(e) **Instructions to Panel.** The court shall provide the panel with a written order which states:

(1) The questions listed in AS 09.55.536, clarified or changed as the court deems appropriate to the case.

(2) That the panel is to prepare and submit to the court a list of all persons interviewed, a list of treatises or medical literature used by the panel in its deliberations, and a list of exhibits it examined (such as X-rays, slides, and other items which are not reproducible on paper).

(3) The general nature of the allegations made against each health care provider and of the answer to those allegations. Alternately, the court may submit a copy of the complaint and the answer and advise the panel that they are to address only the medical issues.

(4) That the panel or the Alaska State Medical Association is to retain copies of medical records submitted to them until further notice from the court. The court may make special provision for the safekeeping or retention by the Clerk of Court of X-rays or other original exhibits.

(5) That the panel must maintain a recording of any testimony or oral statements of witnesses and shall keep copies of all written statements the panel may receive or take, whether from witnesses, consultants, or other sources.

(6) That the panel is to review the case of each health care provider individually and render an individual, separate opinion with regard to the allegations against each health care provider.

(7) The name and location of the court personnel who might assist the panel, and that the panel may communicate with the court concerning any questions it may have, or make any requests for assistance.

(8) Any matters of fact or law on which the court has ruled, and that the panel is to review the matter in light of the court's finding and instructions on the law.

(9) That in the event parties are named as defendants who are not health care providers, the panel's consideration is to be directed to the health care providers only.

(10) That the panel is not to communicate with the parties or their attorneys, except to arrange to obtain or review an original exhibit in the possession of one of the parties, or to arrange an examination of the plaintiff, or to arrange an interview with the plaintiff or health care provider, or to arrange the scheduling of the testimony of a panel member at a deposition or at trial.

(f) Interviews by the Panel.

(1) If an attorney desires to be present at an interview of his or her client by the panel, the attorney must give reasonable notice of an intent to do so to the other parties so they may also appear at the interview. If the attorney for the person being interviewed does not appear, no other attorney or party may appear. An attorney appearing before the panel may not question his or her client or any other persons appearing before the panel, nor may an attorney or party cross-examine witnesses or ask questions of the panel. A person being interviewed by the panel may not be accompanied by any representative other than the person's attorney.

(2) Any party may request the panel to interview any person or party.

(g) Discovery. Except by leave of court, no discovery may be conducted until the report of the panel has been filed or until 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.

NEW DISCOVERY AND DISCLOSURE RULES

1. Automatic Disclosure of Certain Information.

A. Initial Disclosures (Rule 26(a)(1))

Automatic disclosure of basic information early in the case. Information includes:

- * factual basis of claims and defenses;
- * names of people who have information about the case;
- * statements;
- * relevant documents and tangible things;
- * photographs, diagrams, and videotapes;
- * insurance agreements;
- * computations and evidence upon which damages claims are based.

B. Expert Witness Reports (Rule 26(a)(2))

Automatic disclosure of written report from each independent expert who may be used at trial. Report must contain:

- * expert's opinions and basis for opinions;
- * information considered by expert in forming opinions;
- * exhibits to be used by expert;
- * qualifications of expert, including list of publications;
- * compensation;

- * other cases in which witness has testified as an expert.

Deadline for disclosure of expert reports must be specified in pretrial order required under Rule 16(b).

C. Pretrial Disclosures (Rule 26(a)(3))

Automatic disclosure of witness and exhibit lists. Deadline for disclosure must be specified in pretrial order. (Rule 16(b))

2. **Limitations on Traditional Forms of Discovery.**

A. Limits on Depositions

- * Number of depositions limited. Each side may depose as a matter of right:
 - * other parties;
 - * expert witnesses expected to be called at trial;
 - * treating physicians;
 - * document custodians; and
 - * any three other persons.

Other depositions require leave of court or written stipulation. (Rule 30(a))

- * Length of depositions limited. Depositions of parties, expert witnesses, and treating physicians may not exceed six hours. All other depositions limited to three hours. (Rule 30(d)(2))
- * Existing restrictions on depositions of expert witnesses have been eliminated.

B. Limits on Interrogatories and Requests for Admission (Rules 33(a) and 36(b))

A party may serve no more than thirty interrogatories upon another party. (Alaska rules currently limit parties to thirty interrogatories.)

There is no limit on requests for admission.

C. Supplementation of Discovery (Rule 26(e))

Initial disclosures must be supplemented at "appropriate intervals." In fast-track cases, appropriate interval is defined as no longer than 30 days. (Rule 16.1(k)(4)) In other cases, appropriate interval will be specified in pretrial order. (Rule 16(b)(4))

Rules governing supplementation of other forms of discovery are essentially unchanged. Party must seasonably amend a response if party learns that response is in some material respect incomplete or inaccurate and additional or corrective information has not otherwise been made known during discovery process.

3. **New Pretrial Procedure.**

A. Meeting of the Parties (Rule 26(f))

Mandatory meeting of the parties to exchange/discuss disclosures and formulate discovery plan.

- * meeting must occur at least two weeks before pretrial conference.
- * initial disclosures are due at or within ten days after meeting.

B. Report to the Court (Rule 26(f))

Parties must file report outlining discovery plan. Report is due within ten days after meeting of the parties (i.e., at least four days prior to pretrial conference).

C. Pretrial Conference (Rule 16(a)-(c))

Pretrial conference must be held within ninety days after last answer is filed (i.e., 110 to 230 days or four to eight months after filing of complaint).

Following conference, court must enter pretrial order that establishes:

- * deadlines for joinder, amendment of pleadings, and filing of motions;
- * time to disclose expert witness reports;
- * appropriate interval for supplementation of disclosures;
- * time to exchange witness and exhibit lists;
- * time to complete discovery;
- * time for trial or the trial setting conference;
- * other matters appropriate to the case.

4. Sanctions (Rule 37).

- * Failure to disclose information: presumptive inability to use information, unless failure was harmless or justified. (Rule 37(c)(1))

- * Other discovery violations: court may impose sanction under Rule 37(b)(2)(A)-(C). However, rule now lists factors court must consider before imposing sanction under this rule. Factors include:

- * the nature of the violation, including the willfulness of the conduct and the materiality of the information that the party failed to disclose;
- * the prejudice to the opposing party;
- * the relationship between the information the party failed to disclose and the proposed sanction;
- * whether another lesser sanction would adequately protect the opposing party and deter other discovery violations; and
- * other factors deemed appropriate by the court or required by law.

The court may not make an order which has the effect of establishing or dismissing a claim or defense or determining a central issue in the litigation unless the court finds that the party acted willfully. (Rule 37(b)(3))

- * Court may impose sanctions for unreasonable or obstructionist conduct. (Rule 37(g))

Civil Rule 82. Attorney's Fees.

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

(b) Amount of Award.

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

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

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

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

- (A) the complexity of the litigation;
- (B) the length of trial;
- (C) the reasonableness of the attorneys' hourly rates and the number of hours expended;
- (D) the reasonableness of the number of attorneys used;
- (E) the attorneys' efforts to minimize fees;
- (F) the reasonableness of the claims and defenses pursued by each side;
- (G) vexatious or bad faith conduct;
- (H) the relationship between the amount of work performed and the significance of the matters at stake;
- (I) the extent to which a given fee award may be so onerous to the non-prevailing party that it would deter similarly situated litigants from the voluntary use of the courts;
- (J) the extent to which the fees incurred by the prevailing party suggest that they had been influenced by considerations apart from the case at bar, such as a desire to discourage claims by others against the prevailing party or its insurer; and

(K) other equitable factors deemed relevant.

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

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

(c) **Motions for Attorney's Fees.** A motion is required for an award of attorney's fees under this rule or pursuant to contract, statute, regulation, or law. The motion must be filed within 10 days after the date shown in the clerk's certificate of distribution on the judgment as defined by Civil Rule 58.1. Failure to move for attorney's fees within 10 days, or such additional time as the court may allow, shall be construed as a waiver of the party's right to recover attorney's fees. A motion for attorney's fees in a default case must specify actual fees.

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

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

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

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

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

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

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

c:\RULES\CR82(8/96)

00066

Schedule for Award of Attorney's Fees

- ▶ When the **plaintiff** prevails in a tort case, the judge uses the following schedule to calculate the amount of fees that the plaintiff is entitled to recover:

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

- ▶ When the **defendant** prevails, the defendant is entitled to recover

30% of the defendant's actual fees if the case went to trial, or

20% of the defendant's actual fees if the case settled before trial.

**Plaintiff's Recovery
as Percentage of Plaintiff's Actual Fees**

Plaintiff prevails in tort case:

Damages + prejudgment interest = \$500,000

Plaintiff has 33 percent contingent fee agreement with attorney.

Plaintiff's actual fees = \$165,000.

$$(500,000 \times .33 = 165,000)$$

If plaintiff prevails at trial:

Fees recovered from defendant under Rule 82
= \$52,500

Recovery = 32 percent of plaintiff's actual fees.

If plaintiff prevails without trial:

Fees recovered from defendant under Rule 82
= \$34,500

Recovery = 21 percent of plaintiff's actual fees.

List of factors judge considers when deciding whether to deviate from scheduled fee:

- (A) the complexity of the litigation;
- (B) the length of trial;
- (C) the reasonableness of the attorneys' hourly rates and the number of hours expended;
- (D) the reasonableness of the number of attorneys used;
- (E) the attorneys' efforts to minimize fees;
- (F) the reasonableness of the claims and defenses pursued by each side;
- (G) vexatious or bad faith conduct;
- (H) the relationship between the amount of work performed and the significance of the matters at stake;
- (I) the extent to which a given fee award may be so onerous to the non-prevailing party that it would deter similarly situated litigants from the voluntary use of the courts;
- (J) the extent to which the fees incurred by the prevailing party suggest that they had been influenced by considerations apart from the case at bar, such as a desire to discourage claims by others against the prevailing party or its insurer; and
- (K) other equitable factors deemed relevant.

Alaska Judicial Council
October 1995 Study of Civil Rule 82

The Alaska Judicial Council recommends that Rule 82 be retained with limited changes:

1. Amend the plaintiff and defendant recovery schedules. The defendant percentages were set at a level intended to give the defendant an amount proportionate to what the plaintiff's attorney would recover in a one-third contingent fee tort case. However, most fee awards in state courts occur in contract, debt, or other non-tort cases.

To equalize the recovery for plaintiffs and defendants, the Council recommends allowing all parties to recover a percentage of their actual fees or developing different schedules for tort and non-tort cases (or contingent fee and non-contingent fee cases).

2. Retain the list of factors. According to the Council, the factors have not increased litigation at the trial court level.
3. The Alaska Supreme Court has held that non-attorney *pro se* litigants can not recover attorney's fees, while attorney *pro se* litigants can. The Council does not think this distinction is justified and recommends that it be eliminated.

The Council also recommends that the Appellate Rules be amended so that fee awards in appeals are also based on a percentage of the prevailing party's actual fees.

Chapter 10

Recommendations

A. Recommendations

Our recommendations have two parts: recommendations to Alaska and recommendations to jurisdictions that do not shift fees. The Alaska recommendations focus on how the rule works and how to improve it. The national recommendations focus on factors other jurisdictions might consider when thinking about two-way fee shifting in most cases.

1. Recommendations to Alaska Policymakers

We recommend that Alaska retain Civil Rule 82, with limited changes. Perhaps the best reason for this is that more often than not, Alaska practitioners like the rule and think that it benefits them and their clients more than it harms or has no effect. Also, judges more often than not like the rule and are comfortable with its operation.

00071

Rule 82 seemed, for the most part, to positively affect the processing and resolution of cases, even though this effect was subtle and varied depending on the factors discussed above. The negative effects of the rule, when tempered by the judicial discretion available under the 1993 amendments, were relatively minor and were offset by the rule's benefits.

The Alaska Supreme Court should consider at least a few possible changes to Rule 82 or the case law surrounding its application. A number of attorneys questioned why plaintiff and defendant recovery schedules differed. While the origins of the dual recovery system remained unclear, we did learn that the defendant percentages were set at a level intended to give the defendant an amount proportionate to what the plaintiff's attorney would recover in a one-third contingent fee tort case. The assumption behind this structure presents a problem, because it is based on contingent fee cases, although most fee awards in state court occur in contract or other non-personal injury cases.

If the Alaska Supreme Court intended to set defendant and plaintiff recoveries the same, it would be more effective to hold them both to a percentage of actuals. Another possibility is to base fee awards on the amount of recovery (and in the event of no recovery, on the amount in controversy).⁶⁹⁷ This approach would ensure that both plaintiffs and defendants recovered fees based on the same schedule, and it would increase the predictability of the defendant's fee award. Drawbacks are that plaintiff's attorneys would have to estimate time spent and document it with affidavits or time sheets (in certain cases, like contingent fee and high-volume collections cases, they do not keep time sheets); and parties probably would disagree about the amount in controversy in the event of a defense verdict, requiring parties and judges to spend more time than they currently do settling the amount of fees. Also, because the amount of an attorney's fee award to a successful plaintiff might be less predictable, Rule 82's influence in settling cases might decrease.

Another possibility is to develop different methods of recovery for different types of cases. One schedule, based on a percentage of actuals, could apply to some cases (torts), while another schedule, based on the amount in controversy, could apply to others (debt/contract and real estate cases). Advantages to this approach are that the rule can

⁶⁹⁷ We note that this system is used successfully elsewhere. In Germany, the parties name the damages up front and the amount of the fee award is set as a percentage of that amount. Pfennigstorf, *supra* note 7, at 63.

be better tailored to meet its goals. Drawbacks are that the process initially might be more complicated and more time-consuming.

Our interviews with attorneys and judges did not suggest that the 1993 amendments had increased litigation at the trial court level.⁵⁹⁸ While the factors seldom were invoked, they seemed to fit when they were invoked.⁵⁹⁹ Our data do not support a recommendation that the factors be revoked.

Next, we see no real reason why attorney's fees in appellate cases should be awarded based on a usually standard and arguably arbitrary amount. Attorney's fees for appellate cases could equally well be set at 30% of the reasonable fees spent on the appeal.

Finally, the distinction made by the Alaska Supreme Court in case law between *pro se* litigants who are attorneys and those who are not seems unjustified. The supreme court has held that non-attorney *pro se* litigants can not recover attorney's fees, while attorney *pro se* litigants can. The court supported this distinction by reasoning that non-attorneys were more likely than attorneys to spend time unnecessarily on legal issues, and also that the court would not know at what rate to compensate the *pro se* litigant. Neither of these rationales strongly supports the result. Litigants who spend excessive time do not pose a problem if a money judgment is recovered, because the attorney's fee award is based on the amount awarded, not on the time spent. If the prevailing party did not recover a money judgment, interviews with judges for the current study suggested that the defeated adversary usually alerted the trial judge of excessive legal work or hourly fees. Even without the defeated party's help, judges were comfortable reviewing billings for reasonableness. The court should reconsider whether the inequity, and economic detriment suffered by *pro se* litigants does not warrant making them eligible for attorney's fee awards.⁶⁰⁰

⁵⁹⁸ Litigation at the appellate level may increase if cases involving the factors make their way up to the supreme court. We did not hear of many challenges to the factors.

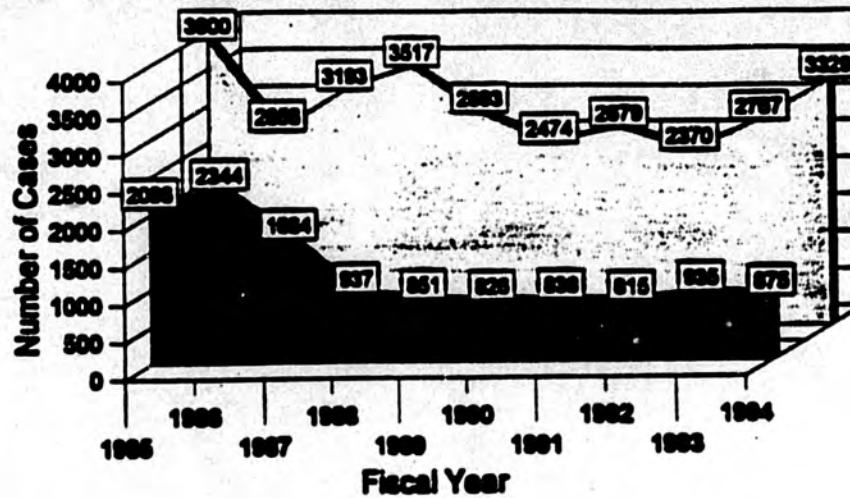
⁵⁹⁹ Note that Oregon recently incorporated them into its fee-shifting statute.

⁶⁰⁰ Note that litigants represented free of charge by Legal Services or another provider are entitled to attorney's fees, even though they are not paying for the legal services. See *Gregory v. Sauser*, 574 P.2d 445, 445 (Alaska 1978).

Alaska Judicial Council
October 1995 Study of Civil Rule 82

Figure 1

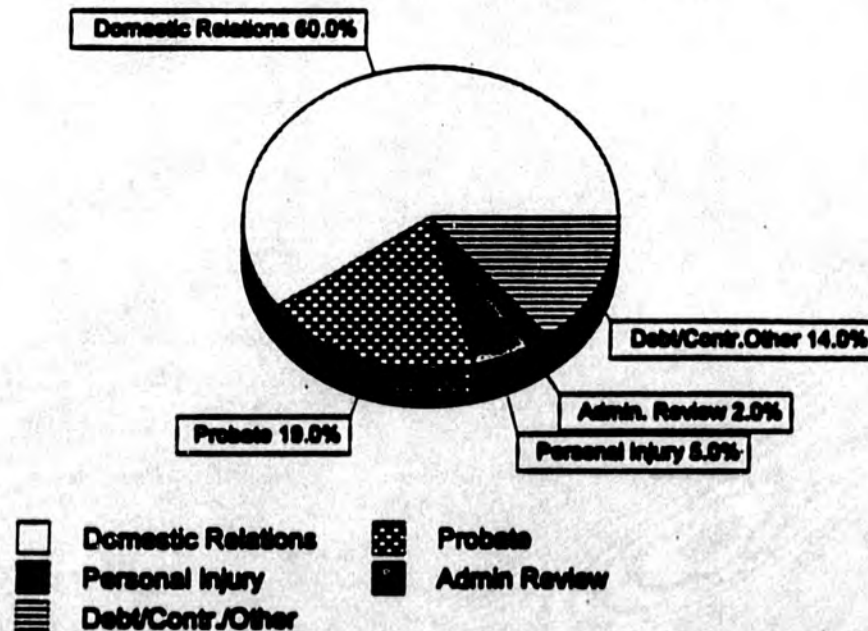
Tort Filings Compared to Other Civil Filings, Alaska
Adapted from National Center for State Courts & Ak. Ct. System Reports



- Other Civil Filings
- Torts (personal injury & property damage filing)

Figure 5

Superior Court Civil Cases, Alaska 1992-93
Adapted from Alaska Court System Annual Report (1993)



Civil 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 and the offeree must pay the costs and attorney's fees incurred after the making of the offer (as would be calculated under Civil Rules 79 and 82 if the offeror were the prevailing party). The offeree may not be awarded costs or attorney's fees incurred after the making of the offer.

(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) 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 before trial if it is served within a reasonable time not less than 10 days prior to the commencement of hearings to determine the amount or extent of liability.

CR68(8/96)

Effect of Offer of Judgment

1. Plaintiff prevails in tort case. No offer of judgment. Plaintiff recovers:

damages + prejudgment interest at 10.5% + attorney's fees + costs

2. Defendant makes offer of judgment to plaintiff. Offer = \$500,000. Plaintiff rejects offer. Plaintiff prevails at trial. Judgment in favor of plaintiff = \$400,000. Judgment is less favorable to plaintiff than defendant's offer. Plaintiff penalized as follows:

- ▶ Prejudgment interest rate reduced from 10.5 percent to 5.5 percent.
- ▶ Plaintiff does not recover attorney's fees or costs incurred after date of offer.
- ▶ Instead, plaintiff pays defendant attorney's fees and costs from date of offer through date of judgment

3. Plaintiff makes offer of judgment to defendant. Offer = \$400,000. Defendant rejects offer. Plaintiff prevails at trial. Judgment against defendant = \$500,000. Judgment is less favorable to defendant than plaintiff's offer. Defendant penalized as follows:

- ▶ Prejudgment interest rate increased from 10.5 percent to 15.5 percent.

Rule 100. Mediation.

(a) **Application.** At any time after a complaint is filed, a party may file a motion with the court requesting mediation for the purpose of achieving a mutually agreeable settlement. The motion must address how the mediation should be conducted as specified in paragraph (b), including the names of any acceptable mediators. The court may order mediation in response to such a motion, or on its own motion, whenever it determines that mediation may result in an equitable settlement. In making this determination, the court may consider whether there is a history of domestic violence between the parties which could be expected to affect the fairness of the mediation process or the physical safety of the domestic violence victim. Mediation may not be ordered in a case filed under AS 25.35.010 or .020 and conduct which constitutes domestic violence under these statutes may not be the subject of mediation under this rule.

(b) **Order.** A order of mediation must state:

(1) the name of the mediator, or how the mediator will be decided upon;

(2) any changes in the procedures specified in paragraphs (c) and (e), or any additional procedures;

(3) that the costs of mediation are to be borne equally by the parties unless the court apportions the costs differently between the parties; and

(4) a date by which the initial mediation conference must commence.

(c) **Challenge of Mediator.** Each party has the right once to challenge peremptorily any mediator appointed by the court if the "Notice of Challenge of Mediator" is timely filed pursuant to Civil Rule 42(c).

(d) **Mediation Briefs.** Any party may provide a confidential brief to the mediator explaining its view of the dispute. If a party elects to provide a brief, the brief may not exceed five pages in length and must be provided to the mediator not less than three days prior to the mediation. A party's mediation brief may not be disclosed to anyone without the party's consent and is not admissible in evidence.

(e) **Conferences.** Mediation will be conducted in informal conferences at a location agreed to by the parties or, if they do not agree, at a location designated by the mediator. All parties shall attend the initial conference at which the mediator shall first meet with all parties. Thereafter the mediator may meet with the parties separately. Counsel for a party may attend all conferences attended by that party.

(f) **Termination.** After the initial joint conference and the first round of separate conferences if separate conferences are required by the mediator,

a party may withdraw from mediation, or the mediator may terminate the process if the mediator determines that mediation efforts are likely to be unsuccessful. Upon withdrawal by a party or termination by the mediator, the mediator shall notify the court that mediation efforts have been terminated.

(g) Mediation proceedings shall be held in private and are confidential. The mediator shall not testify as to any aspect of the mediation proceedings. This rule does not relieve any person of a duty imposed by statute.

(h) If the mediation is successful, the party requesting mediation shall prepare a stipulation for dismissal which dismisses all or such portions of the action as have been concluded by mediation as agreed upon at the mediation.

1995 Directory of Mediators Second Edition

**includes "A Consumer Guide to Selecting a Mediator"
by the Alaska Judicial Council**



**Alaska Court System
State of Alaska
303 K Street
Anchorage, Alaska 99501-2099**

00078

A copy of this directory is available at the Anchorage, Juneau, Fairbanks, Ketchikan and Kenai law libraries. Copies may also be obtained from the Clerks of Court in Anchorage and Fairbanks and from the office of the Court Rules Attorney.

A new edition of this directory will be published once a year. If you would like to be included in the directory, send your name and mailing address to the Court Rules Attorney at the address shown below. Mediators who are included in the 1995 directory will automatically receive a new information form for the 1996 directory.

If you have any comments or suggestions regarding this directory, please contact the Court Rules Attorney.

**Alaska Court System
303 K Street
Anchorage, Alaska 99501
(907) 264-8239**

Directory of Mediators

The purpose of this directory is to help judges and parties find potential mediators. The directory contains an information form for each person or company who asked to be included. The information form was completed by the mediator and describes the mediator's education, training and mediation experience. The form also describes the types of cases the mediator handles and the mediator's fees.

The information forms are organized alphabetically by last name. The index at the front of the directory lists the mediators by type of case and by community. **Example:** To find a mediator who handles construction cases in Anchorage, find the "Construction" section of the index, then find "Anchorage" in the list of communities in that section.

Please note that parties and judges are free to choose a mediator who is not included in this directory, even if mediation is ordered under Civil Rule 100. Civil Rule 100 does not require that mediators be selected from this directory or that mediators appointed under the rule have any particular education or training.

CAUTION

In Alaska, anyone can act as a mediator. There are no State standards or licensing requirements. This directory includes an information form for each person or company who asked to be included. No minimum training or experience was required.

The Alaska Court System has not checked to see whether the mediators in this directory have the qualifications they say they have or whether they are competent mediators. It is up to parties and judges to decide what kind of training and experience they need in a mediator and to ensure that the mediator they select has the necessary skills.

A Consumer Guide to Selecting a Mediator



This guide was developed under a grant (#SJI-94-03E-H-284) from the State Justice Institute. The points of view expressed are those of the authors and do not necessarily represent the official position or policies of the State Justice Institute.

00082

The Judicial Council is a state agency charged by the Alaska constitution to make recommendations that improve the administration of justice.

acknowledgments

The Judicial Council would like to express its appreciation to the many people who contributed to this project. Over forty people contributed their knowledge, time and useful suggestions on the substance and format of the brochure, and many contributed invaluable comments on drafts. Thanks to all who gave so freely of their expertise and time, and exhibited such support and enthusiasm for the project.

note to the reader

To make an informed choice of a mediator, the consumer must have information and the ability to evaluate that information. This guide begins the educational process by presenting a framework for understanding mediator competence. The information is based on research presented at the 1993 National Symposium on Court-Connected Dispute Resolution Research sponsored by the State Justice Institute and the National Center for State Courts, the ongoing work of the Test Design Project, the work of alternate dispute resolution policy makers, and the experience of mediators and mediation program directors nationwide. We anticipate that the guide will need to be updated as our knowledge grows. Please complete the evaluation form on the back cover to help us increase the usefulness of this brochure.

how to use this guide

Mark this guide up. Use the checklists as you go. Don't feel that you must use all the information or go through all the suggested steps; use only what seems most helpful. Refer to the Resources section at the back for more information.

Alaska Judicial Council
1029 W. 3rd, Suite 201
Anchorage, AK 99501
907/279-2526 Fax 907/276-5046

I. Purpose of This Brochure

This guide is for anyone looking for a mediator. It will be especially useful to lawyers or other professionals advising their clients, court systems and mediation programs that provide information to consumers, judges who refer litigants to mediation, and people who have been referred by the court to mediation and who must choose their own mediator.

This guide does not explain mediation or alternative dispute resolution (ADR) in detail, although a consumer needs at least a basic understanding of mediation to profit fully from this guide. To learn about mediation, consult books, articles and pamphlets at your local library, community mediation center, courthouse, bookstore, mediator's office, or mediation association. The Alaska Court System publishes a free pamphlet that answers some basic questions about mediation.

Mediation is a conflict resolution process in which one or more impartial persons intervene in a conflict with the disputants' consent and help them negotiate a mutually acceptable agreement. *The mediator does not take sides or decide how the dispute should be resolved.*

II. What Qualifications Does a Mediator Need?

Certification explicitly recognizes that a person has completed a specific level of education or training. In some cases, it recognizes that a person has achieved a particular level of skill in performing certain functions. Public, private, professional or educational bodies can certify. If a public body has certified a professional's abilities, the person may then be permitted to practice a profession or use a title.

Qualifications refer to the amount and type of training, education and experience possessed by a mediator. In some states, courts or legislatures impose training or experience standards on mediators who practice in state- or court-funded mediation programs. In most states, including Alaska, a person can offer private mediation services without taking a class, passing a test or having a special license or certification. In reality, however, many private mediators, and most of those who work for or are associated with mediation organizations and programs, have some training or experience.

Most independent mediation programs impose their own training or experience standards on mediators. For example, community mediation centers often require their volunteers to complete a certain amount of mediation training before handling cases.

Some national and local mediation membership organizations set training and experience requirements and ethical standards for their practicing members (refer to the resources section at the end of this brochure for more information). One national non-profit mediator organization, the Academy of Family Mediators, is working to develop a voluntary performance-based certification program.

Many mediation-referral services impose training, experience or other requirements on mediators who wish to be included on their rosters. For example, the American Arbitration Association requires mediators listed on its mediation panel to complete an AAA training course, receive recommendations from the trainers, and successfully complete an apprenticeship. In Anchorage, the Alaska Dispute Settlement Association (ADSA) requires all mediators listed on their referral line to provide certain information to ADSA and the potential client, including an explanation of the standards of professional practice or ethical conduct that the mediator uses.

III. What Makes a Competent Mediator?

There is no universal answer to this question. No particular type or amount of education or job experience has been shown to predict success as a mediator. Successful mediators come from many different backgrounds.

Competence depends partly on the context of the dispute and the parties' expectations. It also depends on whether the mediator has the right mix of acquired skills, training, education, experience and natural abilities to help resolve the specific dispute. Important skills and abilities include neutrality, ability to communicate, ability to listen and understand, and ability to define and clarify issues.

IV. Five Steps to Choosing a Qualified Mediator

Because no easy formula can predict mediator competence, the consumer must do some groundwork before selecting a mediator. First, you must understand the mediation process. After you understand the basics, you can use the following process to choose a mediator:

These steps are described on the next pages. Remember during your search that a mediator should remain neutral and treat both parties with equal fairness and respect.

1. Decide What You Want from Mediation

Think about your goals for the session. Do you want a mediator who suggests options in order to help move the parties towards agreement? Or, do you want a mediator who resists offering opinions so the parties feel responsible for their agreement? Think about past attempts at negotiation and problems with those attempts. What are your choices if mediation does not work?

Think about your abilities. What are your strengths and weaknesses as a negotiator? What are the other party's strengths and weaknesses? What are your emotional limitations? Do you

✓Checklist: Five Steps to Choosing a Mediator

- 1. Decide what you want from mediation**
- 2. Get a list of mediators**
- 3. Look over mediators' written qualifications**
- 4. Interview mediators**
- 5. Evaluate information and make decision**

expect the mediator to help you stand your ground if the other person negotiates better than you or has more "power?" Thinking about these issues is especially important if there is a power imbalance between you and the other party. If there has been abuse and or violence between you and the other party, please read the *Domestic Abuse* section on page 9.

Think about the dispute and the context in which you must resolve it. What is the time frame? Is this a commercial dispute between experienced insurance company representatives, or is it a divorce involving an emotional child custody decision? The approach or model that commercial disputants might prefer may differ greatly from the one preferred by a mother and father.

Consider your budget. How much you can spend might limit your choice of mediator or mediation program.

Many mediators and dispute resolution firms or services can help you understand what services would be best for your dispute. Some will contact the other party to the dispute to introduce the concept of mediation.

2. Compile a List of Names. You can get a list of mediators from several sources.

Word of Mouth. Ask a friend, your attorney, your therapist, or another professional. Describe your case to a mediator and ask, "Other than yourself, who are the most skilled mediators in this kind of case?" Talk to people who have been in a mediation with the mediator (you can ask the mediator for names of clients). What was their case about and what were their impressions of the mediator?

Written Lists. Check local listings in the Yellow Pages. The Alaska Court System publishes a directory of mediators in Alaska. The Alaska state law library has copies of both. Martindale-Hubbell, available in the law library, publishes a national Dispute Resolution Directory containing the names of some 60,000 service providers. Rural consumers can consult the Alaska Judicial Council's directory of organizations that resolve disputes in rural areas (many of these are tribal courts or councils). Many local mediation organizations maintain directories of member-mediators.

Referral Services. The Alaska Dispute Settlement Association maintains a statewide referral service (Anchorage number) and a written directory of members. Many national mediator membership organizations and trade organizations keep lists of practitioner members and offer referral services (some of these organizations are listed at the end of this pamphlet). Some may charge for the referral services.

Checklist: Get Names

- ✓ Ask people and professionals whom you know
- ✓ Look at directories
- ✓ Call referral services (ask whether they charge to refer you to a mediator)

3. Evaluate Written Materials. Call or write several mediators on your list and ask them to send you their promotional materials, resume, references and a sample of their written work. These materials should cover most of the following topics.

Mediation Training. How was the mediator trained? Some mediators receive formal classroom-style training. Some participate in apprenticeships or in mentoring programs. While training alone does not guarantee a competent mediator, most professional mediators have had some type of formal training. How many hours of training has this mediator had? How recent was the training?

Experience. Evaluate the mediator's type and amount of experience (number of years of mediation, number of mediations conducted, types of mediations

conducted). How many cases similar to yours has the mediator handled? A mediator's experience is particularly important if he or she has limited formal training.

Written Work. Some mediators will write up notes about agreements or even draft agreements for the parties. Other mediators do not prepare written agreements or contracts. If your mediator will prepare written work, you may want to review a sample. Samples could include letters, articles or promotional materials. Any sample of the mediator's written work should be clear, well organized, and use neutral language. Agreements or contracts should have detailed information about all items upon which the parties have agreed.

Orientation Session. Some mediators offer an introductory or orientation session after which the parties decide whether they wish to continue. Is it offered at no cost, reduced cost, or otherwise?

Checklist: Evaluate Written Materials

- ✓ Fees: Hourly? Daily? How much?
- ✓ Education: How much? What? How recent?
- ✓ Experience: What kinds of disputes? How many mediations? Areas of specialization?
- ✓ Written (if available): Understandable? Complete? Concise?
- ✓ Insurance: Yes? What kind?
- ✓ Professional memberships? certifications, adherence to ethical standards?

Cost. Understand the provider's fee structure. Does the mediator charge by the hour or the day? How much per hour/day?

Other Considerations. Find out whether the mediator carries professional liability insurance which specifically covers mediation. Is the mediator certified, and if so by whom? While certification usually shows the mediator has completed a specific amount of training or education, training and education do not guarantee competence.

Does the mediator belong to a national or local mediation organization, and is the mediator a practicing or general member? Cost may prevent some competent mediators from joining organizations, becoming certified, or carrying liability insurance.

4. Interview the Mediators. Talk to the mediators in person or by phone. During the interview, observe the mediator's interpersonal and professional skills. Qualities often found in effective mediators include neutrality, emotional stability and maturity, integrity, and sensitivity. Look also for good interviewing skills, verbal and nonverbal communication, ability to listen, ability to define and clarify issues, problem-solving ability, and organization.

During the conversation, you also may want to ask questions about matters covered in the written materials and other topics. Some topics to discuss in the interview include:

Training, Knowledge and Experience. Ask the mediator, "How has your education and experience prepared you to help us work out this specific dispute?" If the mediator had formal training, did it include role play and observations of skilled mediators? While training and education do not guarantee competence, training is most effective when it includes practice-oriented segments such as role play and observation.

Ask "Do you participate in continuing education, on-going supervision, or consultation?" Many professional mediation organizations encourage or require their members to participate in ongoing education or other professional development.

People often ask whether a mediator should be an expert in the subject of the dispute. For example, should the mediator in a commercial mediation be an expert on industry standards and practices? The answer depends on the type of dispute, the mediation program (for example, court-referred or administrative agency), and the parties' expectations and needs. Ask the mediator if he or she thinks subject-matter expertise is necessary for this dispute, and why or why not.

In some cases, the parties may prefer a mediator with no special knowledge of the subject. Benefits of this approach include avoiding a mediator's preconceived notions of what a settlement should look like and letting the parties come up with unique or creative alternatives.

In other cases, for example where the subject of the dispute is highly technical or complex, a mediator who comes to the table with some substantive knowledge could help the parties focus on the key issues in the dispute. Or, parties may want someone who understands a cultural issue or other context of the dispute.

Style. Ask "What values and goals do you emphasize in your practice?" For example, does the mediator encourage the parties to communicate directly with each other, or does he or she control the interchanges? The mediator should be able to describe his or her style of mediation and his or her role in the mediation process.

Remember that different mediators may practice their craft in different ways, although some mediators can change their style to suit the parties' specific needs.

Another stylistic difference is the use of caucus. A caucus is a meeting between one of the parties and the mediator without the other party present. Some mediators caucus frequently during the mediation, while others seldom or never use this procedure. Ask the mediator whether he or she uses caucuses, and if so, when.

If the mediator works for or is associated with a mediation program or organization, ask what values and goals the program emphasizes. For example, the style or requirements of a mediator who practices in a court program designed to reduce court caseloads may differ from the style of someone whose practice does not involve the same time pressure.

Ethics. Ask "Which ethical standards will you follow?" (You may ask for a copy of the standards). All mediators should be able to show or explain their ethical standards (sometimes called a code of conduct) to you. If the mediator is a lawyer or other professional, ask what parts of the professional code of ethics will apply to the mediator's services. Ask the mediator, "Do you have a prior relationship with any of the parties or their attorneys?" The mediator should reveal any prior relationship or personal bias which would affect his or her performance, and any financial interest that may affect the case.

Standards of conduct (Ethics). Standards of conduct do not regulate who may practice, but rather create a general framework for the practice of mediation. National mediator organizations have adopted voluntary standards of conduct. The resources section at the end of this brochure lists some of the national organizations that have adopted or are considering adopting standards of conduct for their practitioner members.

Confidentiality. The mediator should explain the degree of confidentiality of the process. The mediator may have a written confidentiality agreement for you and the other party to read and sign. If the mediation has been ordered by the court, ask the mediator whether he or she will report back to the court at the conclusion of the mediation. How much will the mediator say about what happened during mediation? How much of what you say will the mediator report to the other disputants? Does the confidentiality agreement affect what the disputants can reveal about what was said? If the parties' attorneys are not present during the mediation, will the mediator report

back to them, and if so, what will the mediator say? The mediator should be able to explain these things to you.

Logistics. Who will arrange meeting times and locations, prepare agendas, etc.? Will the mediator prepare a written agreement or memorandum if the parties reach a resolution? What role do the parties' lawyers or therapists play in the mediation? Does the mediator work in teams or alone?

Cost. Ask "How would you estimate costs for this case?; How can we keep costs down?" Are there any other charges associated with the mediation? Does the mediator perform any *pro bono* (free) services or work on a sliding fee scale? If more than one mediator attends the session, must the parties pay for both? Does the mediator charge separately for mediation preparation time and the actual mediation?

Special Considerations if There has Been Domestic Abuse Between You and the Other Party. If there has been domestic abuse or violence between you and the other party, you should understand how it can affect the safety and fairness of the mediation process. Talk to your lawyer, a domestic violence counselor, womens' advocate, or other professional who works with victims of domestic abuse before making the decision to mediate.

Checklist: Talk to the Mediator

- ✓ What ethical standards apply?
- ✓ Confidentiality?
- ✓ What approach to mediation?
- ✓ More about training and experience?
- ✓ Logistics (meetings, written agreements)?
- ✓ How much will this cost?
- ✓ Special concerns?

All family mediators should be knowledgeable and skilled in the screening and referral of cases involving abusive relationships. They should be able to explain the potential risks and benefits of mediation when control, abuse, and violence issues exist. Any mediator who handles such cases should have special training in domestic violence issues and should offer special techniques and procedures to minimize risk and maximize safety of all participants.

If you decide to try mediation, it is important to let the mediator know about the abuse or violence. Some ways you can tell the mediator include asking your lawyer to tell the mediator, or telling the mediator yourself. You can tell the mediator yourself in the initial telephone call, or when filling out any written questionnaires. If

there is an active restraining order, make sure the mediator knows about it before the first session.

Ask what domestic violence training the mediator has had and if the mediator has worked with similar cases. Ask whether or not the mediator believes your case is suitable for mediation and why. Ask how the mediation process can be modified to make it safer and more fair. Can the mediation be done by telephone or in separate sessions ("shuttle mediation")? Can a support person (domestic violence advocate or your attorney) be present during the mediation? If your case is not suitable for mediation, what are your alternatives? Ask for referrals to other resources, such as a local domestic violence counselor.

5: Evaluate Information and Make Decision. During the interviews, you probably observed the mediators' skills and abilities at several important tasks. These tasks, which mediators perform in almost all mediations, include:

- gathering background information,
- communicating with the parties and helping the parties communicate,
- referring the parties to other people or programs where appropriate,
- analyzing information,
- helping the parties agree,
- managing cases, and
- documenting information.

Ask yourself which of the mediators best demonstrated these skills. Did the mediator understand your problem? Understand your questions and answer them clearly? If the other party was present, did the mediator constructively manage any expressions of anger or tension? Did the mediator convey respect and neutrality? Did you trust the mediator? Did the mediator refer you to other helpful sources of information? Understand what was important to you? Pick up on an aspect of the conflict that you were not completely aware of yourself? Did the mediator ask questions to find out whether mediation is preferable or appropriate? Understand the scope and intensity of the case? Of course, not every orientation interview permits the mediator to demonstrate all these skills, and every mediator has relative strengths and weaknesses. But you should be satisfied that the mediator can perform these tasks for you before beginning.

Review the other questions on this checklist. Make sure that the mediator's cost and availability coincide with your resources and timeframe. The other parties to the mediation must agree to work with this person, too. You may want to suggest two or three acceptable mediators so that all parties can agree on at least one.

Checklist: Evaluate

- ✓ Check the mediator's experience skills and abilities against the tasks listed above.
- ✓ Does the mediator have the qualifications you want?
- ✓ Can you afford the services?
- ✓ Can the mediator work with your time frame?
- ✓ Will the other parties agree to the mediator?

Finally, consider evaluations of others who have used this mediator or your own previous experience with this mediator. If applicable, consider the goals and procedures of any organization with which the mediator is associated.

V. Conclusion

The increasing use of mediation has outpaced knowledge about how to measure mediator competence. You can choose a qualified mediator by thinking about what you expect, gathering information about mediators, and evaluating that information using the information in this guide.

More Information/Resources:

Many mediation organizations exist. This is not a definitive list, but merely a sample of some that offer consumer services.

LOCAL ORGANIZATIONS:

Alaska Dispute Settlement Association (ADSA): A non-profit professional association of Alaskans working for resolution of conflict in non-judicial settings by providing mediation, arbitration and facilitation services. Membership costs \$25 per year and is open to everyone with an interest in alternative dispute resolution. Offers a telephone referral service: (907) 258-0624.

Alaska Bar Association Alternative Dispute Resolution Section: Membership in this section of the Alaska Bar Association is open to lawyers and non-lawyers with an interest in alternative dispute resolution. Among its many activities, the section presents continuing education programs on dispute resolution topics. *Call (907) 272-7469 for more information.*

NATIONAL ORGANIZATIONS:

American Arbitration Association (AAA): Maintains panels of trained mediators with wide range of subject matter expertise and supplies complete administrative services. Can arrange for any other form of alternative dispute resolution, should mediation fail or not be preferred. A not-for-profit organization in operation since 1926, AAA has a network of 34 regional offices throughout the United States. Cases processed in Alaska are administered from the AAA office in Seattle. *Call 1-800-559-3222 or Email aaaaxnwx@reach.com for complete information and assistance.*

American Bar Association Section on Alternative Dispute Resolution: Sells books, pamphlets and videos about alternative dispute resolution and mediation; publishes quarterly magazine, and offers general information. *Call (202) 331-2258 or write to: 1800 M St., N.W.; 2nd Floor, South Lobby; Washington, D.C. 20036.*

Academy of Family Mediators: A mediator membership organization. Practitioner membership entitles the mediator to listing in the Academy's National Referral Roster. To qualify for practitioner member status, the applicant must (1) complete 60 hours

of mediation training as described below, (2) have at least 100 hours of face-to-face mediation experience in at least 10 mediation cases; and (3) submit six sample memoranda, case reports or other documentation from the required ten mediation cases, and maintain 20 hours of continuing education every two years. The sixty hours of training must include no less than 30 hours of an integrated generic family mediation training. This integrated mediation training must include the following core areas and at least six hours of role playing: information gathering skills and knowledge, relationship skills and knowledge, communication skills and knowledge, problem-solving skills and knowledge, ethical decision-making values skills and knowledge, interaction and conflict management skills and knowledge, professional skills and knowledge, an introduction to conflict resolution theory, family systems and development, domestic violence issues and legal context (substantive knowledge base), and at least two hours of training in domestic violence issues. *Call (612) 525-8670 or write to: 1500 S. Hwy 100, Suite 355; Golden Valley, MN. 55416-1593.*

Association of Family and Conciliation Courts: an interdisciplinary association of judges, lawyers, mediators and mental health professionals dedicated to the development and improvement of the practices and procedures of court-connected services as a complement to the judicial process. Members must subscribe to the purposes of the Association. *Call (608) 251-4001 or write to: 329 W. Wilson St; Madison, WI 53703.*

CPR Institute for Dispute Resolution: A membership-based nonprofit corporation with a variety of educational and information functions. Offers neutrals for public policy disputes. Also offers many publications, including a Model Mediation Procedure. *Call (212) 949-6490 or write to: 366 Madison, New York, N.Y. 10017.*

National Association for Community Mediation: An organization of community mediation programs and volunteer mediators which supports and promotes community-based mediation programs. The NACM will maintain a national directory and database and develop financial resources. *Requests for information handled by NIDR staff (see below).*

National Institute for Dispute Resolution (NIDR): established in 1983 by five foundations and corporations to encourage the growth and development of dispute resolution, NIDR makes grants devoted solely to conflict resolution and provides a source of innovation, information, and technical assistance for people who seek ways

to improve the ways disputes are resolved. In 1992, the National Institute for Dispute Resolution published its *Interim Guidelines for Selecting Mediators*. The Guidelines, designed to help program administrators evaluate staff mediators and target training needs, was based on work done by the Test Design Project. Call (202) 466-4764 or write to: 1726 M St. N.W., Ste 500; Washington, D.C. 20036-4502.

San Diego Mediation Center: a non-profit, public service organization, which provides mediation and other dispute resolution services and training. It was established in 1982 by the San Diego Law Center, a program of the University of San Diego Law School and the San Diego County Bar Association. The Center, in conjunction with representatives of the ADR community of San Diego, has developed a performance based mediator credentialing program. The instrument used to assess performance is designed as a generic evaluation of specific behaviors, measuring both the ability to facilitate a process, and specific skills and techniques. Call (619) 295-0203 or write to: 2150 W. Washington St. #112; San Diego, CA 92110.

The Society of Professionals in Dispute Resolution (SPIDR): a non-profit organization promoting the use of alternative dispute resolution throughout the United States and other countries. SPIDR has issued two reports on mediator qualifications. Both draw on the observations of practitioners and consumers, the policy and personal goals of the SPIDR membership, and research attempting to quantify the combination of skills, training, education, experience and other attributes in a good mediator. Call (202) 783-7277 or write to: 815 15th St; N.W., Suite 530, Washington, D.C. 20005.

Standards of Practice

LOCAL:

(None adopted in Alaska).

NATIONAL:

American Bar Association (ABA): Standards of Practice for Lawyer Mediators in Family Disputes (adopted 1984).

AAA, ABA & SPIDR: Standards of Practice for Mediators.

SPIDR: Ethical Standards of Professional Responsibility for the Society of Professionals in Dispute Resolution (adopted June 1986, readopted June 1991).

Academy of Family Mediators: Standards of Practice for Divorce and Family Mediation (also subscribed to by the Association of Family and Conciliation Courts).

CORRECTION

**THE FOLLOWING DOCUMENT(S)
HAVE BEEN REFILMED TO
ASSURE LEGIBILITY OR PAGINATION**



Central Microfilm Services
Department of Education & Early Development
State of Alaska

to improve the ways disputes are resolved. In 1992, the National Institute for Dispute Resolution published its *Interim Guidelines for Selecting Mediators*. The Guidelines, designed to help program administrators evaluate staff mediators and target training needs, was based on work done by the Test Design Project. Call (202) 466-4764 or write to: 1726 M St. N.W., Ste 500; Washington, D.C. 20036-4502.

San Diego Mediation Center: a non-profit, public service organization, which provides mediation and other dispute resolution services and training. It was established in 1982 by the San Diego Law Center, a program of the University of San Diego Law School and the San Diego County Bar Association. The Center, in conjunction with representatives of the ADR community of San Diego, has developed a performance based mediator credentialing program. The instrument used to assess performance is designed as a generic evaluation of specific behaviors, measuring both the ability to facilitate a process, and specific skills and techniques. Call (619) 295-0203 or write to: 2150 W. Washington St. #112; San Diego, CA 92110.

The Society of Professionals in Dispute Resolution (SPIDR): a non-profit organization promoting the use of alternative dispute resolution throughout the United States and other countries. SPIDR has issued two reports on mediator qualifications. Both draw on the observations of practitioners and consumers, the policy and personal goals of the SPIDR membership, and research attempting to quantify the combination of skills, training, education, experience and other attributes in a good mediator. Call (202) 783-7277 or write to: 815 15th St; N.W., Suite 530, Washington, D.C. 20005.

Standards of Practice

LOCAL:

(None adopted in Alaska).

NATIONAL:

American Bar Association (ABA): Standards of Practice for Lawyer Mediators in Family Disputes (adopted 1984).

AAA, ABA & SPIDR: Standards of Practice for Mediators.

SPIDR: Ethical Standards of Professional Responsibility for the Society of Professionals in Dispute Resolution (adopted June 1986, readopted June 1991).

Academy of Family Mediators: Standards of Practice for Divorce and Family Mediation (also subscribed to by the Association of Family and Conciliation Courts).

MORE INFORMATION:

The Ohio Commission on Dispute Resolution and Conflict Management and the Oregon Dispute Resolution Commission offer consumer's guides to selecting third parties to help resolve public conflicts. For public policy disputes, different considerations in choice of mediator may apply than the very general ones discussed here.

INFORMATION ABOUT NEGOTIATION STRATEGIES: Many books exist. Try *Getting to Yes* by Roger Fisher and William Ury and *Getting Past No* by William Ury.

RESEARCH AND ACADEMIC WRITING ON MEDIATOR QUALIFICATION AND COMPETENCE: See the list of references cited in the Test Design Project's most recent paper on performance-based assessment of mediators. The Test Design Project's work is published by NIDR (address above).

Quick Reference: Select a Mediator

Checklist 1: What Do You Want?

1. What are your goals?
2. What mediation approach do you prefer?
3. Assess your abilities: strengths, weaknesses
4. What is your timeframe?
5. What is your budget?

Checklist 2: Get Names

1. Ask people and professionals whom you know
2. Look at directories
3. Call referral services (ask whether they charge to refer you to a mediator)

Checklist 3: Evaluate Written Materials

1. Fees: Hourly? Daily? How much?
2. Education: How much? What? How recent?
3. Experience: What kinds of disputes? How many mediations? Areas of specialization?
4. Written (if available): Understandable? Complete? Concise?
5. Insurance: Yes? What kind?
6. Professional memberships? certifications, adherence to ethical standards?

Checklist 4: Interview Mediator

1. What ethical standards apply?
2. Confidentiality?
3. What approach to mediation?
4. More about training and experience?
5. Logistics (meetings, written agreements)?
6. How much will this cost?
7. Domestic abuse concerns?

Checklist 5: Evaluate

1. Evaluate the mediator's skills and abilities against the tasks listed above.
2. Did the mediator understand you, listen well, act neutral, understand the problem, convey respect, analyze well?
3. Can you afford the services?
4. Can the mediator work with your time frame?
5. Will the other parties agree to the mediator?

Consumer Guide to Selecting a Mediator Evaluation Form

Your answers to all of the following questions will help us improve this guide. All answers will remain confidential.

1. Have you ever used mediation? ☐ Yes ☐ No
2. Are you a(n): ☐ Private consumer ☐ Attorney ☐ Judge ☐ Therapist
☐ Other _____
3. Gender: ☐ Male ☐ Female
4. Ethnicity: ☐ Caucasian ☐ African American ☐ Alaskan Native
☐ Asian American ☐ Hispanic ☐ Other _____
5. Age: _____ years.

6. The information provided in this guide was (circle one):

Very Useful

1

2

3

4

Not Useful

5

7. The information provided was (circle one):

Easy to Understand

1

2

3

4

Hard to Understand

5

8. What did you learn from this guide that will help you most?

.....
.....
.....

9. What other information should this guide include?

.....
.....
.....

10. Other comments, suggestions:

.....
.....
.....
.....
.....
.....

Thank you for your help!

Please return to: Alaska Judicial Council, 1029 W. 3rd Avenue, Suite 201, Anchorage, AK 99501

Phone: (907) 279-2526 Fax: (907) 276-5046

INDEX

Adoption	1
Child Support	2
Commercial	3
Construction	4
Consumer Disputes	5
Divorce/Dissolution--All Issues	6
Labor/Employment	7
Landlord/Tenant	8
Natural Resources/Land/Environmental Issues	9
Personal Injury	10
Probate/Guardianship	11
Products Liability	12
Professional Liability	13
Property Settlement/Spousal Maintenance	14
Public Policy	15
Real Estate	16
Victim/Offender	17
Other	18

Adoption

Anchorage

Adelman, Paul I.
Baker, Carol
Dearborn, Mary Ann
Harrington, Kathleen
Kelley, Laura W.
Kirk, Pamela E.
Middleton, Timothy G.
Pettersen, Drew
Roley, Ryan R.
Settlement
Zalewski, Mary-Ellen

Eagle River

Jennings, Karen L.

Fairbanks

Bacon, Glenn H.
Brimner, Teresa L.
Callahan, Daniel L.
Roberts, Fleur L.
Therrien, Valerie M.

Homer

Meyer, Barbara
Zeller, Martin

Juneau

Flanders, Kirk A.
Pearson, Stephen J.

Ketchikan

Miller, Kevin G.
Stump, W. Clark

Talkeetna

McKeown, Timothy J.

Unalaska

Lutz, Gary J.

Child Support

Anchorage

Adelman, Paul I.
Anderson, Kathleen G.
Baker, Carol
Banks, William M.
Bettine, Frank & Genivee
Carr, James R. (Randy)
Dearborn, Mary Ann
Dee, Kevin M.
Eddy, Charles H.
Groh, Eggers & Price
Harrington, Kathleen
Kelley, Laura W.
Kirk, Pamela E.
Knight, Robert H. (Bob)
Lazur, Richard & Louise
Miller, Sheila D.
Pettersen, Drew
Ripley, Justin J.
Roley, Ryan R.
Settlement
Sturges, Sharon
Zalewski, Mary-Ellen

Eagle River

Jennings, Karen L.

Fairbanks

Bacon, Glenn H.
Brimner, Teresa L.
Callahan, Daniel L.
Gollogly, Vincent T.
Hamilton, David W.
Maxwell, Lou Anne
Roberts, Fleur L.
Therrien, Valerie M.

Homer

Jackinsky, Sara
Meyer, Barbara
Zeller, Martin

Juneau

Flanders, Kirk A.
Pearson, Stephen J.

Ketchikan

Miller, Kevin G.
Stump, W. Clark

Palmer

Palmer, Carol C.

Sitka

Berg, Theodore G.

Talkeetna

McKeown, Timothy J.

Unalaska

Lutz, Gary J.

Commercial

Anchorage

Adelman, Paul I.
Allingham, Lynn M.
Anderson, Kathleen G.
Bankston, William M.
Barrack, Martin J.
Bentley, Joy C.
Bettine, Frank & Genivee
Bledsoe, Mark S.
Carr, James R. (Randy)
Claman, Matthew W.
Conway, John M.
Cravez, Glenn E.
Davis, Paul L.
Dearborn, Mary Ann
Dee, Kevin M.
Dickson, Robert J.
Gagnon, Bruce E.
Gilmore, Patrick B.
Ginder, Peter C.
Groh, Eggers & Price
Hanson, David G.
Isbell, Shawn M.
Johnson, Ted
Juday, Jerome H.
Kirk, Pamela E.
Knight, Robert H. (Bob)
Knutson, Milford H.
Landau, Robert W.
Lekisch, Peter A.
Middleton, Timothy G.
Miller, Sheila D.
Page, Nelson G.
Pettersson, Drew
Pfiffner, Frank A.
Ripley, Justin J.
Settlement
Seymour, S. Jay
Sturges, Sharon
Treptow, John A.
Weber, Daniel
Zalewski, Mary-Ellen

Eagle River

Jennings, Karen L.

Fairbanks

Bacon, Glenn H.
Groseclose, Robert B.
Parrish, James A.
Therrien, Valerie M.

Homer

Zeller, Martin

Juneau

Flanders, Kirk A.
Pearson, Stephen J.

Ketchikan

Miller, Kevin G.

Construction

Anchorage

Adelman, Paul I.
Allingham, Lynn M.
Bankston, William M.
Bettine, Frank & Genivee
Bledsoe, Mark S.
Brooks, Donna J.
Carr, James R. (Randy)
Claman, Matthew W.
Conway, John M.
Cravez, Glenn E.
Dickson, Robert J.
Gagnon, Bruce E.
Groh, Eggers & Price
Johnson, Ted
Juday, Jerome H.
Kirk, Pamela E.
Knight, Robert H. (Bob)
Knutson, Milford H.
Page, Nelson G.
Petterson, Drew
Pffner, Frank A.
Ripley, Justin J.
Settlement
Zalewski, Mary-Ellen

Eagle River

Jennings, Karen L.

Fairbanks

Bacon, Glenn H.
Groseclose, Robert B.
Milne, Clark R.
Parrish, James A.
Therrien, Valerie M.

Juneau

Flanders, Kirk A.

Ketchikan

Miller, Kevin G.