

ALASKA LEGISLATURE COMMITTEE FILES 1995-1996 8672

8684 HOUSE LABOR & COMMERCE

other identification or authentication, statements of fact, or opinion on a subject contained in a published treatise, periodical, book, or pamphlet, or statements of experts without the necessity of the experts appearing at the hearing. The panel may upon the application of any party or upon its own decision appoint as a consultant, an impartial and qualified architect, engineer, surveyor, or landscape architect or other professional person or expert to testify before the panel or to conduct any necessary professional or expert examination of the claimant or relevant evidentiary matter and to report to or testify as a witness thereto. Such a consultant shall not be compensated or reimbursed except for travel and living expenses to be paid which may be incurred as a result of such person's appearance before the panel. Such expenses shall be paid by the department of commerce and consumer affairs to be paid as provided in section 672-3. Discovery by the parties shall not be allowed.

During the hearing and at any time prior to the rendition of an advisory decision pursuant to section 672-7, the panel may encourage the parties to settle or otherwise dispose of the case voluntarily. [L 1981, c 228, pt of § 1; am L 1982, c 204, § 8; am L 1985, c 36, § 6; am L 1988, c 132, § 2]

*Effective date.* — The 1988 amendment became effective May 27, 1988.

**§ 672-6. Same; persons attending hearings of panel.**

Unless excluded or excused by the panel, the following persons shall attend hearings before the panel:

- (1) The party or parties making the claim;
- (2) The design professional or professionals against whom the claim is made or representatives thereof, other than counsel, authorized to act for such design professionals; and
- (3) Counsel of the parties, if any. [L 1981, c 228, pt of § 1]

**§ 672-7. Same; decisions.**

(a) Within fifteen days after the completion of a hearing, the panel shall file a written advisory decision with the director of commerce and consumer affairs, who shall thereupon mail copies to all parties concerned, their counsel, the board of registration, and the representative of each design professionals' liability insurance carrier authorized to act for such carrier. The panel shall decide the issue of liability, and shall state its conclusions in writing and after a finding of liability, the panel shall decide the amount of damages, if any, which should be awarded in the case. The decision as to damages shall include in simple, concise terms a division as to which portion of the damages recommended are attributable to economic losses and which to noneconomic losses; provided the panel may not recommend punitive damages.

(b) The decisions shall be signed by all members of the panel; provided that any member of the panel may file a written concurring or dissenting opinion.

(c) The advisory decision required by this section need not be filed if the claim is settled or disposed of before the decision is written or filed. [L 1981, c 228, pt of § 1; am L 1982, c 204, § 8; am L 1983, c 124, § 17]

**§ 672-8. Subsequent litigation; excluded evidence.**

The claimant may institute litigation based upon the claim in an appropriate court only after a party to the design professional conciliation panel hearing rejects the decision of the panel.

No statement made in the course of the hearing of the design professional conciliation panel shall be admissible in evidence either as an admission, to impeach the credibility of a witness, or for any other purpose in any trial of the action, provided that such statements may be admissible for the purpose of section 672-11 hereof. No decision, conclusion, finding, or recommendation of the design professional conciliation panel on the issue of liability or on the issue of damages shall be admitted into evidence in any subsequent trial, nor shall any party to the design professional conciliation panel hearing, or the counsel or other representative of such party, refer or comment thereon in an opening statement, an argument, or at any other time, to the court or jury, provided that such decision, conclusion, finding, or recommendation may be admissible for the purpose of section 672-11. [L 1981, c 228, pt of § 1]

**§ 672-9. Immunity of panel members from liability.**

No member of a design professional conciliation panel shall be liable in damages for libel, slander, or other defamation of character of any party to the design professional conciliation panel proceeding for any action taken or any decision, conclusion, finding, or recommendation made by the member while acting as a member of a design professional conciliation panel under this chapter. [L 1981, c 228, pt of § 1]

**§ 672-10. Statute of limitations tolled.**

The filing of the claim with the design professional conciliation panel shall toll any applicable statute of limitations, and any such statute of limitations shall remain tolled until sixty days after the date the decision of the panel is mailed or delivered to the parties; provided that in no case shall the applicable statute of limitations be tolled for more than twelve months. If a decision by the design professional conciliation panel is not reached within twelve months, the statute of limitations shall resume running and the party filing the claim may commence a suit based on the claim in any appropriate court of this State. The panel shall notify in writing all parties of this provision. [L 1981, c 228, pt of § 1; am L 1985, c 36, § 7]

**§ 672-11. Duty to cooperate; assessment of costs and fees.**

It shall be the duty of every person who files a claim with the design professional conciliation panel, every architect, engineer, surveyor, or landscape

architect against whom such claim is made, to cooperate with the design professional conciliation panel for the purpose of achieving a prompt, fair, and just disposition or settlement of such claim, provided that such cooperation shall not prejudice the substantive rights of said persons.

After trial of such claim or after settlement of such claim after suit has been filed, any party may apply to the court in which the suit was brought to have the costs of the action assessed against any party or any insurance carrier or any other person providing professional liability insurance to a party design professional or both, for failure to cooperate with the design professional conciliation panel. The court may award such costs, or a portion thereof; including attorney's fees, witness fees, including those of expert witnesses, costs of discovery and transcribing depositions, and court costs to the party applying therefor.

On application of the director of commerce and consumer affairs, the court may award as a civil penalty against any party or any insurance carrier or other person providing professional liability insurance to a party design professional, or all or any combination of such persons, all or a portion of the costs and expenses of the design professional conciliation panel attributable to a claim involving such persons, if the court finds that such person or persons failed to cooperate with the design professional conciliation panel. Such penalty shall be payable to the general fund.

In determining whether any person has failed to cooperate in good faith, the court shall consider, but is not limited to, the following:

- (1) The attendance of the persons at the hearing of the design professional conciliation panel;
- (2) The extent to which representatives of the parties and counsel representing parties came to panel hearings with knowledge of the claims and defenses and authority to negotiate a settlement or other disposition of the claim;
- (3) The testimony of members of the panel as to the facts of the person's participation in the panel hearing;
- (4) The extent of the person's cooperation in providing the panel with documents and testimony called for by the panel; and
- (5) The reasons advanced by the person so charged for not fully cooperating or negotiating. [L 1981, c 228, pt of § 1; am L 1982, c 204, § 8; am L 1983, c 124, § 17; am L 1985, c 36, § 8]

#### § 672-12. Annual report.

The director of commerce and consumer affairs shall prepare and submit to the legislature annually, twenty days prior to the convening of each regular session, a report containing the director's evaluation of the operation and effects of this chapter. The report shall include a summary of the claims brought before the design professional conciliation panel and the disposition of those claims. [L 1981, c 228, pt of § 1; am L 1982, c 204, § 8; am L 1983, c 124, § 17; am imp L 1984, c 90, § 1]

**§ 672-13. Administration of chapter.**

The director of commerce and consumer affairs shall be responsible for the implementation and administration of this chapter and shall adopt rules, in conformity with chapter 91, necessary for the purposes of this chapter. [L 1981, c 228, pt of § 1; am L 1982, c 204, § 8; am L 1983, c 124, § 17]

**§ 672-14. Retroactive application.**

This chapter shall apply to any claim arising prior to June 22, 1981, if a suit based on the claim has not been filed in a court of competent jurisdiction prior to that date. [L 1983, c 138, § 2; am L 1985, c 36, § 9]

# HAWAII REVISED STATUTES ANNOTATED

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1994 CUMULATIVE SUPPLEMENT

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VOLUME 13

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*Prepared by the Editorial Staff of the Publisher*

Under the Direction of

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F. J. PAYNE AND C. I. HOWARD

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Annotated through 874 P.2d 899. For complete scope of  
annotations, see scope of volume page.

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**Place in Pocket of Corresponding Volume of Main Set.  
This Supersedes Previous Supplement, Which  
May Be Retained for Reference.**

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## CHAPTER 672

## DESIGN PROFESSIONAL CONCILIATION PANEL

Sec.	Sec.
672-2.1. Determination of unsuitability.	672-5. Design professional conciliation panel hearing; fact-finding; evidence; voluntary settlement.
672-3. Design professional conciliation panel; composition, selection, compensation.	672-7. Same; decisions.
672-4. Review by panel required; notice; pre-	
	sentation of claims; termination.

§ 672-2. Actions against architects, professional engineers, surveyors, and landscape architects.

## CASE NOTES

Cited in *Franks v. City of Honolulu*, 74 Haw. 328, 843 P.2d 668 (1993).

§ 672-2.1. Determination of unsuitability.

Any party may file a motion with the circuit court in the judicial circuit in which the claim arose for a determination that the subject matter of the dispute is unsuitable for review by a panel under this chapter; provided that no such application may be filed within ten days of the date on which the claim is scheduled to be heard by a panel or after such a hearing has taken place.

In determining whether the subject matter of a dispute is unsuitable for disposition pursuant to this chapter, a court may consider:

(1) The magnitude of the potential award, or any issue of broad public concern raised by the subject matter underlying the dispute;

(2) Problems referred to the court where court regulated discovery is necessary;

(3) The fact that the matter in dispute is a reasonable or necessary issue to be resolved in pending litigation and involves other matters not covered by or related to this chapter;

(4) The fact that the design professional's involvement in the matter is distinctly secondary in importance to the involvement of parties not covered by this chapter;

(5) The potential for unreasonable delays in reaching any resolution of the matter by its referral to a panel pursuant to this chapter;

(6) The fact that there are too many parties or issues involved to be effectively handled by the informal processes of this chapter; or

(7) The fact that one or more of the design professionals named in the claim is no longer subject to the jurisdiction of the panel, or refuses to participate in the proceedings before the panel, to the detriment of the remaining parties.

For the purpose of any such application there shall be a rebuttable presumption that the subject matter is unsuitable for review by a panel under

this chapter where the claim against the design professional arises out of a third-party action in pending litigation.

Any such application to the circuit court shall be made and heard in a summary manner and in accordance with procedures for the making and hearing of motions. [L 1985, c 36, pt of § 1; am L 1992, c 91, § 1]

The 1992 amendment, effective May 27, 1992, near the beginning of the first paragraph deleted "or any person served with notice of a claim" following "Any party"; at the end of

paragraph (5) deleted "or"; at the end of paragraph (6) substituted "; or" for a period; added paragraph (7); and added the next to the last paragraph of this section.

#### CASE NOTES

The use of the word "party" in this section should be given its general legal meaning; thus, the term "any party" may reasonably be interpreted to mean any person or entity involved in a design professional conciliation panel proceeding, including claimants. *Franks v. City of Honolulu*, 74 Haw. 328, 843 P.2d 668 (1993) (decided under prior law).

Compelling claimants to complete the design professional conciliation panel

(DPCP) process under § 672-8, even though their claims might be unsuitable for such review, would be inconsistent with the purposes and policies of this chapter; therefore, claimants may institute an action in circuit court to seek a determination of DPCP unsuitability pursuant to this section prior to a decision of the panel. *Franks v. City of Honolulu*, 74 Haw. 328, 843 P.2d 668 (1993).

#### § 672-3. Design professional conciliation panel; composition, selection, compensation.

(a) There are established conciliation panels which shall review and render findings and advisory opinions on the issues of liability and damages in tort claims against professional architects, engineers, surveyors, and landscape architects.

(b) A design professional conciliation panel, hereafter called "the panel", shall be formed for each claim filed pursuant to section 672-4 and, after each panel renders its decision or the claim is otherwise disposed of, it shall be disbanded. Each design professional conciliation panel shall consist of one chairperson selected from among persons who are familiar with and experienced in the tort claims settlement process, one attorney licensed to practice in the courts of the State and experienced in trial practice, and one architect, engineer, surveyor, or landscape architect licensed to practice under chapter 464. The chairperson shall be appointed by the director of commerce and consumer affairs from a list of eligible persons approved by the chief justice of the supreme court of Hawaii. The attorney shall be appointed by the chairperson from a list of not less than thirty-five attorneys experienced in trial practice submitted annually by the supreme court. The architect, engineer, surveyor, or landscape architect shall be appointed by the chairperson from a list of not less than thirty-five design professionals submitted annually by the board of professional engineers, architects, surveyors, and landscape architects.

The chairperson shall preside at the meetings of the panel. The chairperson

which will become payable when the decision of the panel is submitted. At the discretion of the director of commerce and consumer affairs, the chairperson and all panel members may be compensated at one-half of the amount of compensation specified in this section, when and if the claim is disposed of by any means prior to the hearing before the panel. The chairperson and all panel members shall also be paid allowances for travel and living expenses which may be incurred as a result of the performance of their duties. These costs shall be paid by the department of commerce and consumer affairs from funds collected from the parties, to be shared equally. The claimant shall deposit \$450 with the department upon the filing of the claim and the failure to do so shall result in the claim being rejected for filing. Each design professional shall deposit \$450 with the department within twenty days of being served with the claim and the failure to do so shall result in termination of proceedings under this chapter, allowing the claimant to proceed in accordance with section 672-8. If the claim is withdrawn, determined to be unsuitable for proceedings under this chapter, or otherwise terminated without participation by a panel, the department shall return all moneys collected to the respective parties. Any moneys remaining after all costs have been paid shall be returned to the respective parties on a pro rata basis.

The office and meeting space, secretarial and clerical assistance, office equipment and office supplies for the panel shall be furnished by the department of commerce and consumer affairs.

The board shall prepare a list of architects, engineers, surveyors, and landscape architects along with their respective specialties who shall then be considered consultants to the panel in their respective fields. Panel members may consult with other legal, technical, and insurance specialists. Any consultant called by the panel to appear before the panel shall be paid an allowance for travel and living expenses which may be incurred as a result of such person's appearance before the panel. Such costs shall be paid by the department of commerce and consumer affairs. [L 1981, c 228, pt of § 1; am L 1982, c 204, § 8; am L 1985, c 36, § 4; am L 1992, c 91, § 2; am L 1993, c 6, § 26]

The 1992 amendment, effective May 27, 1992, in the third sentence of the first paragraph of subsection (b) added "the director of commerce and consumer affairs from a list of eligible persons approved by" following "chairperson shall be appointed by"; in the second sentence of the second paragraph deleted "handled" following "per claim"; substituted a period for "and shall" following "the decision of the panel is submitted"; added the present third sentence of the second paragraph of subsection (b); added at the beginning of the present fourth sentence "The chairperson and all panel members shall also"; at the end of the present fourth sentence of the second paragraph substituted a period for "and they" following "the performance of their duties" and added at the

beginning of the present fifth sentence "These costs"; in the present fifth sentence of the second paragraph substituted "parties" for "claimant and defendant"; at the beginning of the present seventh sentence substituted "Each" for "The"; added the present last sentence of the second paragraph of subsection (b); in the third paragraph of subsection (b) substituted "panel" for "board" following "and office supplies for the"; and made minor changes in punctuation.

The 1993 amendment, effective April 12, 1993, in subsection (b), deleted "of registration" where it appeared preceding "of professional engineers" in the last sentence of the first paragraph, and preceding "shall prepare" in the first sentence of the last paragraph.

**§ 672-4. Review by panel required; notice; presentation of claims; termination.**

(a) Any person or the person's representative claiming that a tort has been committed by the design professional or entities employing such design professionals shall file a claim with the department of commerce and consumer affairs before a suit based on the claim may be commenced in any court of the State. All claims shall be submitted to the department of commerce and consumer affairs in writing. The claimant shall set forth facts upon which the claim is or may be based and shall include the names of all parties against whom the claim is or may be made who are known to the claimant. Within five business days thereafter, the panel shall give notice of the claim, by certified mail, to all architects, engineers, surveyors, or landscape architects and others who are or may be parties to the claim and shall furnish copies of the claims to such persons. Such notice shall set forth a date, not more than twenty days after mailing the notice, within which any design professional against whom a claim is made shall file a written response to the claim, and a date and time for a hearing of the panel. Such notice shall describe the nature and purpose of the panel's proceedings and shall designate the place of the hearing. The times originally set forth in the notice may be changed by the chairperson, on due notice to all parties, for good cause; provided that a party requesting the rescheduling of the hearing within seven days of the scheduled date shall be required in the sole discretion of the panel chairperson to additionally compensate the panel in an amount equal to the fee panel members receive pursuant to section 672-3.

(b) At any time, by mutual consent of the parties involved, the department of commerce and consumer affairs, prior to the appointment of the chairperson, or the chairperson after the chairperson's appointment, may terminate the proceedings and the claimant may proceed in accordance with section 672-8. [L 1981, c 228, pt of § 1; am L 1982, c 204, § 8; am L 1983, c 138, § 1; am imp L 1984, c 90, § 1; am L 1985, c 36, § 5; am L 1992, c 91, § 3]

The 1992 amendment, effective May 27, 1992, in subsection (a) deleted from the end of the second sentence "on forms provided by the department"; deleted the former third sentence which read: "If the claim is presented orally, the department of commerce and consumer affairs shall reduce the claim to writing."; in the present fourth sentence substituted "the" for

"written" preceding "claims to such persons."; in the present fifth sentence substituted "shall" for "may" following "any design professional against whom a claim is made"; and deleted ", not less than five days following the date for filing a response," preceding "for a hearing of the panel."

**CASE NOTES**

Cited in *Franks v. City of Honolulu*, 74 Haw. 328, 843 P.2d 668 (1993).

**§ 672-5. Design professional conciliation panel hearing; fact-finding; evidence; voluntary settlement.**

Every claim of a tort shall be heard by the design professional conciliation panel as soon as possible after the date for filing a response. No persons other than the panel, witnesses, and consultants called by the panel, and the persons listed in section 672-6 shall be present except with the permission of the chairperson. The panel may, in its discretion, conduct an inquiry of a party, witness, or consultant without the presence of any or all parties.

The hearing shall be informal. The panel may require a stenographic record of all or part of its proceedings for the use of the panel, but such record shall not be made available to the parties. The panel may receive any oral or documentary evidence. Questioning of parties, witnesses, and consultants may be conducted by the panel, and the panel may, in its discretion, permit any party, or any counsel for a party to question other parties, witnesses, or consultants. The panel may designate who, among the parties, shall have the burden of going forward with the evidence with respect to such issues as it may consider, and unless otherwise designated by the panel, when a design professional's records have been provided for the claimant's proper review, such burden shall initially rest with the claimant at the commencement of the hearing.

The panel shall have the power to require by subpoena the appearance and testimony of witnesses and the production of documentary evidence. When such subpoena power is utilized, notice shall be given to all parties. The testimony of witnesses may be taken either orally before the panel or by deposition. In cases of refusal to obey a subpoena issued by the panel, the panel may invoke the aid of any circuit court in the State, which may issue an order requiring compliance with the subpoena. Failure to obey such order may be punished by the court as a contempt thereof. Any member of the panel, the director of the department, or any person designated by the director of the department may sign subpoenas. Any member of the panel may administer oaths and affirmations, examine witnesses, and receive evidence. Notwithstanding such powers, the panel shall attempt to secure the voluntary appearance, testimony, and cooperation of parties, witnesses, and consultants without coercion.

At the hearing of the panel and in arriving at its opinion, the panel shall consider, but not be limited to, statements or testimony of witnesses, construction documents, inspection reports, calculations, and other records kept in the usual course of the practice of the design professional without the necessity for other identification or authentication, statements of fact, or opinion on a subject contained in a published treatise, periodical, book, or pamphlet, or statements of experts without the necessity of the experts appearing at the hearing. The panel may, upon the application of any party or upon its own decision, appoint as a consultant, an impartial and qualified architect, engineer, surveyor, or landscape architect or other professional person or expert to testify before the panel or to conduct any necessary professional or expert

examination of the claimant or relevant evidentiary matter and to report to or testify as a witness thereto. Such a consultant shall not be compensated or reimbursed except for travel and living expenses to be paid which may be incurred as a result of such person's appearance before the panel. Such expenses shall be paid by the department of commerce and consumer affairs as provided in section 672-3. Except for the production of documents and records kept in the usual course of the practice of an architect, engineer, surveyor, or landscape architect, discovery by the parties shall not be allowed. Requests for production of documents shall be submitted to the chairperson of the panel for approval, denial, or modification, at the chairperson's sole discretion.

During the hearing and at any time prior to the rendition of an advisory decision pursuant to section 672-7, the panel may encourage the parties to settle or otherwise dispose of the case voluntarily. [L 1981, c 228, pt of § 1; am L 1982, c 204, § 8; am L 1985, c 36, § 6; am L 1988, c 132, § 2; am L 1992, c 91, § 4]

The 1992 amendment, effective May 27, 1992, in the first sentence of the first paragraph substituted "as soon as possible" for "within thirty days" following "the design professional conciliation panel"; in the last sentence of the second paragraph added "a" preceding "design professional's records"; in the third from the last sentence of the fourth paragraph deleted "to be paid" preceding "as provided in section

672-3."; at the beginning of the next to the last sentence of the fourth paragraph substituted "Except for the production of documents and records kept in the usual course of the practice of an architect, engineer, surveyor, or landscape architect, discovery" for "Discovery"; added the last sentence of the fourth paragraph; and made minor changes in punctuation.

#### § 672-7. Same; decisions.

(a) Within thirty days after the completion of a hearing, the panel shall file a written advisory decision with the director of commerce and consumer affairs, who shall thereupon mail copies to all parties concerned, or their counsel if represented by counsel, the board, and the representative of each design professionals' liability insurance carrier authorized to act for such carrier. The panel shall decide the issue of liability, and shall state its conclusions in writing. After a finding of liability, if evidence has been presented regarding damages, the panel shall decide the amount of damages, if any, which should be awarded in the case. The decision as to damages shall include in simple, concise terms a division as to which portion of the damages recommended are attributable to economic losses and which to noneconomic losses; provided that the panel may not recommend punitive damages.

(b) The decisions shall be signed by all members of the panel; provided that any member of the panel may file a written concurring or dissenting opinion.

(c) The advisory decision required by this section need not be filed if the claim is settled or disposed of before the decision is written or filed. [L 1981, c 228, pt of § 1; am L 1982, c 204, § 8; am L 1983, c 124, § 17; am L 1992, c 91, § 5; am L 1993, c 6, § 27]

The 1992 amendment, effective May 27, 1992, in the first sentence of subsection (a) substituted "thirty" for "fifteen" following

"Within"; added "or" following "mail copies to all parties concerned."; added "if represented by counsel" preceding "the board of registration.";

divided the former second sentence into two sentences by substituting a period for "and after" following "its conclusions in writing" and adding at the beginning of the present third sentence "After"; in the present third sentence added "if evidence has been presented regarding damages," preceding "the panel shall decide

the amount"; and near the end of the last sentence of subsection (a) added "that" preceding "the panel may not recommend punitive damages."

The 1993 amendment, effective April 12, 1993, deleted "of registration" following "the board" in the first sentence of subsection (a).

### § 672-8. Subsequent litigation; excluded evidence.

#### CASE NOTES

Determination of unsuitability for design professional conciliation. — Compelling claimants to complete a design professional conciliation panel (DPCP) process under this section, even though their claims might be unsuitable for such review, would be inconsistent with the purposes and policies of this

chapter therefore, claimants may institute an action in circuit court to seek a determination of (DPCP) unsuitability pursuant to § 672-2.1 prior to a decision of the panel. *Franks v. City of Honolulu*, 74 Haw. 328, 843 P.2d 668 (1993).

Cited in *Franks v. City of Honolulu*, 74 Haw. 328, 843 P.2d 668 (1993).

New Jersey  
Certificate of Merit Law  
As of June 1995

§§1-4  
C.2A:53A-28  
To  
2A:53A-29  
§5  
Note To §§1-4

P.L.1995, CHAPTER 139, approved June 29, 1995  
1994 Senate No. 1493 (Fourth Reprint)

AN ACT concerning tort reform and the negligence or malpractice of certain licensed <sup>2</sup>[, registered or certified]<sup>2</sup> persons and supplementing Title 2A of the New Jersey Statutes.

BE IT ENACTED by the Senate and General Assembly of the State of New Jersey:

1. As used in this act, "licensed person" means any person who is licensed <sup>2</sup>[, registered or certified by the Director of the Division of Consumer Affairs in the Department of Law and Public Safety or by one of the boards prescribed in section 2 of P.L.1978, c.73 (C.45:1-15) ] as:

a. an accountant pursuant to P.L.1977, c.144 (C.45:2B-1 et seq.);

b. an architect pursuant to R.S.45:3-1 et seq.;

c. an attorney admitted to practice law in New Jersey;

d. a dentist pursuant to R.S.45:6-1 et seq.;

e. an engineer pursuant to P.L.1938, c.342 (C.45:8-27 et seq.);

f. a physician in the practice of medicine or surgery pursuant to R.S.45:9-1 et seq.;<sup>2</sup> <sup>3</sup>[and]<sup>3</sup> <sup>2</sup>[includes]

g.<sup>2</sup> <sup>3</sup>a podiatrist pursuant to R.S. 45:5-1 et seq.;

h. a chiropractor pursuant to P.L. 1989, c. 153 (C. 45:9-41.17 et seq.);

i. a registered professional nurse pursuant to P.L. 1947, c. 282 (C. 45:11-23 et seq.); and

j.<sup>3</sup> a health care facility as defined in section 2 of P.L.1971, c.138 (C.28:2H-2).

2. In any action for damages for personal injuries, wrongful death or property damage resulting from an alleged act of malpractice or negligence by a licensed person in his profession or occupation, the plaintiff shall, within 80 days following the date of <sup>1</sup>[filing of the action] <sup>2</sup>[service of the complaint on the defendant<sup>1</sup>] filing of the answer to the complaint by the defendant<sup>2</sup>, provide each defendant with an affidavit of an appropriate licensed person that there exists a reasonable probability that the care, skill or knowledge exercised or exhibited in the treatment, practice or work that is the subject of the complaint, fell outside acceptable professional or occupational standards or treatment practices. <sup>2</sup>The court may grant no more than one additional period, not to exceed 60 days, to file the affidavit pursuant to this section, upon a finding of good cause.<sup>2</sup> The person executing the affidavit shall be licensed <sup>2</sup>[, registered or certified, as appropriate.]<sup>2</sup> in this or any other

EXPLANATION—Matter enclosed in bold-faced brackets (thus) in the above bill is not enacted and is intended to be omitted in the law.

Matter underlined thus is new matter.

Matter enclosed in superscript numerals has been adopted as follows:

<sup>1</sup> Senate SCH committee amendments adopted November 10, 1994.

<sup>2</sup> Assembly AIN committee amendments adopted June 1, 1995.

<sup>3</sup> Senate floor amendments adopted June 22, 1995.

<sup>4</sup> Assembly floor amendments adopted June 26, 1995.

state; have particular expertise in the general area or specialty involved in the action, as evidenced by board certification or by devotion of the person's practice substantially to the general area or specialty involved in the action for a period of at least five years <sup>2</sup>; and be actively engaged in the practice of his profession or occupation, to which at least 80% of the person's professional or occupational time shall be devoted or, if on the faculty of an accredited college, university or professional or occupational school, to which at least 30% of the person's professional or occupational time shall be devoted and at least 50% of the person's time shall be devoted to teaching, for a total of at least 80%, and the] <sup>4</sup>[<sup>3</sup>; and be actively engaged in the practice of his profession or occupation, to which at least 80% of the person's professional or occupational time shall be devoted or, if on the faculty of an accredited college, university or professional or occupational school, to which at least 30% of the person's professional or occupational time shall be devoted and at least 50% of the person's time shall be devoted to teaching, for a total of at least 80%<sup>3</sup>]<sup>4</sup> . The<sup>2</sup> person shall have no financial interest in the <sup>2</sup>outcome of the<sup>2</sup> case under review, but this prohibition shall not exclude the person from being an expert witness in the case.

3. An affidavit shall not be required pursuant to section 2 of this act if the plaintiff provides a sworn statement in lieu of the affidavit setting forth that: the defendant has failed to provide plaintiff with medical records or other records or information having a substantial bearing on preparation of the affidavit; a written request therefor along with, if necessary, a signed authorization by the plaintiff for release of the medical records or other records or information requested, has been made by certified mail or personal service; and at least 45 days have elapsed since the defendant received the request.

4. If the plaintiff fails to provide an affidavit or a statement in lieu thereof, pursuant to section 2 or 3 of this act, it shall be deemed a failure to state a cause of action.

5. This act shall take effect immediately and shall apply to causes of action which occur on or after the effective date of this act.

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Requires affidavit for malpractice actions by a neutral licensed person showing that treatment, practice or work was unacceptable.

**Proposed Model Act  
With Regard to Suits or Claims  
Against Design Professionals  
[Design Professional Conciliation Panel Law]**

1. **Definitions.** For the purposes of this chapter, "design professional" means a professional engineer, architect, surveyor, or landscape architect licensed under applicable state law.
2. **Actions Against Design Professionals.** In any action for damages arising out of the alleged violation of professional standards in the professional practice of a design professional and before the time of filing the complaint, the aggrieved person shall file a claim with the design professional conciliation panel.
3. **Design Professional Conciliation Panel; Composition, Selection, Compensation.**

A design professional conciliation panel, hereafter called "the panel", shall be formed for each claim filed pursuant to Section 4 and after each panel renders its decision or the claim is otherwise disposed of it shall be disbanded. Each design professional conciliation panel shall consist of one chairperson selected from among persons who are familiar with and experienced in the tort claims settlement process, one attorney licensed to practice in the courts of the State and experienced in trial practice, and one architect, engineer, surveyor or landscape architect licensed to practice under (Applicable State Law). The chairperson shall be appointed by the chief justice of the (highest applicable state court). The attorney shall be appointed by the chairperson from a list of not less than thirty-five (35) attorneys experienced in trial practice submitted annually by the (highest applicable state court). The design professional shall be appointed by the chairperson from a list of not less than thirty-five (35) design professionals submitted annually by the board of registration of professional engineers, architects, and surveyors and landscape architects.

The chairperson shall preside at the meetings of the panel. The chairperson and all panel members shall be compensated at the rate of \$\_\_\_ per claim handled which will become payable when the decision of the panel is submitted and shall be paid allowances for travel and living expenses which may be incurred as a result of the performance of their duties by the (Applicable State Agency) from funds posted in advance by the claimant and respondent, to be shared equally.

was concluded that the filing of the claim does not lack substantial justification.

The Georgia statute requires the plaintiff to file with his complaint an affidavit of an expert competent to testify, which affidavit sets forth specifically at least one negligent act or omission claimed to exist and the factual basis for each such claim. The California statute, unlike those of Colorado and Georgia, requires that the conclusion in the certificate as to the merits of the claim be that of the plaintiff's attorney rather than that of the individual consulted. The California statute requires the plaintiff's attorney to certify that he has consulted with a qualified individual and that the attorney has concluded on the basis of such consultation that there is reasonable and meritorious cause for the filing of the complaint.<sup>12</sup>

### Review Panels

The review panel system is comparable to nonbinding arbitration. Compliance with this type of tort reform legislation entails significantly greater effort by claimants than compliance with the certificate of merit statutes discussed above. The Hawaii statutory scheme is typical of this type of legislation. The process begins with the filing of a claim with the designated authority before a suit can be commenced. In the claim, the claimant sets forth the facts upon which the claim is based and the names of all parties against whom the claim is made who are known to the claimant.<sup>13</sup>

Following receipt of the design professional's response to the claim, a panel is convened for the purpose of conducting an informal hearing during which it will review and render findings and issue an advisory opinion. A panel is formed for each claim filed. The panel may receive oral or documentary evidence; question the parties, witnesses and consultants; and subpoena the appearance and testimony of witnesses and the production of documentary evidence. The Hawaii statute also limits discovery by the parties during the review process. Except for the production of documents and records kept in the usual course of the practice of the design professional, discovery by the parties is not allowed.

In its written advisory decision, the panel decides the issue of liability, and if liability is found and if evidence has been presented regarding damages, the panel determines the amount of damages, if any, that should be awarded.

Often more important than the panel's decision itself is the effect the decision may have on any subsequent civil litigation between the parties. The panel's decision is not binding on any party.<sup>14</sup> Following rejection of the panel's decision by either party, the plaintiff may proceed with a civil action against the design professional. Under the Hawaii scheme, reference in the civil action to any aspect of the panel's hearing is prohibited.<sup>15</sup> The Kansas statute, however, expressly provides that the panel's written report shall be admissible in any subsequent litigation.<sup>16</sup>

The statute of limitations is tolled during the pendency of the panel review process. The statute will also remain tolled for a specified period following service of the panel's decision upon the parties.<sup>17</sup> The Hawaii statute caps the duration of the tolling of the statute of limitations at twelve

months. The statute provides some measure of protection to plaintiffs in that, if a decision by the panel is not reached within twelve months of the filing of the claim with the panel, the statute of limitations shall resume running, and the plaintiff can commence its civil action against the design professional without awaiting the panel's decision.

### Conclusion

This type of tort reform legislation has, for the most part, withstood constitutional challenge. An exception is the Wyoming statute.<sup>18</sup> Despite enactment in only a small number of states, this type of what is pejoratively referred as "special legislation" is an important aspect of design professional liability reform. It is likely to become even more important as more states enact similar legislation. These statutes may be viewed as special legislation erecting impediments to the resolution of professional negligence claims and creating additional procedures to be following prior to or in conjunction with the filing of a civil action; or more positively, as a valid and rational means to reduce the number of frivolous actions filed against licensed professionals. It is important to be aware of these statutes. Although these statutes do not ultimately determine whether a claim can be brought, failure to comply is grounds for dismissal of a claim.

### Endnotes

1. *E.g.*, CAL. CIV. PROC. CODE § 411.35; COLO. REV. STAT. §§ 13-20-601 to -602; GA. CODE ANN. § 9-11-9.1; HAW. REV. STAT. §§ 672-1 to -14; KAN. STAT. ANN. §§ 60-3501 to -3509; WYO. STAT. §§ 9-2-1801 to -1812 (declared unconstitutional in 1990).

2. *E.g.*, House Bill 935, N.C. General Assembly, 1991 Sess., April 19, 1991 ("An Act to Establish a Claims Review Panel for Civil Actions Involving Architectural Services"); Senate Bill 626, Mo. Legislative Assembly, Jan. 10, 1994 (would have required filing of affidavit in any claims against a professional similar to the Georgia statute).

3. *E.g.*, Housing Auth. of Savannah v. Greene, 383 S.E.2d 867 (Ga. 1989).

4. *E.g.*, Kneip v. Southern Eng'g Co., 395 S.E.2d 809 (Ga. 1990).

5. CAL. CIV. PROC. CODE § 411.35(a). This statute also applies to professional engineers and land surveyors.

6. GA. CODE ANN. § 9-11-9.1(a).

7. 842 P.2d 245 (Colo. 1992).

8. *See, e.g.*, Kneip v. Southern Eng'g Co., 395 S.E.2d 809 (Ga. 1990) (engineer); Richmond Leasing Co. v. Cooper, Cooper, Maiorillo & Stalnaker, 428 S.E.2d 603 (Ga. App. 1993) (attorney malpractice); Ruzette v. Preferred Research, Inc., 397 S.E.2d 489 (Ga. App. 1990) (title examiner).

9. Ruzette v. Preferred Research, Inc., 397 S.E.2d 489 (Ga. App. 1990).

10. *See, e.g.*, CAL. CIV. PROC. CODE § 411.35; COLO. REV. STAT. § 13-20-602(3); GA. CODE ANN. § 9-11-9.1(a).

11. *See, e.g.*, HAW. REV. STAT. § 672-1 to -14; KAN. STAT. ANN. §§ 60-3501 to -3509. *See also* WYO. STAT. §§ 9-2-1801 to -1812 (declared unconstitutional on equal protection grounds in 1990); House Bill 935, N.C. General Assembly, 1991 Sess., April 19, 1991 (HB 935 would have established a claims review panel similar to that used in Kansas; HB 935 was not ratified).

12. CAL. CIV. PROC. CODE § 411.35(b)(1).

13. HAW. REV. STAT. § 672-4(a).

14. HAW. REV. STAT. § 672-8; KAN. STAT. ANN. § 60-3506.

15. HAW. REV. STAT. § 672-8.

16. KAN. STAT. ANN. § 60-3505(c).

17. HAW. REV. STAT. § 672-10 (sixty days); KAN. STAT. ANN. § 60-3509 (thirty days).

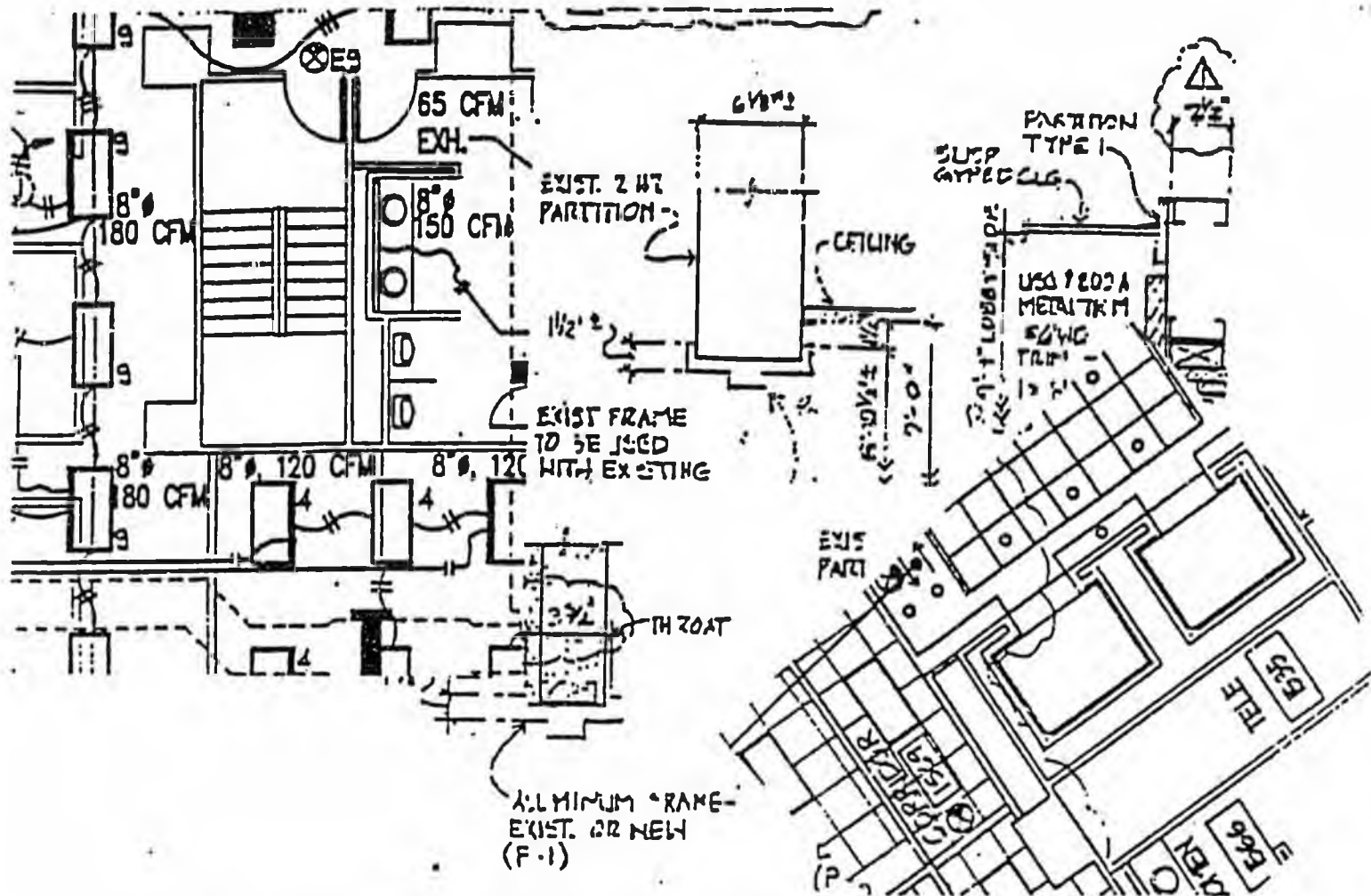
18. State ex rel. Wyoming Ass'n of Consulting Eng'rs & Land Surveyors v. Sullivan, 798 P.2d 826 (Wyo. 1990).

of any or all parties.

The hearing shall be informal. The panel may require a stenographic record of all or part of its proceedings for the use of the panel, but such record shall not be available to the parties nor shall it be admissible in any subsequent legal proceeding. The panel may receive any oral or documentary evidence. Questioning of parties, witnesses, and consultants may be conducted by the panel, and the panel may, in its discretion, permit any party, or any counsel for a party to question other parties, witnesses or consultants. The panel may designate who, among the parties, shall have the burden of going forward with the evidence with respect to such issues as it may consider, and unless otherwise designated by the panel, when the design professional's records have been provided to the claimant for the claimant's proper review, such burden shall initially rest with the claimant at the commencement of the hearing.

The panel shall have the power to require by subpoena the appearance and testimony of witnesses and the production of documentary evidence. When such subpoena power is utilized, notice shall be given to all parties. The testimony of witnesses may be taken either orally before the panel or by deposition. In cases of refusal to obey a subpoena issued by the panel, the panel may invoke the aid of any superior (circuit) court in the State, which may issue an order requiring compliance with the subpoena. Failure to obey such order may be punished by the court as a contempt thereof. Any member of the panel may sign subpoenas, administer oaths and affirmations, examine witnesses, and receive evidence. Notwithstanding such powers, the panel shall attempt to secure the voluntary appearance, testimony, and cooperation of parties, witnesses and consultants without coercion.

In arriving at its advisory decision the panel shall consider, but not be limited to, statements or testimony of witnesses, construction documents, inspection reports, calculations and other records kept in the usual course of the practice of the design professional without the necessity for other identification or authentication. The panel may also consider statements of fact or opinion on a subject contained in a published treatise, periodical, book or pamphlet, or statements of experts without the necessity of the experts appearing at the hearing. The panel may upon the application of any party or upon its own decision appoint as a consultant, an impartial and qualified design professional or other professional person or expert to testify before the panel or to conduct any necessary professional or expert examination of the claimant or relevant evidentiary matter and to report to or testify as a witness thereto. Such a consultant shall not be compensated or reimbursed except for travel and living expenses which may be incurred as a result of such person's appearance before the panel. Such expenses shall be paid by the [Applicable State Entity] as provided in Section 3. Discovery by the parties pursuant to the Code of Civil Procedure shall not be allowed.



conduct and be grounds for disciplinary action against the plaintiff's attorney.<sup>12</sup> Since 1979, the statute has been continually re-enacted by the California legislature and the current version will remain in effect until January 1, 1997.

A similar statutory requirement is also in force in Colorado.<sup>13</sup> Under Section 13-20-602(a) of the Colorado Revised Statutes, a plaintiff's attorney must certify that the attorney has consulted a professional who has expertise in the area of the alleged negligent conduct and that the professional, after reviewing the facts, records, documents and other relevant material, has concluded that the filing of the action "does not lack substantial justification."<sup>14</sup> The failure to file the "certificate of review" will result in the dismissal of the action.<sup>15</sup>

Section 9-11-9.1 of the Official Code of Georgia provides that in any action for damages alleging professional malpractice, the plaintiff shall be required to file with the complaint an affidavit of an expert competent to testify; the affidavit shall set forth specifically at least one negligent act or omission claimed to exist and the factual basis for each such claim.<sup>16</sup> If the plaintiff fails to file the required affidavit and the defendant raises the failure in its initial responsive pleading, the complaint is subject to dismissal for failure to state a claim and cannot be cured by amendment unless a court determines that the plaintiff had the affidavit available prior to filing the complaint and the failure to file it was simply the result of a mistake.<sup>17</sup> The statute does, however, permit the filing of an action without an affidavit where the period of limitations will expire within 10 days of the date of filing and an affidavit could not be prepared in such time. In such circumstances, the affidavit must be filed within 45 days of the date on which the complaint was filed.<sup>18</sup>

Section 9-11-9.1 was originally enacted as part of the Medical Malpractice Act and applied only to medical malpractice actions or actions involving health care providers. It was not until 1989 that the Georgia courts held that it applied equally to architects and engineers.<sup>19</sup>

Georgia, unlike California and Colorado, requires that the affidavit be executed by a design professional and include a specific statement regarding the allegedly negligent act or omission.<sup>20</sup> The intent of the legislature in enacting this statute was to require the plaintiff to set forth the particulars of the claim it was making and thereby reduce the number of frivolous malpractice suits being filed.<sup>21</sup>

Unlike the preceding statutes, some states have developed a "panel" procedure. In 1985, Hawaii enacted a statute which provides for a Design Professional Conciliation Panel.<sup>22</sup> The statute requires that prior to the filing of an action for damages arising out of allegedly negligent acts or omissions of a person holding a license as a professional engineer, architect, surveyor or landscape architect, the aggrieved party shall file a claim with the Design Professional Conciliation Panel (Panel).<sup>23</sup>

Any claim filed with the Panel must be accompanied by a certificate which declares that the attorney has reviewed the facts of the case and has consulted with at least one design professional licensed to practice in the same discipline as the design professional against whom the claim is made and, after such consultation, the attorney has concluded that there is a "reasonable and meritorious case" for the filing of the claim.<sup>24</sup> The certification required by this section is substantially similar to that required by Cal. Code Civ. Proc. Section 411.35(b).

D. The advisory decision required by this section need not be filed if the claim is settled or disposed of before the decision is written or filed.

8. **Subsequent Litigation; Excluded Evidence.** The claimant may institute litigation based upon the claim in an appropriate court only after the panel has filed its advisory decision with the (Applicable State Entity).

No statement made in the course of the hearing of the panel shall be admissible in evidence either as an admission, to impeach the credibility of a witness, or for any other purpose in any trial of the action, provided that such statements shall be admissible for the purpose of section 11 hereof. No decision, conclusion, finding or recommendation of the panel on the issue of liability or on the issue of damages shall be admitted into evidence in any subsequent trial, nor shall any party to the panel hearing, or the counsel or other representative of such party, refer or comment thereon in an opening statement, an argument, or at any other time, to the court or jury, provided that such decision, conclusion, finding, or recommendation shall be admissible for the purpose of section 11.

Subsequent to the decision of the panel, and if the claimant rejects the decision of the panel and chooses to institute litigation, the claimant shall be required to file an affidavit to accompany any charge of professional negligence, malpractice or breach of contract based on negligence or other violation of professional standards.

- A. In any action for damages alleging professional malpractice, negligence or breach of contract based on negligence or other violation of professional standards, the claimant shall be required to file with the complaint an affidavit of an expert competent to testify, which affidavit shall set forth specifically at least one negligent act or omission claimed to exist and the factual basis for each claim.
- B. The contemporaneous filing requirement of subsection (a) of this Code section shall not apply to any case in which the period of limitation will expire within ten (10) days of the date of filing and, because of such time constraints, the claimant has alleged that an affidavit of an expert could not be prepared. In such cases, the plaintiff shall have 45 days after the filing of the complaint to supplement the pleading with the affidavit. The trial court may, on motion, after hearing and for good causes extend such time as it shall determine justice requires.
- C. If an affidavit is filed after the filing of a complaint, as allowed under Subsection B of this section, the design professional shall not be required to file an answer to the complaint and affidavit until 30 days after the filing of the affidavit.

Second, the contract clause requires a certification by a licensed design professional working in the same discipline as the design professional against whom the claim is made, whereas all the above statutory schemes<sup>45</sup> (with the exception of the Georgia statute<sup>46</sup>) provide for certification by an attorney. The statutory requirements are not unlike the restrictions currently imposed by Rule 11 of the Federal Rules of Civil Procedure or Section 8.01-271 of the Code of Virginia. The certification of a design professional, however, is more likely to provide a basis for identifying the substantive design issues underlying a potential dispute than the general and conclusory opinion of an attorney premised on a limited consultation with a design professional. This detailing of the claims, in most cases, will facilitate earlier resolution of claims as the potential defendant will be better able to evaluate the merits of the claims before they are even filed. Obviously, this will enhance settlement potential and decrease the costs to all parties involved.

In the same vein, the statutory provisions (again with the exception of the Georgia statute<sup>47</sup>) only require certification of a "reasonable and meritorious cause"<sup>48</sup> or that the filing of the claim "does not lack substantial justification."<sup>49</sup> The con-

tractual provision, however, requires specification of those acts or omissions which it is contended constitute a violation of the *standard of care* and upon which the proposed claim will be premised. The contractual version imposes a much higher standard and requires the communication of information which will provide a basis for a dialogue more likely to lead to an early resolution of disputes involving alleged design error. Equally important, perhaps, the resolution of design-related disputes without resort to litigation will foster and strengthen business relationships. This too, in turn, is likely to produce greater profitability, higher levels of professional satisfaction and a better end result.

## CONCLUSION

Briefly stated, in the absence of a statutorily mandated certificate of merit, a contractual provision similar to the one set out above will not only tend to reduce the incidence of frivolous claims but will also foster the flow of information concerning potential claims and, thereby, encourage resolution of valid claims without resort to unnecessary, expensive and time-consuming litigation.

*Notes on page 36.*

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- D. The extent of the person's cooperation in providing the panel with documents and testimony called for by the panel; and
  - E. The reasons advanced by the person so charged for not fully cooperating or negotiating.
12. Annual Report. The director of (Applicable State Entity) shall prepare and submit to the legislature annually, twenty days prior to the convening of each regular session, a report containing his or her evaluation to the operation and effect of this chapter. The report shall include a summary of the claims brought before the panel and the disposition of those claims.
13. Administration of (chapter). The [Applicable State Entity] shall be responsible for the implementation and administration of this (chapter) and shall adopt rules in conformity with chapter (\_\_\_\_\_), necessary for the purpose of this (\_\_\_\_\_).

#### NOTE

Each State will have to determine the means of providing secretarial and clerical assistance, office equipment, space and supplies.

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## Legislation Division Update

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### Certificates of Merit and Review Panels: Conditions Precedent to Civil Actions Against Design Professionals

In a limited number of jurisdictions, a person purportedly damaged by the professional negligence of a design professional must obtain independent review of the merits of his claim before pursuing a civil action against the design professional. The statutory mandates vary in methodology. Some statutes require the plaintiff to attach to the complaint a certificate declaring that his attorney has consulted with a qualified individual and that the attorney (or the expert) has concluded that there is reasonable and meritorious cause for the filing of the action. Other statutes require the claim to be presented to an independent panel for an advisory, non-binding opinion. Currently, only a handful of states have enacted such legislation.<sup>1</sup>

Similar legislation has periodically been introduced in other states without success.<sup>2</sup> Most of the statutes were enacted in the 1980s as part of widespread tort reform in response to a malpractice insurance crisis affecting many professions. The Georgia statute, for example, was enacted as part of comprehensive legislative tort reform in response to a perceived liability insurance crisis and the increasing social costs of tort litigation. The comprehensiveness of the Georgia tort reform is illustrated by the fact that, although the title of the Act is the "Medical Malpractice Reform Act of 1987," the Act has been applied to claims arising out of malpractice on the part of other professionals, including architects<sup>3</sup> and engineers.<sup>4</sup>

#### Types of Actions Affected

These statutes apply to actions against the design professional or, in some situations, any licensed professional for damages arising out of the defendant's "professional negligence" or "professional malpractice." The California statute, for example, applies to "every action, including a cross-complaint for damages or indemnity, arising out of the professional negligence of a person holding a valid architect's certificate."<sup>5</sup> Similarly, the Georgia statute applies to "any action for damages alleging professional malpractice."<sup>6</sup>

All indications are that courts will broadly construe the types of claims within the scope of these statutes and will not be influenced by the plaintiff's formal designation of its claim. The Colorado Supreme Court discussed the scope of the Colorado statute in a case involving attorney malpractice. This case is equally applicable to claims against design professionals because the statute applies to all licensed pro-

essionals. In this case, *Martinez v. Badis*,<sup>7</sup> the plaintiffs brought three claims against their attorney: legal malpractice, breach of fiduciary duty, and breach of contract. The court held that the statute did not apply to the negligence claims only. It applied to all claims "based upon" alleged professional negligence. The statutory language was sufficiently broad to include every claim that required proof of professional negligence as a predicate to recovery, whatever the formal designation of that claim might be. Georgia appellate courts have similarly interpreted the Georgia statute, finding the determinative factor to be whether expert testimony is necessary to establish the appropriate standard of care.<sup>8</sup> The Georgia statute applies to any action for professional malpractice sounding in tort or breach of contract.

The Georgia statute was found inapplicable in a case involving a licensed professional because the plaintiff's cause of action could be resolved without proof of the customary practice in the profession and did not, therefore, constitute "professional malpractice."<sup>9</sup> In this case, the defendant, a title examiner, correctly examined a title but was negligent in failing to attach to a report sent to the plaintiff the last page of the title examination that showed the existence of liens. The statute did not apply because there were no allegations of negligence in the title examination itself. The failure to attach the last page was an act of simple negligence, not an act of malpractice. Where the plaintiff can prove negligence or breach of contract without proof of a customary practice in the profession and the violation thereof, the claim is not one of professional malpractice within the scope of the statute.

#### Methodology

There are two types of pre-suit claim certification systems currently in use. The first, and less onerous, requires the plaintiff or the plaintiff's attorney to file with the court a document (certificate or affidavit) stating primarily that the attorney has consulted with a qualified individual who finds the complaint not lacking merit or substantial justification.<sup>10</sup> The second system requires the plaintiff to submit his claim to a review panel for an advisory, nonbinding opinion on whether the design professional committed malpractice.<sup>11</sup>

#### Certificate of Merit

States that have enacted the certificate of merit review system specify the contents of the document to be filed, who must file it, and when it must be filed. The Colorado statute, for example, requires the plaintiff's attorney to file a "certificate of review" within 60 days following service of the complaint. The certificate shall declare that the attorney has consulted with a person who has expertise in the area of the alleged negligent conduct and that the professional who has been consulted has reviewed the facts and

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*Editor's Note:* This column was written by Paul E. Davis of the National Institute of Construction Law, Inc., in Greensboro, North Carolina, and is based on an article that originally appeared in the February 1994 issue of the *Construction Law Adviser* published by Clark Boardman Callaghan.

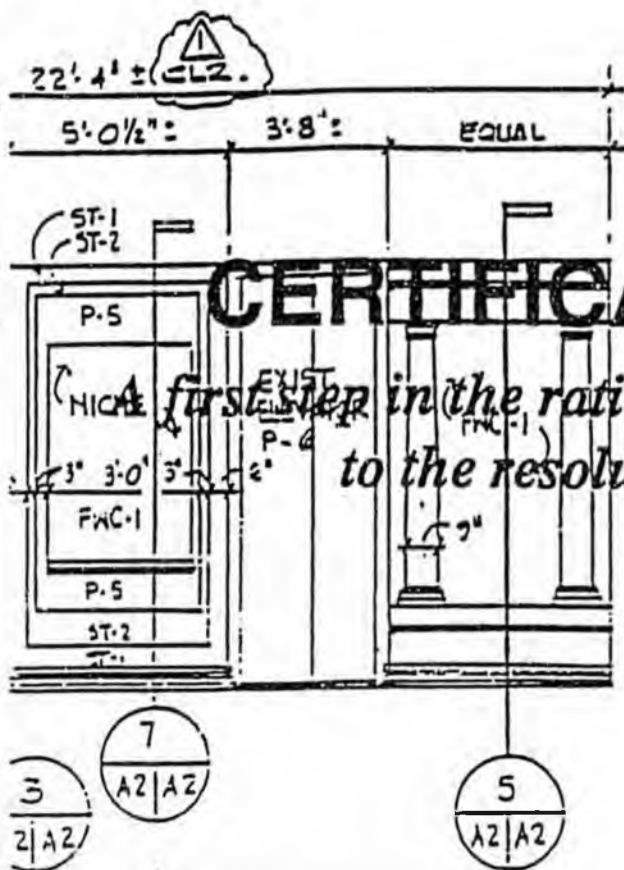
The various state boards of registration shall prepare a list of architects, engineers, surveyors and landscape architects along with their respective specialties who shall than be considered consultants to the panel in their respective fields. Panel members may consult with other legal, technical and insurance consultants. Any consultant called by the panel to appear before the panel shall be paid an allowance for travel and living expenses which may be incurred as a result of such person's appearance before the panel. Such costs shall be paid and apportioned between the parties.

4. Review by the Panel Required; Notice; Presentation of Claims; Termination.

A. Any person or his representative claiming that a tort or breach of contract based on alleged negligence or other violation of professional standards has been committed by the design professional or entities employing such design professionals shall file a claim with [Applicable State Entity] before a suit based on the claim may be commenced in any court of the State. All claims shall be submitted to the [Applicable State Entity] in writing on forms provided by the [Applicable State Entity]. If the claim is presented orally, the [Applicable State Entity] shall reduce the claim to writing. The claimant shall set forth facts upon which the claim is based and shall include the names of all parties against whom the claim is or may be made who are known to the claimant. Within thirty (30) calendar days thereafter, the panel shall give notice of the claim, by certified mail to all design professionals and others who are or may be parties to the claim and shall furnish copies of written claims to such persons. Such notice shall set forth a date, not more than thirty (30) days after mailing the notice, within which any design professional against whom a claim is made may file a written response to the claim, and a date and time, not less than fifteen (15) days following the date for filing a response, for a hearing of the panel. Such notice shall describe the nature and purpose of the panel's proceedings and shall designate the place of the hearing. The times originally set forth in the notice may be changed by mutual agreement between the claimant(s) and respondent(s) or by the chairman, on due notice to all parties, for good cause.

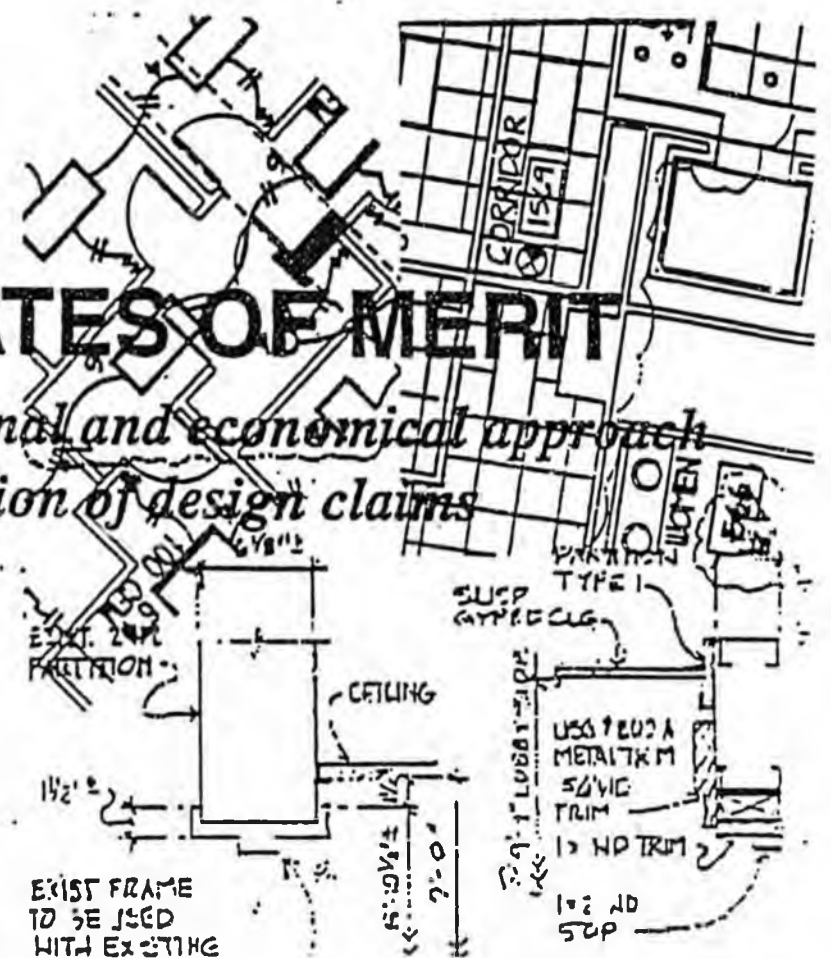
B. At any time, by mutual consent of the parties involved, the [Applicable State Entity] prior to the appointment of the chairman, or the chairman after his appointment, may terminate the proceedings and the claimant may proceed in accordance with Section 8.

5. Design Professional Conciliation Panel Hearing; Fact-Finding; Evidence; Voluntary Settlement. Every claim of a tort or a breach of contract based on negligence or other violation of professional standards shall be heard by the design professional conciliation panel within thirty days after the date of filing a response. No person other than the panel, witnesses and consultants called by the panel, and the persons listed in section 6 shall be present except with the permission of the chairperson. The panel may, in its discretion, conduct an inquiry of a party, witness or consultant without the presence



# CERTIFICATES OF MERIT

*first step in the rational and economical approach to the resolution of design claims*



by BRUCE E. TITUS  
and CHRISTINE M. MCANNEY

**C**ertificates of merit as a mandatory first step in dispute resolution—proponents state that such a requirement minimizes the filing of “frivolous” lawsuits, while opponents argue that the requirement unfairly makes valid lawsuits tougher to file and is a covert way for defense lawyers to figure out, sooner than they ordinarily would, what expert witnesses and theories of negligence the claimant plans to use.

What are certificates of merit and what about them is causing such divergent opinions in the legal profession?

## STATUTORY MEASURES

A certificate of merit statute is largely intended to minimize the filing of “frivolous” lawsuits by requiring a potential claimant to consult a registered and/or licensed design professional on the merits of a design-related claim as a precondition to litigation.

Certificates of merit are required in California,<sup>1</sup> Georgia,<sup>2</sup> and Colorado.<sup>3</sup> In addition, Hawaii<sup>4</sup> has statutorily established a process in which claimants present their claims to a panel of industry experts for a non-binding review.<sup>5</sup>

The certificate of merit concept was originally introduced in connection with litigation involving claims of medical malpractice. Since the mid-1980s at least 12 states have attempted to minimize the filing of frivolous suits against physicians, dentists and others by requiring a colleague to vouch for the validity of a malpractice suit.<sup>6</sup>

California was the first state to require, by statute, a certificate of merit in cases arising out of alleged design defects.<sup>7</sup> Section 411.35 of the California Code of Civil Pro-

cedure provides that in every action, including a cross-complaint for damages or indemnity, arising out of the professional negligence of a person holding a valid architect's certificate, registration as a professional engineer or a land surveyor's license, the plaintiff's attorney shall file a certificate executed by the attorney declaring one of the following:

- That the plaintiff's attorney has reviewed the facts of the case and consulted with at least one architect, professional engineer or land surveyor licensed to practice in the state in the same discipline as the potential defendant who is knowledgeable in the relevant issues involved in the particular action and that the attorney has concluded based upon his review and the consultation that there is “reasonable and meritorious cause” for the filing of such action.<sup>8</sup>
- That the plaintiff's attorney was unable to obtain the required consultation because a statute of limitations would impair the action and that the certificate required could not be obtained before the impairment of the action. If the attorney relies upon Section 411.35(b)(2), the certificate required by (b)(1) shall be filed within 60 days after the filing of the Complaint.<sup>9</sup>
- The plaintiff's attorney may also file a certificate which states that the attorney was unable to obtain the consultation required by (b)(1) because the attorney had made three separate good faith attempts with three separate architects, professional engineers or land surveyors and none of those contacted would agree to such a consultation.<sup>10</sup>

The failure to file a certificate in accordance with the statute is grounds for a demurrer or a motion to strike.<sup>11</sup> Additionally, a violation of the statute may constitute unprofessional

During the hearing and at any time prior to the rendition of an advisory decision pursuant to Section 7, the panel may encourage the parties to settle or otherwise dispose of the claim voluntarily.

6. **Persons Attending Hearings of Panel.** Unless excluded or excused by the panel, the following persons shall attend hearings before the panel:

- A. The party or parties making the claim;
- B. The design professional or professionals against whom the claim is made or representatives thereof, other than legal counsel or other representative, authorized to act for such design professionals; and
- C. Legal counsel of the parties, if any.

7. **Decisions.**

- A. Within fifteen (15) days after the completion of a hearing, the panel shall file a written advisory decision with the director of (Applicable State Entity), who shall thereupon mail copies to all parties concerned, their counsel, the board of registration as applicable, and the representative of each design professional's liability insurance carrier authorized to act for such carrier.
- B. The panel shall have the duty, after joint deliberation to render one or more of the following decisions:
  - 1. The evidence does not support a conclusion that the design professional failed to comply with the appropriate standard of care;
  - 2. The evidence supports a conclusion that the design professional failed to comply with the appropriate standard of care and that such failure is a proximate cause in the alleged damages;
  - 3. The evidence supports a conclusion that the design professional failed to comply with the appropriate standard of care and that such failure is not a proximate cause in the alleged damages; or
  - 4. The evidence indicates that there is a material issue of fact, not requiring an expert opinion, bearing on liability for consideration by a court or jury.
- C. The advisory decision shall be signed by all members of the panel; provided that any member of the panel may file a written concurring or dissenting opinion.

The Conciliation Panel is made up of three individuals: a chairperson selected from persons familiar with and experienced in the tort claims settlement process, appointed by the director of commerce and consumer affairs; an attorney licensed to practice in the state and experienced in trial practice, appointed by the chairperson from a list submitted by the Hawaii Supreme Court; and a design professional licensed to practice in the same discipline as the design professional against whom the claim is made, appointed by the chairperson from a list submitted by the Board of Registration of that profession.<sup>25</sup> Each party to the claim is required to pay \$450 to bring the action to the Panel.<sup>26</sup> The Panel may receive oral and documentary evidence and has the power to subpoena witnesses and documents and hire consultants.<sup>27</sup>

After completion of a hearing, the Panel issues a written advisory decision. The Panel decides the issue of liability and the amount of damages, if any, which should be awarded. The Panel may not, however, recommend punitive damages.<sup>28</sup> The claimant may institute litigation based upon the claim only after a party to the hearing rejects the Panel decision. Neither statements made in the course of the hearing nor any conclusion, finding, recommendation or decision of the Panel is admissible in evidence.<sup>29</sup>

The filing of a claim with the Panel tolls any applicable statute of limitations until 60 days after the decision is delivered to the parties provided, however, that in no case shall the limitation period be tolled for more than 12 months.<sup>30</sup>

Interestingly, the statute permits any party to file (in a court of competent jurisdiction) a motion for a determination that the subject matter of the dispute is unsuitable for review by the Panel.<sup>31</sup> In determining whether the subject matter of a dispute is unsuitable for Panel review, a court may consider:

- The magnitude of the potential award, or any issue of broad public concern raised by the subject matter;<sup>32</sup>
- Problems referred to the court where court regulated discovery is necessary;<sup>33</sup>
- Whether the matter before the Panel is a reasonable or necessary issue to be resolved in pending litigation or involves other matters not related to the statute;<sup>34</sup>
- Whether the design professional's involvement is secondary in importance to involvement of parties not covered by the statute;<sup>35</sup>
- The potential for unreasonable delay in reaching a resolution by referral to the Panel;<sup>36</sup>
- Whether there are too many parties or issues involved to be effectively handled by the Panel process;<sup>37</sup> or
- One or more of the design professionals involved is no longer subject to jurisdiction of the Panel or refuses to participate to the detriment of the remaining parties.<sup>38</sup>

These statutory requirements have been upheld in the courts on the premise that getting a design professional (or doctor in medical malpractice cases) to approve the allegations of a complaint prior to the filing of a lawsuit is no different from using an expert witness at trial. The expert simply offers an opinion a little sooner.<sup>39</sup> Indeed, it is this very feature which benefits the dispute resolution process.

## CONTRACTUAL PROVISION

At present, no statutory provision similar to those described has been enacted in either Virginia, Maryland or the District of Columbia. The absence of such statutory provisions should not, however, deprive the construction industry in these jurisdictions from reaping the benefits

afforded by such statutes. There is no reason why the certificate of merit cannot be injected into the dispute resolution process by way of a contractual agreement. The precondition to the pursuit of a claim premised upon allegedly defective design services would be enforceable, as would any other valid contractual provision. Should a party fail to fulfill the pre-condition as agreed, a Demurrer or Motion to Dismiss would provide a means of asserting the prematurity of the litigation.

This approach is similar to the enforcement of a compulsory arbitration clause. Courts in Virginia,<sup>40</sup> Maryland<sup>41</sup> and the District of Columbia<sup>42</sup> generally recognize and enforce such contractual agreements which establish pre-conditions and/or bars to litigation. Indeed, it is generally accepted that, where the parties to a contract have specified in the contract conditions upon which an action under the contract may be maintained, such conditions must be complied with before an action for breach of contract may be instituted.<sup>43</sup> For example, in *James Julian, Inc. v. State Highway Administration*,<sup>44</sup> the Maryland Court of Special Appeals held that a term in a construction contract which mandated resolution by the engineer of a contractor's claims for additional compensation and breach of contract was a condition precedent to recovery of payment, and the contractor's failure to exhaust the contractual remedies precluded litigation of those claims.

A clause similar to the following placed in the contract between an owner and a design professional would reap the benefits now only available in those states with statutory programs in place.

### Certificate of Merit Clause

The Client shall make no claim (whether directly, in the form of a third-party claim, or for indemnity) against the Design Professional unless the Client shall have first provided the Design Professional with a written certification executed by an independent design professional licensed in [Virginia, Maryland or the District of Columbia] to practice in the same discipline as the Design Professional, specifying those acts or omissions which the certifier contends constitute a violation of the standard of care expected of a Design Professional performing professional services under similar circumstances and upon which the claim will be premised. Such certification shall be provided to the Design Professional thirty (30) days prior to the presentation of, and shall be a precondition to any such claim or the institution of, any arbitration or judicial proceeding.

While similar in some aspects to the statutory requirements discussed above, this clause provides several additional features intended to streamline the dispute resolution process.

First, the clause requires that the certification be provided thirty (30) days prior to the presentation of the claim or the institution of any arbitration or judicial proceeding rather than being filed with the initial pleading in court (or as in Hawaii, with a panel). This will provide a period of time within which the design professional can assess the claims which are about to be asserted against him/her, rebut the matters contained in the certification, and attempt to negotiate a resolution. If this occurs, all parties would be spared the tremendous expenditures of time and expense normally associated with the arbitration or litigation of such claims.

D. This Code section shall not be construed to extend any applicable period of limitation.

9. **Immunity of Panel Members from Liability.** No member of the panel shall be liable in damages for any tort, including, but not limited to, libel, slander, or defamation of character of any party to the panel proceeding for any action taken or any decision, conclusion, finding, or recommendation made by the member while acting as a member of the panel under this (chapter).
10. **Statute of Limitations Tolloed.** The filing of the claim with the panel shall remain tolloed until sixty days after the date the decision of the panel is mailed or delivered to the parties.
11. **Duties to Cooperate; Assessment of Costs and Fees.** It shall be the duty of every person who files a claim with the panel, and every design professional against whom such claim is made, to cooperate with the panel for the purpose of achieving a prompt, fair and just disposition or settlement of such claim, provided that such cooperation shall not prejudice the substantive rights of said persons.

After trial of such claim or settlement of such claim after suit has been filed, any party may apply to the court in which the suit was brought to have the costs of the action assessed against any party for failure to cooperate with the panel. The court may award such costs, or portion thereof, including attorney's fees, witness fees, including those of expert witnesses, costs of discovery and transcribing depositions, and court costs to the party applying therefor.

On application of the [Applicable State Entity], the court may award as a civil penalty against any party all or a portion of the costs and expenses of the panel attributable to a claim involving such persons, if the court finds that such person or persons failed to cooperate with the panel. Such penalty shall be payable to the general fund.

In determining whether any person has failed to cooperate in good faith, the court shall consider, but is not limited, to the following:

- A. The attendance of the persons at the hearing of the panel;
- B. The extent to which representatives of the parties and counsel representing parties came to panel hearings with knowledge of the claims and defenses and authority to negotiate a settlement or other disposition;
- C. The testimony of members of the panel and to the facts of the person's participation in the panel hearing;

## NOTES

1. California Code Civil Procedure, Section 411.35 (1993).
2. Official Code of Georgia Annotated, Section 9-11-9.1 (1992).
3. Colorado Revised Statutes, Section 13-20-601 *et seq.* (1992).
4. Hawaii Code Annotated, Section 672-1 *et seq.* (1992).
5. At various times, similar legislation has been proposed in Florida, Utah, New Jersey, Washington and North Carolina.
6. *The Wall Street Journal*, April 14, 1993, at B1, Col. 1.
7. Section 4-1.35 of the California Code of Civil Procedure was enacted in 1979.
8. Cal. Code Civ. Proc. Section 411.35(b)(1).
9. Cal. Code Civ. Proc. Section 411.35(b)(2).
10. Cal. Code Civ. Proc. Section 411.35(b)(3).
11. Cal. Code Civ. Proc. Section 411.35(g).
12. Cal. Code Civ. Proc. Section 411.35(f).
13. Colorado Revised Statutes 13-20-601, *et seq.*
14. C.R.S. 13-20-602(3)(a)(I) and (II).
15. C.R.S. 13-20-602(4).
16. Official Code of Georgia Annotated Section 9-11-9.1(a).
17. O.C.G.A. Section 9-11-9.1(f).
18. O.C.G.A. Section 9-11-9.1(b).
19. *Housing Auth. v. Greene*, 259 Ga. 435, 383 S.E.2d 867 (1989); *Kneip v. Southern Eng'g Co.*, 260 Ga. 409, 395 S.E.2d 809 (1990) (Dismissal of a claim for engineering malpractice for failure to file the required affidavit would have been unfair, where cases applying this Code section to non-medical malpractice actions had not been decided until after the complaint was filed.)
20. O.C.G.A. Section 9-11-9.1(a).
21. *Barr v. Johnson*, 189 Ga. App. 136, 375 S.E.2d 51, *cert. denied*, 189 Ga. App. 911, 375 S.E.2d 51 (1988); *Housing Authority of Savannah v. Greene*, 259 Ga. 435, 383 S.E.2d 867 (1989).
22. Hawaii Code Annotated Section 672-1, *et seq.*
23. H.R.S. Section 672-2.
24. H.R.S. Section 672-2.5.
25. H.R.S. Section 672-3.
26. H.R.S. Section 672-3(b).
27. H.R.S. Section 672-5.
28. H.R.S. Section 672-7.
29. H.R.S. Section 672-8.
30. H.R.S. Section 672-10.
31. H.R.S. Section 672-2.1.
32. H.R.S. Section 672-2.1(1).
33. H.R.S. Section 672-2.1(2).
34. H.R.S. Section 672-2.1(3).
35. H.R.S. Section 672-2.1(4).
36. H.R.S. Section 672-2.1(5).
37. H.R.S. Section 672-2.1(6).
38. H.R.S. Section 672-2.(7).
39. *See, Housing Authority of Savannah v. Gilpin & Bazemore/Architects & Planners, Inc.*, 191 Ga. App. 400, 381 S.E.2d 550, appeal dismissed, 259 Ga. 435, 383 S.E.2d 867 (1989); *see also, Boigegrain v. Gilbert*, 784 P.2d 849 (Colo. App. 1989).
40. *Piland Corp. v. League Construction*, 238 Va. 187 (1989) (Court enforced arbitration clause in contract and required trial court to stay court proceedings pending arbitration.)
41. *James Julian, Inc. v. State Highway Administration*, 63 Md. App. 74, 492 A.2d 308 (1985).
42. *Clifton D. Mayhew, Inc. v. Mabro Construction, Inc.*, 383 F. Supp. 192 (D.C. D.C. 1974) (Enforcing arbitration clause as a precondition to maintenance of an action.)
43. *U.S. for Use of E & R Const. Co., Inc. v. Guy H. James Constr. Co.*, 390 F. Supp. 1193 (D.C. Tenn.) *aff'd U.S. v. Guy H. James Constr. Co.*, 489 F.2d 756 (6th Cir. 1972); *Vaughn Constr. Co. v. Virginian R. Co.*, 82 W. Va. 658, 97 S.E. 278 (1918); *Small v. Morrison*, 185 N.C. 577, 118 S.E. 12 (1923).
44. 63 Md. App. 74, 492 A.2d 308 (1985).
45. Cal. Code Civ. Proc. Section 411.35(b); C.R.S. Section 13-20-602(1); H.R.S. Section 672-2.5(a).
46. *See, O.C.G.A. Section 9-11-9.1(a)* which requires an "affidavit of an expert competent to testify."
47. *See, O.C.G.A. Section 9-11-9.1(a)* which requires the expert affidavit to set forth specifically at least one act or omission claimed to exist and the factual basis for each such claim.
48. Cal. Code Civ. Proc. Section 411.35(b)(1); H.R.S. Section 672-2.5(a)(1).
49. Colorado Revised Statutes 13-20-602(3)(a)(II).

## About the Authors

Bruce E. Titus, a partner in Venable, Baetjer and Howard, practices in the firm's McLean, Virginia, office. His practice centers around design and structural failure litigation and the general representation and counseling of architects and engineers. He received his B.A. and J.D. from the College of William and Mary where he served as the executive editor of the William and Mary Law Review. He is the current chair of the VSB Construction and Public Contracts Law Section.



Christine M. McAnney, an associate in Venable, Baetjer and Howard, practices in the firm's McLean, Virginia, office. She earned her J.D. in 1989 from George Mason University School of Law where she graduated with distinction. A significant portion of her practice involves the general representation of architects and engineers including litigation in state and federal courts involving design and structural failures.





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## EXECUTIVE SUMMARY

### BACKGROUND

Ralph Andersen & Associates has completed its analysis of section 411.35 of the California Code of Civil Procedure, the Certificate of Merit Law. The purpose of the analysis was to assess the overall effectiveness of the law and to identify opportunities to improve it. This assignment involved a thorough evaluation of the effectiveness of the law and included, as a key component of the study effort, a comprehensive mail survey of architects, engineers, land surveyors, major malpractice insurance companies, and trial attorneys. In addition, related background research and analysis was conducted to provide a complete and accurate assessment of the impact of the Certificate of Merit requirement. The Final Report details the background, objectives, methods, findings, and conclusions resulting from the assignment.

The survey analysis and the associated research conducted to evaluate the effectiveness of the Certificate of Merit Law was designed to answer, among others, the following key questions:

- *Has the law resulted in a reduction in the number of malpractice suits?*
- *Has the law reduced the number of jury trials?*
- *How effective is the law?*
- *How has the law been used?*
- *Should the law be retained?*
- *What changes to the law would make it more effective?*
- *What is being done in other states?*

Additionally, the study included a review of the history of the Certificate of Merit Law, a review of its specific provisions, and an overview of related legislative trends in other states.

## STUDY OBJECTIVES

Ralph Andersen & Associates designed a study process to systematically assess the effectiveness of the Certificate of Merit requirement in terms of its impact on malpractice litigation involving design professionals in California and to ascertain the degree of support for retention of the requirement among those directly impacted by the law. The study was timed to coincide with the expiration date of the legislation and the overriding objective of the project was to develop meaningful and useful data on the law's direct impact on malpractice litigation to assist state legislators in considering amendments to the law, reenactment, and/or repeal of the sunset provision. Corollary objectives of the study included an assessment of the adequacy of the statute and the identification of opportunities to improve the legislation.

## STUDY METHODS

The study process included the participation of those who are involved in the professional malpractice litigation arena including architects, engineers, land surveyors, defense counsel, plaintiffs' lawyers, and insurance companies. Critical components of the workplan included:

- personal interviews with representatives of the design professions, trial attorneys, and providers of professional malpractice insurance
- review of the legislative history and previous analyses of the Certificate of Merit Law
- identification of attorneys active as defense and/or plaintiffs' counsel in malpractice lawsuits against design professionals
- development and distribution of separate survey instruments for design professionals, defense counsel, plaintiffs counsel, and major malpractice insurers
- compilation, tabulation and analysis of survey responses

- review and analysis of pertinent statistics and historical trends in statewide civil litigation, both before and after the enactment of the Certificate of Merit provision
- identification of similar legislative provisions in states other than California.

### FINDINGS AND CONCLUSIONS

The principal findings and conclusions of the study include the following:

1. Fewer malpractice suits are filed against design professionals as a result of the Certificate of Merit Law.
2. More malpractice lawsuits against design professionals are dismissed as a result of the law.
3. The law has resulted in fewer jury trials.
4. The law is generally complied with, and non-compliance appears to be related more to ignorance of the statute than to willful disregard of the law.
5. Design professionals support the Certificate of Merit Law and demonstrate that support through their willingness to consult on the merits of potential malpractice litigation.
6. Costs of the consultation required under the law are not significant.
7. There is overwhelming support for retention of the law among those directly involved in design malpractice litigation.
8. There are opportunities to improve the law to better serve its intended purposes.



the day after it is signed by the governor or on the day after the governor's veto is overridden or on the day after expiration of the period allowed for gubernatorial action by art. II, § 17 of the Alaska Constitution.

(d) An Act which specifies a definite effective date becomes effective at 12:01 a.m., Alaska Standard Time on the date specified.

(e) When the governor allows a bill to become law without signature, the governor shall give written notice of that fact to the legislature. The date of this notice does not affect the date the bill becomes law or the date the Act takes effect.

(f) In this section

(1) "Act" means a bill which has become law;

(2) "bill" means a legislative document proposing an Act;

(3) "becomes effective" means becomes applicable; "effective date" does not mean date of enactment (or date of becoming law), although the two will coincide when a bill which has an immediate-effective-date provision is allowed to become law without the governor's signature;

(4) "becomes law" means is enacted; "enactment" occurs when any one of the following takes place:

(A) a bill which is passed by the legislature is signed by the governor;

(B) the period specified in art. II, § 17 of the Alaska Constitution expires without gubernatorial action;

(C) the legislature overrides the governor's veto of a bill;

(5) "passed by the legislature" means that the required majority of each house of the legislature has taken final action in approving the same version of a bill. (§ 5 ch 62 SLA 1962; am § 8 ch 126 SLA 1966; am § 1 ch 115 SLA 1974; am §§ 1 — 3 ch 6 SLA 1984)

Legislative history reports. — For an analysis of the amendment of this section by ch. 115, SLA 1974 (HB 758 am), see 1974 House Journal, 562—565.

#### NOTES TO DECISIONS

Applied in *Atlantic Richfield Co. v. Petroleum Corp.*, 585 P.2d 534 (Alaska State, 705 P.2d 418 (Alaska 1985)).  
Cited in *North Slope Borough v. Sohio*, 585 P.2d 534 (Alaska 1978).

Sec. 01.10.080. Computation of time. The time in which an act provided by law is required to be done is computed by excluding the first day and including the last, unless the last day is a holiday, and then it is also excluded. (§ 6 ch 62 SLA 1962)

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Ford  
2/21/96

CS FOR HOUSE BILL NO. 414( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

NINETEENTH LEGISLATURE - SECOND SESSION

BY

Offered:  
Referred:

Sponsor(s): REPRESENTATIVE GREEN

A BILL

FOR AN ACT ENTITLED

1 "An Act requiring conciliation panel review prior to filing a civil action against  
2 an architect, engineer, or land surveyor; amending Rule 402, Alaska Rules of  
3 Evidence; and providing for an effective date."

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

5 \* Section 1. AS 08.48.111 is amended to read:

6 Sec. 08.48.111. POWER TO REVOKE, SUSPEND, OR REISSUE  
7 CERTIFICATE. The board may suspend, refuse to renew, or revoke the certificate of  
8 or reprimand a registrant or corporation who is found guilty of (1) fraud or deceit in  
9 obtaining a certificate; (2) gross negligence, incompetence, or misconduct in the practice  
10 of architecture, engineering, or land surveying; or (3) a violation of AS 09.55.750(d), this  
11 chapter, a regulation adopted under this chapter, or the code of ethics or professional  
12 conduct as adopted by the board. The code of ethics or professional conduct shall be  
13 distributed in writing to every registrant and applicant for registration under this chapter.  
14 This publication and distribution of the code of ethics or professional conduct constitutes

1 due notice to all registrants. The board may revise and amend its code and, upon doing  
2 so, shall immediately notify each registrant in writing of the revisions or amendments.  
3 The board may, upon petition of the registrant or corporation, reissue a certificate if a  
4 majority of the members of the board vote in favor of the reissuance.

5 \* Sec. 2. AS 09.55 is amended by adding new sections to read:

6 **ARTICLE 9. MALPRACTICE CLAIM AGAINST DESIGN PROFESSIONAL.**

7 **Sec. 09.55.700. MANDATORY CONCILIATION PANEL REVIEW.** A person  
8 who has a claim against a design professional for civil damages resulting from  
9 professional negligence shall, before filing the claim with the court, submit the claim for  
10 review by the design professional conciliation panel.

11 **Sec. 09.55.710. FILING OF CLAIM; DESIGN PROFESSIONAL**  
12 **CONCILIATION PANEL.** (a) A claim required to be reviewed by a panel under  
13 AS 09.55.700 shall be submitted to the department in writing with the fee required by  
14 (b) of this section. The claimant shall set out facts upon which the claim is based, and  
15 shall include the names of all design professionals against whom the claim is made who  
16 are known to the claimant. Within 10 days after receiving a claim, the department shall  
17 provide notice of the claim and of the deposit requirement under (b) of this section to  
18 all design professionals against whom the claim is made. The notice must include a  
19 date, at least 10 but not more than 20 days after mailing the notice, within which a  
20 design professional against whom a claim is made may file a written response to the  
21 claim.

22 (b) A claim may not be accepted by the department for filing unless the claimant  
23 deposits \$750 with the department when the claim is filed. The design professional shall  
24 deposit \$750 with the department not later than the date specified under (a) of this  
25 section for filing a written response to the claim. If the design professional fails to  
26 deposit the funds required by this subsection, the claimant may proceed with a civil  
27 action in the appropriate court. If a claim is withdrawn or otherwise terminated without  
28 participation by a panel, the department shall return all money collected to the respective  
29 parties.

30 (c) Not more than 15 days after the date for receiving the response from the  
31 design professional under (a) of this section, the department shall form a design  
32 professional conciliation panel to consider the claim. A panel shall consist of one

1 individual acting as the chair, selected from among individuals who are familiar with and  
2 experienced in the tort claims settlement process, one attorney licensed in this state and  
3 experienced in trial practice, and one design professional. The chair shall be appointed  
4 by the department. The attorney panel member shall be appointed by the chair from a  
5 list of not less than 20 attorneys experienced in trial practice submitted annually to the  
6 department by the Alaska Supreme Court. The design professional member shall be  
7 appointed by the chair from a list of not less than 20 design professionals submitted  
8 annually by the State Board of Registration for Architects, Engineers and Land Surveyors  
9 established under AS 08.48. After a panel renders its decision or the claim is otherwise  
10 disposed of, the panel shall be disbanded.

11 (d) The chair shall preside at the meetings of the panel. Panel members shall  
12 be compensated at the rate of \$300 per claim and per diem and travel expenses  
13 authorized for boards and commissions under AS 39.20.180. Panel member  
14 compensation is due when the decision of the panel is submitted to the department. The  
15 department shall pay panel members from funds collected from the claimant and  
16 defendant.

17 (e) Office and meeting space, office equipment, and office supplies for the panel  
18 shall be furnished by the department.

19 (f) The board shall prepare a list of design professionals, along with their  
20 respective specialties, who shall then be considered consultants to the panel in their  
21 respective fields. Panel members may also consult with other legal, technical, and  
22 insurance specialists. A consultant called by the panel to appear before the panel shall  
23 be paid per diem and travel expenses authorized for boards and commissions under  
24 AS 39.20.180. Per diem and travel costs for a consultant shall be paid by the department  
25 from funds provided under AS 09.55.710(b) or 09.55.750(d).

26 Sec. 09.55.720. REVIEW BY PANEL; VOLUNTARY TERMINATION. (a)

27 Within five business days after the panel is formed, the panel shall give notice of the  
28 hearing, by certified mail, to all design professionals and others who are parties to the  
29 claim. Notice of the hearing must include (1) a date and time, at least 15 but not more  
30 than 30 days following the date the notice is mailed, for a hearing by the panel; (2) a  
31 description of the nature and purpose of the panel's proceedings; and (3) the location of  
32 the place for the hearing. The time and location originally set out in the notice may be

1 changed by the chair on due notice to all parties for good cause, provided that a party  
2 requesting the rescheduling of the hearing within seven days of the scheduled date may  
3 be required by the panel chair to compensate the panel in an additional amount equal to  
4 the fee panel members receive under AS 09.55.710(d).

5 (b) At any time, by mutual consent of the parties involved, the department,  
6 before the appointment of the chair, or the chair after the chair's appointment, may  
7 terminate the proceedings and the claimant may proceed in the appropriate court.

8 Sec. 09.55.730. PANEL HEARING PROCEDURES. (a) A person, other than  
9 the panel, witnesses, consultants called by the panel, and the persons listed in  
10 AS 09.55.740, may not be present at a panel hearing except with the permission of the  
11 chair. The panel may, in its discretion, conduct an inquiry of a party, witness, or  
12 consultant without the presence of a party.

13 (b) A panel hearing shall be informal. The panel may record its proceedings for  
14 the use of the panel, but the record may not be made available to the parties and is not  
15 admissible in any other action or proceeding, except that a record of a statement made  
16 at a panel hearing is admissible as provided under AS 09.55.750. The panel may receive  
17 oral or documentary evidence. Questioning of parties, witnesses, and consultants may  
18 be conducted by the panel, and the panel may, in its discretion, permit a party or counsel  
19 for a party to question other parties, witnesses, or consultants. The panel may designate  
20 who, among the parties, shall have the burden of going forward with the evidence with  
21 respect to the issues it may consider. Unless otherwise designated by the panel, when  
22 a design professional's records have been provided for the claimant's review, the burden  
23 of going forward with the evidence shall initially rest with the claimant at the  
24 commencement of a hearing.

25 (c) The panel has the power to require by subpoena the appearance and  
26 testimony of witnesses and the production of documentary evidence. When subpoena  
27 power is utilized, notice shall be given to all parties. The testimony of witnesses may  
28 be taken either orally before the panel or by deposition. In cases of refusal to obey a  
29 subpoena issued by the panel, the panel may invoke the aid of the appropriate court. A  
30 member of the panel or the commissioner may sign subpoenas. A member of the panel  
31 may administer oaths and affirmations, examine witnesses, and receive evidence. The  
32 panel shall attempt to secure the voluntary appearance, testimony, and cooperation of

1 parties, witnesses, and consultants without coercion.

2 (d) At the panel hearing, and in arriving at its opinion, the panel shall consider  
3 statements or testimony of witnesses, construction documents, inspection reports,  
4 calculations, and other records kept in the usual course of the practice of the design  
5 professional without the necessity for other identification or authentication. Statements  
6 of fact or opinion on a subject contained in a published treatise, periodical, book, or  
7 pamphlet, or statements of experts may be considered by a panel without the necessity  
8 of the experts appearing at the hearing. The panel may, upon the application of a party  
9 or upon its own decision, appoint as a consultant an impartial and qualified design  
10 professional or other professional person or expert to testify before the panel or to  
11 conduct necessary professional or expert examination of the claimant or relevant  
12 evidentiary matter and to report to or testify as a witness. A panel consultant may not  
13 be compensated or reimbursed except for per diem and travel expenses authorized for  
14 boards and commissions under AS 39.20.180. Consultant per diem and travel expenses  
15 shall be paid by the department from funds provided under AS 09.55.710(b) or  
16 09.55.750(d). Except for a claim that involves personal injury or death, the parties may  
17 not conduct discovery. Discovery in a claim involving personal injury or death shall be  
18 conducted as provided under the Alaska Rules of Civil Procedure.

19 (e) During a panel hearing and at any time before the release of an advisory  
20 decision under AS 09.55.750, the panel may encourage the parties to voluntarily settle  
21 or otherwise dispose of the case.

22 Sec. 09.55.740. REQUIRED PANEL ATTENDANCE. Unless excluded or  
23 excused by the panel, the following persons shall attend hearings before the panel:

24 (1) the party or parties making the claim;

25 (2) any design professional against whom the claim is made or a  
26 representative of the design professional, other than counsel, authorized to act for the  
27 design professional; and

28 (3) counsel representing the parties, if any.

29 Sec. 09.55.750. PANEL DECISIONS; ADDITIONAL PAYMENTS. (a) Except  
30 as provided under (c) of this section, within 15 days after the completion of a hearing,  
31 a panel shall file a written advisory decision on the claim with the commissioner. The  
32 commissioner shall mail copies to all parties concerned, counsel of the parties concerned,

1 the board, and the representative of each design professional's liability insurance carrier  
2 authorized to act for the carrier. The panel shall state its conclusions in writing. The  
3 panel may not decide the issue of damages.

4 (b) Each member of the panel shall sign the decision, and the decision may  
5 include concurring or dissenting opinions. The decision must contain one of the  
6 following conclusions:

7 (1) the evidence does not indicate that the design professional failed to  
8 comply with the applicable standard of care;

9 (2) the evidence does indicate that the design professional failed to  
10 comply with the applicable standard of care and that failure is the proximate cause of the  
11 alleged damages;

12 (3) the evidence indicates that the design professional failed to comply  
13 with the applicable standard of care, but the failure is not a proximate cause of the  
14 alleged damages; or

15 (4) the evidence indicates that there is a material issue of fact, not  
16 requiring an expert opinion, bearing on liability that should be considered by a court or  
17 jury.

18 (c) The advisory decision required by this section need not be filed if the claim  
19 is settled or disposed of before the decision is written or filed.

20 (d) Before filing an advisory decision as required under (a) of this section, the  
21 chair of the panel shall determine if sufficient funds have been deposited with the  
22 department to pay all expenses allowed under AS 09.55.710 and 09.55.730. If funds on  
23 deposit are insufficient, the parties to the conciliation proceeding shall contribute  
24 sufficient funds to pay all panel expenses as provided under (e) of this section. A party  
25 shall deposit the required funds within 10 days after receiving notice of the deposit  
26 requirement. A panel decision may not be released until the department has sufficient  
27 funds to pay all panel expenses.

28 (e) If the decision of the panel contains the conclusion described

29 (1) under (b)(1) of this section, the claimant shall deposit all additional  
30 funds required under (d) of this section;

31 (2) under (b)(2) of this section, the design professional shall deposit all  
32 additional funds required under (d) of this section; and -

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(3) under (b)(3) or (4) of this section, the parties to the conciliation proceeding shall, in equal shares, deposit additional funds required under (d) of this section.

(f) A design professional who fails to deposit funds as required under (e) of this section has committed misconduct in the practice for which the design professional is licensed, and the department shall provide notice of the misconduct to the board.

(g) If a claimant fails to deposit funds as required under (e) of this section, the department shall impose a civil penalty of \$1,000 against the claimant.

Sec. 09.55.760. SUBSEQUENT LITIGATION; EXCLUDED EVIDENCE. A claimant may institute litigation based on a claim heard by a panel in an appropriate court only after a party to the design professional conciliation panel hearing rejects the decision of the panel. A statement made in the course of the hearing of the panel is admissible in a subsequent civil action to the extent allowed under the Alaska Rules of Evidence. A decision, conclusion, finding, or recommendation of the panel may not be admitted into evidence in a subsequent civil action, nor may a party to the panel hearing, or the counsel or other representative of a party, refer to or comment on a decision, conclusion, finding, or recommendation of the panel in an opening statement, an argument, or at any other time, to the court or jury, except that a decision, conclusion, finding, or recommendation may be admissible under AS 09.55.790(b).

Sec. 09.55.770. PANEL MEMBER IMMUNITY. A member of a panel is not liable for civil damages for action taken or for a decision, conclusion, finding, or recommendation made by the member while acting as a member of a panel.

Sec. 09.55.780. STATUTE OF LIMITATIONS TOLLED; LACK OF A DECISION IN SIX MONTHS. Notwithstanding any other provision of law, the filing of a claim with the department tolls any applicable statute of limitation until 30 days after the date the decision of the panel is mailed or delivered to the parties. However, the applicable statute of limitations may not be tolled for more than six months. If a decision by the panel is not reached within six months after the claim is filed, the applicable statute of limitations shall resume running and the party filing the claim may commence a suit based on the claim in the appropriate court.

Sec. 09.55.790. DUTY TO COOPERATE; ASSESSMENT OF COSTS AND FEES. (a) It is the duty of a person who files a claim with the panel and of a design

1 professional against whom a claim is made to cooperate with the panel for the purpose  
2 of achieving a prompt, fair, and just disposition or settlement of a claim, provided that  
3 the cooperation may not prejudice the substantive rights of the person.

4 (b) On application of the department, the court may award as a civil penalty  
5 against a party all or a portion of the costs and expenses of the panel attributable to a  
6 claim involving the person if the court finds that the person failed to cooperate with the  
7 panel.

8 Sec. 09.55.800. COMPUTATION OF TIME. The provisions of AS 01.10.080  
9 apply to AS 09.55.700 - 09.55.820 for purposes of calculating applicable time periods.

10 Sec. 09.55.810. ANNUAL REPORT. The department shall prepare annually,  
11 20 days before the convening of a regular legislative session, a report containing the  
12 department's evaluation of the operation and effects of AS 09.55.700 - 09.55.820. The  
13 department shall notify the legislature that the report is available. The report must  
14 include a summary of claims brought before a panel and the disposition of those claims.

15 Sec. 09.55.820. DEFINITIONS. In AS 09.55.700 - 09.55.820,

16 (1) "board" means the State Board of Registration for Architects,  
17 Engineers and Land Surveyors;

18 (2) "commissioner" means the commissioner of commerce and economic  
19 development;

20 (3) "department" means the Department of Commerce and Economic  
21 Development;

22 (4) "design professional" means an architect, engineer, or land surveyor  
23 licensed under AS 08.48;

24 (5) "panel" means the design professional conciliation panel;

25 (6) "professional negligence" means a negligent act or omission by a  
26 design professional in providing professional services;

27 (7) "professional services" means services provided by a design  
28 professional that are within the scope of the services for which the design professional  
29 is licensed as an architect, engineer, or land surveyor.

30 \* Sec. 3. AS 09.55.760, enacted by sec. 2 of this Act, has the effect of amending Rule 402,  
31 Alaska Rules of Evidence, by providing that a decision, conclusion, finding, or recommendation  
32 of the panel, and references to the decision, conclusion, finding, or recommendation, are not

1 admissible in a subsequent civil action except for the purpose of assessing a penalty under  
2 AS 09.55.790(b).

3 \* Sec. 4. This Act applies to causes of action that accrue on or after the effective date of this  
4 Act.

5 \* Sec. 5. This Act takes effect July 1, 1996.

9-LS1508V  
Ford  
1/30/96

CS FOR HOUSE BILL NO. 414( )  
IN THE LEGISLATURE OF THE STATE OF ALASKA  
NINETEENTH LEGISLATURE - SECOND SESSION

BY

Offered:  
Referred:

Sponsor(s): REPRESENTATIVE GREEN

A BILL

FOR AN ACT ENTITLED

1 "An Act requiring conciliation panel review prior to filing a civil action against  
2 an architect, engineer, or land surveyor; amending Rules 402 and 613, Alaska  
3 Rules of Evidence; and providing for an effective date."

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

5 \* Section 1. AS 09.55 is amended by adding new sections to read:

6 ARTICLE 9. MALPRACTICE CLAIM AGAINST DESIGN PROFESSIONAL.

7 Sec. 09.55.700. MANDATORY CONCILIATION PANEL REVIEW;  
8 JUDICIAL DETERMINATION OF EXCEPTIONS. (a) Except as provided under (b)  
9 and (d) of this section, a person who has a claim against a design professional for civil  
10 damages resulting from professional negligence shall, before filing the claim with the  
11 court, submit the claim for review by the design professional conciliation panel.

12 (b) A party or a person served with notice of a claim submitted to a panel  
13 under (a) of this section may file a motion with the appropriate court for a  
14 determination that the subject matter of the dispute is unsuitable for review by a panel.

*Proposed CS*

1 For purposes of this subsection, it is presumed that a claim is unsuitable for review by  
2 a panel if the claim arises out of a third-party action in pending litigation. An  
3 application allowed by this subsection may not be filed within 10 days of the date on  
4 which the claim is scheduled to be heard by a panel or after a hearing by a panel has  
5 occurred.

6 (c) In determining whether the subject matter of a dispute is unsuitable for  
7 disposition by a panel, a court may consider

8 (1) the magnitude of the potential award, or any issue of broad public  
9 concern raised by the subject matter underlying the dispute;

10 (2) problems referred to the court where court regulated discovery is  
11 necessary;

12 (3) the fact that the matter in dispute is a reasonable or necessary issue  
13 to be resolved in pending litigation and involves other matters not covered by or  
14 related to the claim;

15 (4) the fact that the design professional's involvement in the matter is  
16 distinctly secondary in importance to the involvement of parties not covered by this  
17 section;

18 (5) the potential for unreasonable delays in reaching a resolution of the  
19 matter by its referral to a panel; or

20 (6) the fact that there are too many parties or issues involved to be  
21 effectively handled by the informal processes of AS 09.55.700 - 09.55.810.

22 (d) A claim is not required to be submitted to the panel if the design  
23 professional against whom the claim is asserted agrees, within 20 days after receiving  
24 notice of the claim, to waive review by the panel. If a claim is asserted against more  
25 than one design professional and one or more design professionals refuse to waive  
26 panel review, panel review may not be waived and the claim shall proceed as provided  
27 under AS 09.55.700 - 09.55.810.

28 Sec. 09.55.710. FILING OF CLAIM; DESIGN PROFESSIONAL  
29 CONCILIATION PANEL. (a) A claim required to be reviewed by a panel under  
30 AS 09.55.700(a) shall be submitted to the department in writing with the fee required  
31 by (b) of this section. The claimant shall set out facts upon which the claim is based,

1 and shall include the names of all parties against whom the claim is made who are  
2 known to the claimant.

3 (b) A claim may not be accepted by the department for filing unless the  
4 claimant deposits \$750 with the department when the claim is filed. The design  
5 professional shall deposit \$750 with the department within 20 days of being served  
6 with the claim. If the design professional fails to deposit the funds required by this  
7 subsection, the claimant may proceed with a civil action in the appropriate court. If  
8 a claim is withdrawn, determined to be unsuitable for proceedings under AS 09.55.700  
9 - 09.55.810, or otherwise terminated without participation by a panel, the department  
10 shall return all money collected to the respective parties.

11 (c) Upon receiving the claim and fee from the claimant, the department shall  
12 form a design professional conciliation panel to consider the claim. A panel shall  
13 consist of one individual acting as the chair, selected from among individuals who are  
14 familiar with and experienced in the tort claims settlement process, one attorney  
15 licensed in this state and experienced in trial practice, and one design professional.  
16 The chair shall be appointed by the department. The attorney panel member shall be  
17 appointed by the chair from a list of not less than 20 attorneys experienced in trial  
18 practice submitted annually to the department by the Alaska Supreme Court. The  
19 design professional member shall be appointed by the chair from a list of not less than  
20 20 design professionals submitted annually by the State Board of Registration for  
21 Architects, Engineers and Land Surveyors established under AS 08.48.

22 (d) After a panel renders its decision or the claim is otherwise disposed of, the  
23 panel shall be disbanded. A panel shall review the claim and render findings and  
24 advisory opinions on the issue of liability.

25 (e) The chair shall preside at the meetings of the panel. Panel members shall  
26 be compensated at the rate of \$300 per claim and per diem and travel expenses  
27 authorized for boards and commissions under AS 39.20.180. Panel member  
28 compensation is due when the decision of the panel is submitted to the department.  
29 The department shall pay panel members from funds collected from the claimant and  
30 defendant.

31 (f) Office and meeting space, office equipment, and office supplies for the

1 panel shall be furnished by the department.

2 (g) The board shall prepare a list of design professionals, along with their  
3 respective specialties, who shall then be considered consultants to the panel in their  
4 respective fields. Panel members may also consult with other legal, technical, and  
5 insurance specialists. A consultant called by the panel to appear before the panel shall  
6 be paid per diem and travel expenses authorized for boards and commissions under  
7 AS 39.20.180. Per diem and travel costs for a consultant shall be paid by the  
8 department.

9 Sec. 09.55.720. REVIEW BY PANEL; VOLUNTARY TERMINATION. (a)

10 Within five business days after the panel is formed, the panel shall give notice of the  
11 claim, by certified mail, to all design professionals and others who are parties to the  
12 claim, and shall furnish copies of written claims to each person. Notice of the claim  
13 must include (1) a date, not more than 20 days after mailing the notice, within which  
14 a design professional against whom a claim is made may file a written response to the  
15 claim; (2) a date and time, not less than 30 days following the date for filing a  
16 response, for a hearing by the panel; (3) a description of the nature and purpose of the  
17 panel's proceedings; and (4) the location of the place for the hearing. The time and  
18 location originally set out in the notice may be changed by the chair on due notice to  
19 all parties for good cause, provided that a party requesting the rescheduling of the  
20 hearing within seven days of the scheduled date may be required by the panel chair  
21 to compensate the panel in an additional amount equal to the fee panel members  
22 receive under AS 09.55.710(e).

23 (b) At any time, by mutual consent of the parties involved, the department,  
24 before the appointment of the chair, or the chair after the chair's appointment, may  
25 terminate the proceedings and the claimant may proceed in the appropriate court.

26 Sec. 09.55.730. PANEL HEARING PROCEDURES. (a) A person, other than  
27 the panel, witnesses, consultants called by the panel, and the persons listed in  
28 AS 09.55.740, may not be present at a panel hearing except with the permission of the  
29 chair. The panel may, in its discretion, conduct an inquiry of a party, witness, or  
30 consultant without the presence of a party.

31 (b) A panel hearing shall be informal. The panel may record its proceedings

1 for the use of the panel, but the record may not be made available to the parties. The  
2 panel may receive oral or documentary evidence. Questioning of parties, witnesses,  
3 and consultants may be conducted by the panel, and the panel may, in its discretion,  
4 permit a party or counsel for a party to question other parties, witnesses, or  
5 consultants. The panel may designate who, among the parties, shall have the burden  
6 of going forward with the evidence with respect to the issues it may consider. Unless  
7 otherwise designated by the panel, when a design professional's records have been  
8 provided for the claimant's review, the burden of going forward with the evidence  
9 shall initially rest with the claimant at the commencement of a hearing.

10 (c) The panel has the power to require by subpoena the appearance and  
11 testimony of witnesses and the production of documentary evidence. When subpoena  
12 power is utilized, notice shall be given to all parties. The testimony of witnesses may  
13 be taken either orally before the panel or by deposition. In cases of refusal to obey  
14 a subpoena issued by the panel, the panel may invoke the aid of the appropriate court.  
15 A member of the panel or the commissioner may sign subpoenas. A member of the  
16 panel may administer oaths and affirmations, examine witnesses, and receive evidence.  
17 The panel shall attempt to secure the voluntary appearance, testimony, and cooperation  
18 of parties, witnesses, and consultants without coercion.

19 (d) At the panel hearing, and in arriving at its opinion, the panel shall consider  
20 statements or testimony of witnesses, construction documents, inspection reports,  
21 calculations, and other records kept in the usual course of the practice of the design  
22 professional without the necessity for other identification or authentication. Statements  
23 of fact or opinion on a subject contained in a published treatise, periodical, book, or  
24 pamphlet, or statements of experts may be considered by a panel without the necessity  
25 of the experts appearing at the hearing. The panel may, upon the application of a  
26 party or upon its own decision, appoint as a consultant an impartial and qualified  
27 design professional or other professional person or expert to testify before the panel  
28 or to conduct necessary professional or expert examination of the claimant or relevant  
29 evidentiary matter and to report to or testify as a witness. A panel consultant may not  
30 be compensated or reimbursed except for per diem and travel expenses authorized for  
31 boards and commissions under AS 39.20.180. Consultant per diem and travel expenses

1 shall be paid by the department from funds provided under AS 09.55.710(b). The  
2 parties may not conduct discovery.

3 (e) During a panel hearing and at any time before the release of an advisory  
4 decision under AS 09.55.750, the panel may encourage the parties to voluntarily settle  
5 or otherwise dispose of the case.

6 Sec. 09.55.740. REQUIRED PANEL ATTENDANCE. Unless excluded or  
7 excused by the panel, the following persons shall attend hearings before the panel:

8 (1) the party or parties making the claim;

9 (2) the design professional against whom the claim is made or a  
10 representative of the design professional, other than counsel, authorized to act for the  
11 design professional; and

12 (3) counsel representing the parties, if any.

13 Sec. 09.55.750. PANEL DECISIONS. (a) Except as provided under (c) of  
14 this section, within 15 days after the completion of a hearing, a panel shall file a  
15 written advisory decision on the claim with the commissioner. The commissioner shall  
16 mail copies to all parties concerned, counsel of the parties concerned, the board, and  
17 the representative of each design professional's liability insurance carrier authorized  
18 to act for the carrier. The panel shall decide the issue of liability and state its  
19 conclusions in writing. The panel may not decide the issue of damages.

20 (b) A panel decision shall be signed by all members of the panel. A member  
21 of the panel may file a written concurring or dissenting opinion.

22 (c) The advisory decision required by this section need not be filed if the claim  
23 is settled or disposed of before the decision is written or filed.

24 (d) Before filing an advisory decision as required under (a) of this section, the  
25 chair of the panel shall determine if sufficient funds have been deposited with the  
26 department to pay all expenses allowed under AS 09.55.710 and 09.55.730. If funds  
27 on deposit are insufficient, the parties to the conciliation proceeding shall in  
28 proportionate shares deposit sufficient funds to pay all panel expenses. A panel  
29 decision may not be released until the department has sufficient funds to pay all panel  
30 expenses.

31 Sec. 09.55.760. SUBSEQUENT LITIGATION; EXCLUDED EVIDENCE. A

1 claimant may institute litigation based on a claim heard by a panel in an appropriate  
2 court only after a party to the design professional conciliation panel hearing rejects the  
3 decision of the panel. A statement made in the course of the hearing of the panel or  
4 a decision, conclusion, finding, or recommendation of the panel on the issue of liability  
5 or on the issue of damages may not be admitted into evidence in a subsequent civil  
6 action, nor may a party to the panel hearing, or the counsel or other representative of  
7 a party, refer or comment in an opening statement, an argument, or at any other time,  
8 to the court or jury, except that a statement, decision, conclusion, finding, or  
9 recommendation may be admissible under AS 09.55.790.

10 Sec. 09.55.770. PANEL MEMBER IMMUNITY. A member of a panel is  
11 not liable for civil damages for action taken or for a decision, conclusion, finding, or  
12 recommendation made by the member while acting as a member of a panel.

13 Sec. 09.55.780. STATUTE OF LIMITATIONS TOLLED; LACK OF A  
14 DECISION IN ONE YEAR. Notwithstanding any other provision of law, the filing  
15 of a claim with the department tolls any applicable statute of limitation until 60 days  
16 after the date the decision of the panel is mailed or delivered to the parties. However,  
17 the applicable statute of limitations may not be tolled for more than 12 months. If a  
18 decision by the panel is not reached within 12 months after the claim is filed, the  
19 applicable statute of limitations shall resume running and the party filing the claim  
20 may commence a suit based on the claim in the appropriate court.

21 Sec. 09.55.790. DUTY TO COOPERATE; ASSESSMENT OF COSTS AND  
22 FEES. (a) It is the duty of a person who files a claim with the panel and of a design  
23 professional against whom a claim is made to cooperate with the panel for the purpose  
24 of achieving a prompt, fair, and just disposition or settlement of a claim, provided that  
25 the cooperation may not prejudice the substantive rights of the person.

26 (b) On application of the department, the court may award as a civil penalty  
27 against a party all or a portion of the costs and expenses of the panel attributable to  
28 a claim involving the person if the court finds that the person failed to cooperate with  
29 the panel.

30 Sec. 09.55.800. ANNUAL REPORT. The department shall prepare annually,  
31 20 days before the convening of a regular legislative session, a report containing the

1 department's evaluation of the operation and effects of AS 09.55.700 - 09.55.810. The  
2 department shall notify the legislature that the report is available. The report must  
3 include a summary of claims brought before a panel and the disposition of those  
4 claims.

5 Sec. 09.55.810. DEFINITIONS. In AS 09.55.700 - 09.55.810,

6 (1) "board" means the State Board of Registration for Architects,  
7 Engineers and Land Surveyors;

8 (2) "commissioner" means the commission of commerce and economic  
9 development;

10 (3) "department" means the Department of Commerce and Economic  
11 Development;

12 (4) "design professional" means an architect, engineer, or land surveyor  
13 licensed under AS 08.48;

14 (5) "panel" means the design professional conciliation panel;

15 (6) "professional negligence" means a negligent act or omission by a  
16 design professional in providing professional services;

17 (7) "professional services" means services provided by a design  
18 professional that are within the scope of the services for which the design professional  
19 is licensed as an architect, engineer, or land surveyor.

20 \* Sec. 2. AS 09.55.760, enacted by sec. 1 of this Act, has the effect of amending Alaska  
21 Rule of Evidence 402, by providing that a statement at a conciliation panel hearing, or a  
22 decision, conclusion, finding, or recommendation of the panel is not admissible in a  
23 subsequent civil action.

24 \* Sec. 3. AS 09.55.760, enacted by sec. 1 of this Act, has the effect of amending Alaska  
25 Rule of Evidence 613, by prohibiting the use of prior statements made by a witness in a civil  
26 action, when the prior statements were made at a conciliation panel hearing.

27 \* Sec. 4. This Act applies to causes of action that accrue on or after the effective date of  
28 this Act.

29 \* Sec. 5. This Act takes effect July 1, 1996.



## Alaska Action Trust

P.O. Box 102323 • Anchorage, Alaska 99510  
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### FAX TRANSMITTAL

TO: House Labor & Commerce  
Attention: George Dozier  
FAX #465-2189

FROM: Debra C. Gravo  
Executive Director

DATE: January 29, 1996

RE: HB 414, Mandatory Mediation/Design Professionals,  
Position Paper by the Alaskan trial lawyers

\*\*\*\*\*

George: What follows is our one-page position paper on HB 414, being heard before the House Labor & Commerce committee Wednesday, January 31st, 3:00 p.m. I would ask that this position paper be made part of the bill file and distributed to committee members prior to the hearing.

Kirsten Tinglum, chair of the Alaska Action Trust, is travelling to Juneau Wednesday, January 31st, to testify before the committee on HB 414. Should there be any changes in the hearing schedule of significance to her appearance, please advise ASAP.

Thank you kindly.



## Alaska Action Trust

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### Analysis of HB 414/SB 119 Mandatory Mediation/Design Professionals

This position paper addresses HB 414 and SB 119, "An Act requiring conciliation panel review in a civil action against an architect, engineer, or land surveyor." This special interest legislation is unwarranted and unwise. It requires another stage of litigation before suit can be brought against architects, engineers, or surveyors for their negligence.

The bill imposes a duty on the plaintiff at the outset of his or her case to submit his or her claims to a design professional conciliation panel. The panel is to be comprised of a mediator, an attorney and a design professional. After a mini-trial, the panel would issue an advisory decision to the court and the parties. If the decision of the panel is rejected by any party, the matter then proceeds to trial in court. The panel's decision would not be admissible at the trial.

In essence, HB 414 and SB 119 require the parties to engage in a mini-trial and forced mediation before discovery. At this early stage, most of the information will be in the hands of the defendant, and the mini-trial will be unfair to the plaintiff.

Mediation makes sense, of course, as a way of resolving litigation. However, the plaintiff should be entitled to discovery before entering into the mediation process.

# Alaska State Legislature

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VICE CHAIR, JUDICIARY COMMITTEE  
MEMBER, STATE AFFAIRS COMMITTEE

FINANCE SUBCOMMITTEES  
DEPT OF NATURAL RESOURCES  
DEPT OF COMMERCE & ECONOMIC DEVELOPMENT  
DEPT OF ENVIRONMENTAL CONSERVATION

## Representative Joe Green

District 10

### Sponsor Statement

#### HB 414 - Mediation Process for Claims Against Design Professionals

HB 414 establishes a dispute mediation process for claims against design professionals. The goal of the new process is to determine if a claim has merit, and if so, to facilitate a settlement, before going to court.

Under terms of the bill, the Department of Commerce will impanel a three-member volunteer board to review the claim. Following an informal hearing the board will issue a written finding of liability, or "certificate of merit", that can be used in the settlement process. The cost of the proceeding is borne by the parties. Either party can settle at any stage of the process.

Similar legislation has been enacted in Arizona, California, Colorado, Georgia, Hawaii, Kansas, and New Jersey.

A study to determine the effectiveness of a similar law in California, passed in 1979, found that fewer lawsuits are filed, and more malpractice suits are settled before they reach the jury.

HB414 is an attempt to keep frivolous lawsuits out of the court system. In several other states, the mediation process has provided a low-cost alternative to litigation and I believe it can work here in Alaska as well.

*Sponsor*

**HB**

**416**

**HB 416(STA) - RELATING TO FEES CHARGED BY STATE AGENCIES - SECTIONAL**

Section	Department	Brief Description	Revenues	
			FY97	Future Years
1	Commerce & Economic Dev	Allows the department to charge costs of hearings related to the real estate surety fund.  This clarifies and simplifies the real estate surety fund statutes by allowing all hearing costs to be charged to the real estate surety fund.	3.0	
2	Education	Allows the department to set fees by regulation for applications to operate and for agents' permits related to postsecondary education institutions  This will allow the corporation to cover costs of this process by allocating these costs across the regulated population. Charges will be based on a sliding scale tied to the tuition/fee revenues of each institution and will set minimums and maximums.	62.5	123.2
3	Governor	Allows the Human Rights Commission to charge fees for education and training services and for materials provided to the public  The Commission has had to direct more of its limited resources towards enforcement and less to training in recent years. This section will allow the Commission to charge for training to deal with this unmet need.	5.1	
4	Labor	Requires self-insured employers to pay a fee to cover the costs of activities related to Workers' Compensation claims processing. Exempts political subdivisions of the state. 4% user fee on all workers compensation costs paid during the previous calendar year. This is similar to the premium tax paid by employers' for WC policies. This fee would cover the cost of processing & hearings on claim disputes before the commission.	367.7	
5	Natural Resources	Allows the department to charge a fee for direct costs of evaluating or auditing an application for exploration credits for mine development.		
6	Transportation & Public Facilities	Allows the department to charge for the use of state marine or harbor facilities and requires municipalities that lease state marine or harbor facilities to charge comparable fees and account for those fees separately.		
7	Commerce & Economic Dev	Increases business license fees charged by Occupational Licensing from \$25 per year to \$75 every 2 years	841.3	

# FISCAL NOTE

STATE OF ALASKA  
1996 LEGISLATIVE SESSION

BILL NO. CSHB 416(STA)

Revision Date: \_\_\_\_\_  
 Title: Omnibus State Fees &  
 Cost Assessments  
 Sponsor: House Rules  
 Requestor: House L&C

Department Affected: Labor  
 BRU: Workers' Compensation  
 Component: Workers' Compensation

COMPONENT SERIAL NO. 344

**EXPENDITURES/REVENUES:** (Thousands of Dollars)

OPERATING	FY 97	FY 98	FY 99	FY 00	FY 01	FY 02
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
<b>TOTAL OPERATING</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

<b>CAPITAL</b>						
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<b>CHANGE IN REVENUE</b>	<b>367.7</b>	<b>367.7</b>	<b>367.7</b>	<b>367.7</b>	<b>367.7</b>	<b>367.7</b>
<b>FUND SOURCE #</b>	<b>1005</b>	<b>1005</b>	<b>1005</b>	<b>1005</b>	<b>1005</b>	<b>1005</b>

**FUNDING:** (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	(367.7)	(367.7)	(367.7)	(367.7)	(367.7)	(367.7)
1005 GF/Program Receipt	367.7	367.7	367.7	367.7	367.7	367.7
1006 GF/MHTIA						
Other						
<b>TOTAL</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

**POSITIONS:**

FULL-TIME						
PART-TIME						
TEMPORARY						

Estimate of current year (FY96) impact: \$ None

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

Section 4 of the bill establishes a 4% Workers' Compensation Self-Insured Assessment on all self-insured employers excluding the state and political subdivisions of the state. The bill would have no cost impact on the Worker's Compensation Division. The assessment on self-insured employers is similar to the premium tax paid by all insured employers. The new program receipts generated would offset existing general funds appropriated to the Division. An effective date of January 1, 1997 is assumed.

Prepared by: Paul Grossi, Director *Paul Grossi* Phone: 465-2790

Division: Workers' Compensation Date: 4/16/96

Approved by Commissioner: Tom Cashen, Commissioner *For Requester*

Agency: Department of Labor Date: 4/16/96

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# CORRECTION

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



Rev. 6/98

Central Microfilm Services  
Department of Education  
State of Alaska

## HB 416(STA) - RELATING TO FEES CHARGED BY STATE AGENCIES - SECTIONAL

Section	Department	Brief Description	Revenues	
			FY97	Future Years
1	Commerce & Economic Dev	<p>Allows the department to charge costs of hearings related to the real estate surety fund.</p> <p>This clarifies and simplifies the real estate surety fund statutes by allowing all hearing costs to be charged to the real estate surety fund.</p>	3.0	
2	Education	<p>Allows the department to set fees by regulation for applications to operate and for agents' permits related to postsecondary education institutions</p> <p>This will allow the corporation to cover costs of this process by allocating these costs across the regulated population. Charges will be based on a sliding scale tied to the tuition/fee revenues of each institution and will set minimums and maximums.</p>	62.5	123.2
3	Governor	<p>Allows the Human Rights Commission to charge fees for education and training services and for materials provided to the public</p> <p>The Commission has had to direct more of its limited resources towards enforcement and less to training in recent years. This section will allow the Commission to charge for training to deal with this unmet need.</p>	5.1	
4	Labor	<p>Requires self-insured employers to pay a fee to cover the costs of activities related to Workers' Compensation claims processing. Exempts political subdivisions of the state.</p> <p>4% user fee on all workers compensation costs paid during the previous calendar year. This is similar to the premium tax paid by employers' for WC policies. This fee would cover the cost of processing &amp; hearings on claim disputes before the commission.</p>	367.7	
5	Natural Resources	<p>Allows the department to charge a fee for direct costs of evaluating or auditing an application for exploration credits for mine development.</p>		
6	Transportation & Public Facilities	<p>Allows the department to charge for the use of state marine or harbor facilities and requires municipalities that lease state marine or harbor facilities to charge comparable fees and account for those fees separately.</p>		
7	Commerce & Economic Dev	<p>Increases business license fees charged by Occupational Licensing from \$25 per year to \$75 every 2 years</p>	841.3	

The business license fees have not been changed since statehood. The increased revenues will help close the fiscal gap. Occupational licensing collects the current fees on a biannual basis.

8	Governor	<p>Allows the Division of Governmental Coordination to charge fees for federal consistency determinations under the Alaska Coastal Management Program. Consistency review process provides a consolidated state response to coastal development projects and related state and federal permit applications. This will allow DGC to charge industry for large and medium size projects.</p> <p>The funds will be used to assemble a team to facilitate early design and review of particular projects. Projects could include forest products manufacturing facilities, oil &amp; gas development projects and mine development in the coastal areas.</p>	0.0	32.5
9	Military & Veterans' Affairs	<p>Allows the department to charge fees for emergency management response training</p> <p>Municipalities, non-profits and for-profit organizations are interested in receiving training on emergency preparedness. The fees will cover travel and facility rental necessary to conduct the training. The trainer is funded from federal FEMA funds.</p>	0.0	4.0
10	Environmental Conservation	<p>Allows the department to charge fees for pesticide and broadcast chemical use and for review of subdivision plans for sewage waste disposal or treatment facilities</p> <p>The department will set and collect fees for review of subdivision plans for sewage disposal or treatment. The fees will replace GF transferred from the domestic wastewater program. This will fund technical staff conducting reviews and supporting costs.</p>	320.0	
11 & 12	Transitional language			
13 - 15	Effective dates			
			TOTAL	1,599.6
				159.7

# FISCAL NOTE

STATE OF ALASKA  
1996 LEGISLATIVE SESSION

BILL NO. CSHB 416(STA)

Revision Date: \_\_\_\_\_  
 Title: Omnibus State Fees &  
 Cost Assessments  
 Sponsor: House Rules  
 Requestor: House L&C

Department Affected: Labor  
 BRU: Workers' Compensation  
 Component: Workers' Compensation

COMPONENT SERIAL NO. 344

**EXPENDITURES/REVENUES:** (Thousands of Dollars)

OPERATING	FY 97	FY 98	FY 99	FY 00	FY 01	FY 02
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
<b>TOTAL OPERATING</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

<b>CAPITAL</b>						
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<b>CHANGE IN REVENUE</b>	<b>367.7</b>	<b>367.7</b>	<b>367.7</b>	<b>367.7</b>	<b>367.7</b>	<b>367.7</b>
<b>FUND SOURCE #</b>	<b>1005</b>	<b>1005</b>	<b>1005</b>	<b>1005</b>	<b>1005</b>	<b>1005</b>

**FUNDING:** (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	(367.7)	(367.7)	(367.7)	(367.7)	(367.7)	(367.7)
1005 GF/Program Receipt	367.7	367.7	367.7	367.7	367.7	367.7
1006 GF/MHTIA						
Other						
<b>TOTAL</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

**POSITIONS:**

FULL-TIME						
PART-TIME						
TEMPORARY						

Estimate of current year (FY96) impact: \$ None

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

Section 4 of the bill establishes a 4% Workers' Compensation Self-Insured Assessment on all self-insured employers excluding the state and political subdivisions of the state. The bill would have no cost impact on the Worker's Compensation Division. The assessment on self-insured employers is similar to the premium tax paid by all insured employers. The new program receipts generated would offset existing general funds appropriated to the Division. An effective date of January 1, 1997 is assumed.

Prepared by: Paul Grossi, Director Phone: 465-2790  
 Division: Workers' Compensation Date: 4/16/96

Approved by Commissioner: Tom Cashen, Commissioner  
 Agency: Department of Labor Date: 4/16/96

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# FISCAL NOTE

**STATE OF ALASKA**  
**1996 LEGISLATIVE SESSION**

**BILL NO.** CSb416 (STA)

Revision Date: 16-Apr-96  
 Title: Fee Authority Bill

Department Affected: Environmental Conservation

Sponsor: Rules Committee by request of Governor  
 Requestor: Labor & Commerce

BRU: Statewide Public Services  
 Component: Statewide Public Services

**COMPONENT SERIAL NO.** 2058

Expenditures/Revenues: (Thousands of Dollars)

OPERATING EXPENDITURES	FY 97	FY 98	FY 99	FY 00	FY 01	FY 02
PERSONAL SERVICES	193.0	193.0	193.0	193.0	193.0	193.0
TRAVEL	0.0	0.0	0.0	0.0	0.0	0.0
CONTRACTUAL	27.0	27.0	27.0	27.0	27.0	27.0
SUPPLIES	0.0	0.0	0.0	0.0	0.0	0.0
EQUIPMENT	0.0	0.0	0.0	0.0	0.0	0.0
LAND&STRUCTURES	0.0	0.0	0.0	0.0	0.0	0.0
GRANTS, CLAIMS	0.0	0.0	0.0	0.0	0.0	0.0
MISCELLANEOUS	0.0	0.0	0.0	0.0	0.0	0.0
<b>TOTAL OPERATING</b>	<b>220.0</b>	<b>220.0</b>	<b>220.0</b>	<b>220.0</b>	<b>220.0</b>	<b>220.0</b>
<b>CAPITAL EXPENDITURES</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>
<b>CHANGE IN REVENUES (1005 )</b>	<b>220.0</b>	<b>220.0</b>	<b>220.0</b>	<b>220.0</b>	<b>220.0</b>	<b>220.0</b>

**FUND SOURCE**

1002 Federal Receipts	0.0	0.0	0.0	0.0	0.0	0.0
1003 GF Match	0.0	0.0	0.0	0.0	0.0	0.0
1004 GF	0.0	0.0	0.0	0.0	0.0	0.0
1005 GF/Program Receipt	220.0	220.0	220.0	220.0	220.0	220.0
1006 GF/MHTIA	0.0	0.0	0.0	0.0	0.0	0.0
Other	0.0	0.0	0.0	0.0	0.0	0.0
<b>TOTAL</b>	<b>220.0</b>	<b>220.0</b>	<b>220.0</b>	<b>220.0</b>	<b>220.0</b>	<b>220.0</b>

Estimate of any current year (FY96) cost: \$ 0.0

**POSITIONS:**

FULL-TIME	0	0	0	0	0	0
PART-TIME	0	0	0	0	0	0
TEMPORARY	0	0	0	0	0	0

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

Bill would allow the department to set and collect fees to review subdivision plans for sewage disposal or treatment. The program receipts collected through these fees will fund salary costs of the technical staff conducting those reviews, salary costs of clerical staff and associated support costs.

Prepared by: Marianne See  
 Division: Director, Division of Statewide Public Service

Phone: 269-7635  
 Date: 4/16/96

Approved by Commissioner: *M. Kelly K*  
 Agency: Department of Environmental Conservation

Date: 4/17/96

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# FISCAL NOTE

No. 6

STATE OF ALASKA  
1996 LEGISLATIVE SESSION

Bill Version: HB 416

(H) Publish Date: 1-12-96

Revision Date: \_\_\_\_\_  
Title: Fees for State Services  
Sponsor: Rules Committee  
Requestor: Governor

Department Affected: Labor  
BRU: Workers' Compensation  
Component: Workers' Compensation  
COMPONENT SERIAL NO. 344

**EXPENDITURES/REVENUES:** (Thousands of Dollars)

OPERATING	FY 97	FY 98	FY 99	FY 00	FY 01	FY 02
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
<b>TOTAL OPERATING</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

CAPITAL						
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CHANGE IN REVENUE	671.3	671.3	671.3	671.3	671.3	671.3
FUND SOURCE #	1005	1005	1005	1005	1005	1005

**FUNDING:** (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	(671.3 )	(671.3 )	(671.3 )	(671.3 )	(671.3 )	(671.3 )
1005 GF/Program Receipt	671.3	671.3	671.3	671.3	671.3	671.3
1006 GF/MHTIA						
Other						
<b>TOTAL</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

**POSITIONS:**

FULL-TIME						
PART-TIME						
TEMPORARY						

Estimate of current year (FY96) impact: \$ 0.0

**ANALYSIS:** (Attach a separate page if necessary) Proposed Legislation of a 4% Workers' Compensation Self-insured Assessment on all self-insured employers would have a zero fiscal impact to the Workers' Compensation Division. The assessment to self-insured employers is similar to the premium tax paid by all insured employers. Exemption of the State is appropriate because the State already allocates 2.5 million to the Worker's Compensation general fund. If this bill is passed the State's contribution would be reduced, but it would still remain greater than the 4% private sector self insured employer assessment. The new program receipts would offset existing general fund allocations.

Prepared by: Paul Grossl, Director *Paul Grossl* Phone: 465-2790  
 Division: Workers' Compensation Date: 1/10/96  
 Approved by Commissioner: Tom Cashen, Commissioner *Tom Cashen*  
 Agency: Department of Labor Date: 1/10/96

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# FISCAL NOTE

Bill Version: HB 416  
(H) Publish Date: 1-12-96

STATE OF ALASKA  
1996 LEGISLATIVE SESSION

Revision Date: \_\_\_\_\_ Dept. Affected: Office of the Governor  
 Title: "An Act relating to fees and assessment of costs  
for certain services provided by state government,..." BRU: Office of Management & Budget  
 Sponsor: Rules Committee Component: Governmental Coordination  
 Requester: Governor COMPONENT SERIAL NO. 18

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

OPERATING EXPENDITURES	FY 97	FY 98	FY 99	FY 100	FY 01	FY 02
PERSONAL SERVICES						
TRAVEL			3.0	3.3	6.8	7.0
CONTRACTUAL			6.5	6.7	13.4	14.0
SUPPLIES			0.2	0.3	0.6	1.2
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
<b>TOTAL OPERATING</b>	<b>0.0</b>	<b>0.0</b>	<b>9.7</b>	<b>10.3</b>	<b>20.8</b>	<b>22.2</b>

CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )			32.5	33.8	67.8	70.4

**FUND SOURCE** (Thousands of Dollars)

FUND SOURCE	FY 97	FY 98	FY 99	FY 100	FY 01	FY 02
1002 Federal Receipts						
1003 GF Match			(22.8)	(23.5)	(47.0)	(48.2)
1004 GF						
1005 GF/Program Receipts			32.5	33.8	67.8	70.4
1037 GF/Mental Health						
Other						
<b>TOTAL</b>	<b>0.0</b>	<b>0.0</b>	<b>9.7</b>	<b>10.3</b>	<b>20.8</b>	<b>22.2</b>

Estimate of any current year (FY96) cost: \$ 0.0

**POSITIONS**

FULL-TIME						
PART-TIME						
TEMPORARY						

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

Sec 6 allows OMB to adopt regulations to charge for services related to consistency reviews under Alaska's Coastal Management Program. For certain types of large projects (e.g., oil and gas development outside of the common carrier pipeline, forest products manufacturing facilities and development, and other large scale proposals), it is cost-effective for the project proponent to have the early involvement of dedicated state staff which facilitates and expedites the review and permitting of their project. Where industry is willing to pay for dedicated staff, this legislation and fiscal note enables DGC to assemble a team consisting of staff from DGC, state agencies and, if applicable, affected coastal districts, to facilitate early design and review of particular projects. Fee levels would be negotiated based on specific project requirements.

While Alaska will always have large projects, without an established record, we cannot predict revenues from this source until those projects near design and permitting stage. State lead time is often less than a fiscal year. This fiscal note anticipates setting fee rates and gaging industry participation during the regulation process in FY97 and FY98. (continued on page 2)

Prepared by: Diane Mayer *Diane Mayer* Phone: 465-3562  
 Division: Governmental Coordination Date: 1/10/96  
 Approved by Commissioner: Jim Ayers, COS Date: 1/10/96  
 Agency: Office of the Governor

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**For informational purposes only**, this fiscal note shows application of the adopted regulations as it would apply to the operating budget of DGC only for a single project in FY99 and FY00. FY01 and FY02 are based on two large project activities. Each year is adjusted for the current inflation rate. Costs associated with additional state agencies and coastal district participation would be included in the fee negotiations with industry and would be distributed to participants through the RSA process.

Until such time as industry need and predictable fee receipts are determined, revenues generated through these fees will increase unrestricted revenue receipts to the GF and will assist in increasing available GF for legislative appropriation.

FISCAL NOTE

No. 3

Bill Version: HB 416

(H) Publish Date: 1-12-96

STATE OF ALASKA  
1996 LEGISLATIVE SESSION

Revision Date: \_\_\_\_\_  
Title: Fee Bill

Department Affected: Environmental Conservation

Sponsor: Rules Committee  
Requestor: Governor

BRU: Statewide Public Services  
Component: Statewide Public Services

COMPONENT SERIAL NO. 2058

Expenditures/Revenues:

(Thousands of Dollars)

OPERATING EXPENDITURES	FY 97	FY 98	FY 99	FY 00	FY 01	FY 01
PERSONAL SERVICES	0.0	0.0	0.0	0.0	0.0	0.0
TRAVEL	0.0	0.0	0.0	0.0	0.0	0.0
CONTRACTUAL	0.0	0.0	0.0	0.0	0.0	0.0
SUPPLIES	0.0	0.0	0.0	0.0	0.0	0.0
EQUIPMENT	0.0	0.0	0.0	0.0	0.0	0.0
LAND&STRUCTURES	0.0	0.0	0.0	0.0	0.0	0.0
GRANTS, CLAIMS	0.0	0.0	0.0	0.0	0.0	0.0
MISCELLANEOUS	0.0	0.0	0.0	0.0	0.0	0.0
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES	0.0	0.0	0.0	0.0	0.0	0.0
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CHANGE IN REVENUES ( 1005 )	220.0	220.0	220.0	220.0	220.0	220.0
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FUND SOURCE

1002 Federal Receipts	0.0	0.0	0.0	0.0	0.0	0.0
1003 GF Match	0.0	0.0	0.0	0.0	0.0	0.0
1004 GF	(220.0)	(220.0)	(220.0)	(220.0)	(220.0)	(220.0)
1005 GF/Program Receipt	220.0	220.0	220.0	220.0	220.0	220.0
1006 GF/MHTIA	0.0	0.0	0.0	0.0	0.0	0.0
Other	0.0	0.0	0.0	0.0	0.0	0.0
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY96) cost: \$ 0.0

POSITIONS:

FULL-TIME	0	0	0	0	0	0
PART-TIME	0	0	0	0	0	0
TEMPORARY	0	0	0	0	0	0

ANALYSIS: (Attach a separate page if necessary.)

Bill would allow the department to set and collect fees to review subdivision plans for sewage waste disposal or treatment. Fees collected would replace general funds currently funding salary costs of the technical staff conducting those reviews, salary costs of clerical staff and associated support costs.

Prepared by: Larry Jones *Lawrence Jones*  
Division: Director, Division of Administrative Services

Phone: 465-5010  
Date: 1/11/96

Approved by Commissioner: Lawrence Jones for Commissioner  
Agency: Department of Environmental Conservation

Date: 1/10/96

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FISCAL NOTE

No. 2

Bill Version: HB 416

(H) Publish Date: 1-12-96

STATE OF ALASKA  
1996 LEGISLATIVE SESSION

Revision Date: \_\_\_\_\_  
Title: Fee Bill

Department Affected: Environmental Conservation

Sponsor: Rules Committee  
Requestor: Governor

BRU: Environmental Health  
Component: Laboratory Services

COMPONENT SERIAL NO. 2065

Expenditures/Revenues: (Thousands of Dollars)

	FY 97	FY 98	FY 99	FY 00	FY 01	FY 01
<b>OPERATING EXPENDITURES</b>						
PERSONAL SERVICES	0.0	0.0	0.0	0.0	0.0	0.0
TRAVEL	0.0	0.0	0.0	0.0	0.0	0.0
CONTRACTUAL	0.0	0.0	0.0	0.0	0.0	0.0
SUPPLIES	0.0	0.0	0.0	0.0	0.0	0.0
EQUIPMENT	0.0	0.0	0.0	0.0	0.0	0.0
LAND&STRUCTURES	0.0	0.0	0.0	0.0	0.0	0.0
GRANTS,CLAIMS	0.0	0.0	0.0	0.0	0.0	0.0
MISCELLANEOUS	0.0	0.0	0.0	0.0	0.0	0.0
<b>TOTAL OPERATING</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>
<b>CAPITAL EXPENDITURES</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>
<b>CHANGE IN REVENUES ( 1005 )</b>	<b>100.0</b>	<b>100.0</b>	<b>100.0</b>	<b>100.0</b>	<b>100.0</b>	<b>100.0</b>

FUND SOURCE

1002 Federal Receipts	0.0	0.0	0.0	0.0	0.0	0.0
1003 GF Match	0.0	0.0	0.0	0.0	0.0	0.0
1004 GF	(100.0)	(100.0)	(100.0)	(100.0)	(100.0)	(100.0)
1005 GF/Program Receipt	100.0	100.0	100.0	100.0	100.0	100.0
1006 GF/MHTIA	0.0	0.0	0.0	0.0	0.0	0.0
Other	0.0	0.0	0.0	0.0	0.0	0.0
<b>TOTAL</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

Estimate of any current year (FY96) cost: \$ 0.0

POSITIONS:

FULL-TIME	0	0	0	0	0	0
PART-TIME	0	0	0	0	0	0
TEMPORARY	0	0	0	0	0	0

ANALYSIS: (Attach a separate page if necessary.)

Bill would authorize the department to charge fees to regulate pesticides and broadcast chemicals. Proposed registration fees received from pesticide and broadcast chemical producers would replace general funds. No additional positions are planned.

Prepared by: Larry Jones  
Division: Director, Division of Administrative Services

Phone: 465-5010  
Date: 1/11/96

Approved by Commissioner: Lawrence Jones  
Agency: Department of Environmental Conservation

Date: 1/10/96

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# FISCAL NOTE

No. 1

Version: HB 416

(H) Publish Date: 1-12-96

**STATE OF ALASKA  
1996 LEGISLATIVE SESSION**

Revision Date: \_\_\_\_\_  
 Title: An Act relating to fees or assessment of costs for certain services provided by state government, ....  
 Sponsor: Rules Committee  
 Requestor: Governor

Department: Commerce and Economic Development  
 BRU: Occupational Licensing  
 Component: Operations

COMPONENT SERIAL NO. 1844

Expenditures/Revenues		(Thousands of Dollars)				
OPERATING EXPENDITURES	FY 97	FY 98	FY 99	FY 00	FY 01	FY 02
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
<b>TOTAL OPERATING</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

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

CHANGE IN REVENUES	841.3	841.3	841.3	841.3	841.3	841.3
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FUND SOURCE		(Thousands of Dollars)				
1002 Federal Receipts						
1003 GF Match						
1004 General Fund						
1091 Designated Program Receipts	(3.0)	(3.0)	(3.0)	(3.0)	(3.0)	(3.0)
1006 GF/MHTIA						
Other 1040 RESF	3.0	3.0	3.0	3.0	3.0	3.0
<b>TOTAL</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

Estimate of any current year (FY 96) cost: \$ 0.0

POSITIONS						
FULL-TIME						
PART-TIME						
TEMPORARY						

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

Section 1 of the bill amends AS 08.88.472(a) to allow real estate surety fund hearing costs on a claim for reimbursement to be charged to the surety fund. Currently, only costs associated with awarded claims may be paid from the fund. The funding source change of \$3.0 from Designated Program Receipts (1091) to the Real Estate Surety Fund (1040) reflect the statutory change made in Section 1. The \$3.0 identified is a very conservative amount since previously, only costs associated with awarded claims were identified. After the first year of charging all surety fund related hearing costs to the surety fund, full costs of related hearings will be documented.

Section 5 of the bill amends AS 43.70.030(a) to increase the business licensing fee from \$25 per year to \$75 biennially. Licenses are currently valid for two-years in which licensees pay \$50. There are approximately 67,300 business licensees which approximately half renew each year. Increasing the fee to \$75 will generate an additional \$841.3 to the General Fund.

Prepared by: Jennifer Strickler, Administrative Officer  
 Division: Occupational Licensing  
 Approved by Commissioner: William L. Hensley  
 Agency: Commerce and Economic Development

Phone: 465-2144  
 Date: January 10, 1996  
 Date: 1/10/96

# FISCAL NOTE

4  
 Bill Version: HB 416  
 (H) Publish Date: 1-12-96

STATE OF ALASKA  
 1996 LEGISLATIVE SESSION

Revision Date: \_\_\_\_\_ Dept. Affected: Office of the Governor  
 Title: "An Act relating to fees or assessments of costs  
for certain services provided by state government,..." BRU: Commissions/Special Offices  
 Sponsor: Rules Committee Component: Human Rights Commission  
 Requester: Governor COMPONENT SERIAL NO. 1

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

OPERATING EXPENDITURES	FY 97	FY 98	FY 99	FY 100	FY 01	FY 02
PERSONAL SERVICES	5.1	5.1	5.1	5.1	5.1	5.1
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
<b>TOTAL OPERATING</b>	<b>5.1</b>	<b>5.1</b>	<b>5.1</b>	<b>5.1</b>	<b>5.1</b>	<b>5.1</b>

CAPITAL EXPENDITURES						
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CHANGE IN REVENUES ( )	5.1	5.1	5.1	5.1	5.1	5.1
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**FUND SOURCE** (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts	5.1	5.1	5.1	5.1	5.1	5.1
1037 GF/Mental Health						
Other						
<b>TOTAL</b>	<b>5.1</b>	<b>5.1</b>	<b>5.1</b>	<b>5.1</b>	<b>5.1</b>	<b>5.1</b>

Estimate of any current year (FY96) cost: \$ 0.0

**POSITIONS**

FULL-TIME						
PART-TIME						
TEMPORARY						

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

The Commission receives many requests for training on preventing discrimination from employers, realtors and other organizations. These training sessions may consist of one hour presentations on the agency's responsibilities or full-day workshops on subjects like preventing discrimination against individuals with disabilities and sexual harassment.

The Commission was once able to respond to all requests for education on Alaska's Human Rights Law and easily meet its role of preventing discrimination without impacting on its enforcement activities. The Commission now has fewer staff at a time when the public's demand for services has soared.

Additional revenue generated by training would help offset the cost of overtime for our investigative staff who have recently been determined overtime eligible.

Prepared by: Paula M. Haley, Executive Director *M. Haley* Phone: -7474 x 241  
 Division: Human Rights Commission Date: 1/9/96  
 Approved by Commissioner: Jim Ayers, Chief of Staff *J. Ayers* Date: 1/10/96  
 Agency: Office of the Governor

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# FISCAL NOTE

No. 8  
 Bill Version: HB 416  
 (H) Publish Date: 1-12-96

STATE OF ALASKA  
 1996 LEGISLATIVE SESSION

Revision Date: \_\_\_\_\_  
 Title: Governor's Fees Bill

Department Affected: Revenue  
 BRU: Alaska Student Aid Corporation  
 Component: Program Administration

Sponsor: Rules Committee  
 Requester: Governor Knowles

COMPONENT SERIAL NO. 2111

**Expenditures/Revenues:**

(Thousands of Dollars)

OPERATING	FY 97	FY 98	FY 99	FY 00	FY 01	FY 02
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
<b>TOTAL OPERATING</b>	-0-	-0-	-0-	-0-	-0-	-0-

CAPITAL EXPENDITURES						
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CHANGE IN REVENUES	62.5*	123.2	125.6	128.2	131.0	133.6
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**FUND SOURCE**

(Thousands of Dollars)

FUND SOURCE	FY 97	FY 98	FY 99	FY 00	FY 01	FY 02
1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
<b>TOTAL</b>						

**POSITIONS:**

POSITIONS	FY 97	FY 98	FY 99	FY 00	FY 01	FY 02
FULL-TIME						
PART-TIME						
TEMPORARY						

Estimate of current year (FY96) impact: \$ -0-

**ANALYSIS:** (Attach a separate page if necessary.) \* estimated revenue upon implementation in January, 1997. Currently these authorization-related activities are performed by 2.5 staff at a cost to the Alaska Student Loan Corporation of approximately \$125,000 each year. Through this bill, the Corporation would have the authority to develop a method of allocating these costs across the regulated population. We anticipate that this could be done on a sliding scale that is tied to the tuition/fee revenues of each institution and would propose that minimum and maximum amounts be set. These funds are program receipts received into the general fund.

Prepared by: Gillian Hays, Legislative Liaison Phone: 465-8718  
 Division: Alaska Student Aid Corporation Date: January 11, 1996  
 Approved by Executive Director: Diane Barrans *Diane Barrans*  
 Agency: Revenue Date: \_\_\_\_\_

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# FISCAL NOTE

No. 7  
 Bill Version: HB 416  
 (H) Publish Date: 1-12-96

**STATE OF ALASKA**  
**1996 LEGISLATIVE SESSION**

Revision Date: Original Dept Affected Military & Veteran's Affairs  
 Title: An Act relating to fees... BRU: Disaster Planning and Control  
 Component: Disaster Planning and Control  
 Sponsor: Rules Committee  
 Requestor: Governor Knowles Component Serial No. 1808

Expenditures/Revenues (Thousands of Dollars)

OPERATING EXPENDITURES	FY97	FY98	FY99	FY00	FY01	FY02
PERSONAL SERVICES						
TRAVEL		2.0	2.0	2.0	2.0	2.0
CONTRACTUAL		2.0	2.0	2.0	2.0	2.0
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
<b>TOTAL OPERATING</b>	0.0	4.0	4.0	4.0	4.0	4.0
<b>CAPITAL EXPENDITURES</b>	0.0	0.0	0.0	0.0	0.0	0.0
<b>CHANGE IN REVENUES (1005)</b>	0.0	4.0	4.0	4.0	4.0	4.0

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts		4.0	4.0	4.0	4.0	4.0
1006 GF/MHTIA						
Other						
<b>TOTAL</b>	0.0	4.0	4.0	4.0	4.0	4.0

Estimate of any current year (FY96) cost: \$ non-anticipated

**POSITIONS**

FULL-TIME	0	0	0	0	0	0
PART-TIME	0	0	0	0	0	0
TEMPORARY	0	0	0	0	0	0

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

Fiscal impact determined by 2 emergency preparedness classes conducted per year - 20 attendees per class - \$100 per attendee per class. One class will be in Juneau, one in Anchorage. The trainer will be paid for by a federal FEMA grant already included in the FY97 operating budget request.

Prepared by: Carol Carroll, Director Phone: 465-4730  
 Division: Administrative Services Date: 11-Jan-96  
 Approved by Commissioner: *Carol Carroll* Date: 11-Jan-96  
 Agency: Military & Veteran's Affairs

TONY KNOWLES  
GOVERNOR



STATE OF ALASKA  
OFFICE OF THE GOVERNOR  
JUNEAU

HB 416  
P O Box 110001  
Juneau, Alaska 99811-0001  
(907) 465-3500  
Fax (907) 465-3532

January 12, 1996

The Honorable Gail Phillips  
Speaker of the House  
Alaska State Legislature  
State Capitol  
Juneau, AK 99801-1182

HB 416

Dear Speaker Phillips:

As we work to close Alaska's budget gap, my fiscal plan combines spending cuts with increases in certain fees and taxes. This fee bill asks users of state services to take responsibility and help cover the costs of the agencies that serve them.

Section 1 of the bill would grant to the Real Estate Commission the power to charge the real estate surety fund for claim hearing costs as they are incurred. Presently, the commission must await the conclusion of a hearing before charging the fund. Because these costs may have been incurred during a fiscal year that has since been "closed out," the costs often cannot be reimbursed from the surety fund. In addition, this section would delete a misleading statutory reference to clarify that only the costs of surety fund claim hearings, and not the costs of all disciplinary hearings, may be charged to the fund.

Section 2 would allow the Alaska Commission on Postsecondary Education to charge fees for processing educational institutions' applications for authorization to operate, along with application fees for the institutions' agent permits.

Section 3 of the bill would authorize the State Commission for Human Rights to establish and charge fees for educational and training services and for information and materials the commission provides to the public. This amendment would help the commission cover costs associated with its education efforts to eliminate discrimination.

The Honorable Gail Phillips  
January 12, 1996  
Page 2

Section 4 of the bill would establish an administrative fee for self-insured employers under the Alaska Workers' Compensation Act. Most employers currently pay a portion of the cost of running the state workers' compensation program through their insurance premium tax. Self-insured employers, however, are receiving the same state services but are not currently contributing to the cost of running the system. Under this bill, employers would share in those costs.

Section 5 would change the biennial fee for a business license from \$50 to \$75. This would mark the first fee increase since statehood.

Section 6 of the bill would allow the Division of Governmental Coordination in the Office of the Governor to adopt regulations to charge for services related to federal consistency determinations and certifications under the Coastal Zone Management Act.

Section 7 of the bill would authorize the Department of Military and Veterans' Affairs to adopt regulations setting reasonable fees for classes and seminars on emergency response procedures.

Section 8 of the bill would authorize the Department of Environmental Conservation to adopt regulations setting fees for the regulation of pesticides and broadcast chemicals and for the review of subdivision plans for sewage waste disposal or treatment.

This legislation, coupled with my spending plan, is a step toward closing Alaska's budget gap. I urge your prompt consideration and passage of this bill.

Sincerely,



Tony Knowles  
Governor

# FAX TRANSMISSION

## DIVISION OF ENVIRONMENTAL HEALTH

555 CORDOVA STREET  
ANCHORAGE, AK 99501  
907-269-7844  
FAX: 907-269-7654

**To:** George Dozier  
**Fax #:** 907-465-2819  
**From:** Janice Adair  
**Subject:** CSHB 416 (StA)

**Date:** April 19, 1996  
**Pages:** Three, including this cover sheet.

### COMMENTS:

I meant to drop copies off while I was in Juneau for the members packets. This is just a brief background on the subdivision plan review function in DEC for which we are seeking fee authority under the referenced bill.

Thanks, and I'll be at the LIO at 3:30.

Janice

## SUBDIVISION PLAN REVIEW

- **What is a subdivision plan review?**

Subdivision plans are reviewed to ensure that proposed lots are sized properly to support safe sewage treatment and disposal.

- **Why are these reviews done, and who does them?**

Ensuring the proposed lots in a subdivision can accommodate safe and economical sewage treatment and disposal is a basic governmental public health review of the subdivision. Equally important, ensuring proper sewage disposal helps maintain property values.

The subdivision review is the first and sometimes only opportunity for the state or municipal government to work with developers and their engineers to assure consistent and proven concepts are applied in dealing with sewage disposal issues.

In most places in the state, it is the Department of Environmental Conservation which does these reviews. However, a municipality may opt through adoption of an ordinance to undertake this activity. Both the Municipality of Anchorage and Valdez have done so.

- **Doesn't this duplicate what private engineers do for the developers?**

Whereas private engineers work with the developer on an individual subdivision and ensures compliance with Title 29, state or municipal review looks at the setting of the subdivision in relation to other subdivisions, adjacent lots, ground water, drinking water, other nearby waterbodies and so on. It's more of a public health review, rather than strictly an engineering review and ensures compliance with Title 46.

- **So what? Why is this important?**

A lot or subdivision that has a failing sewage disposal system can't be sold - banks won't issue a loan, even if there was a willing buyer. Homesites can end up with raw sewage on the ground or contaminated drinking water wells when a system fails.

While nothing can guarantee there will never be a problem, subdivision review is the best insurance we have to head off million-dollar problems for communities, and thousand-dollar problems for individual homeowners. It's a pay-now-or-pay-later situation. Some examples are on the back.

- **How much will it cost and who will pay?**

The Department estimates that the fee would run about \$300 per subdivision. The average subdivision has 7 lots, so the fee would be equal to about \$43 per lot. The developer of the property would pay the fee, though it's likely it would be passed on as a small increase in the cost of each lot. It's important to remember though that it can cost homeowners tens of thousands of dollars to correct the problems with sewage disposal this review is intended to avoid.

## EXAMPLES

- *Talkeetna and Wasilla.* The Talkeetna area was so saturated with failing septic systems, the state and federal governments had to install a \$5.6 million sewer system. In Wasilla, a similar problem wound up costing \$14 million.
- *Castaway Cove/Kenai.* People who purchased lots in two riverside subdivisions, at premium riverside prices, found the lots could not support on-lot septic systems. They can build nothing more than boathouses.
- *McDonald Spit/Kenai.* A five acre tract was subdivided into lots that were too small to accommodate on-site sewage treatment. The lots were sold, and the purchasers found they were unable to secure loans to build on their property and are facing substantial costs to accommodate on-site disposal.
- *Fairbanks.* As septic failures surface in Fairbanks subdivisions, as more people crowd out the existing systems' capacities, homeowners who want to buy or sell property are having to spend \$6,000 to \$10,000 per lot to install proper sewage disposal systems.
- *Chugiak.* When septic systems on residential property failed in Chugiak, ground water - the source for the Chugiak Elementary school's drinking water became contaminated. The school had to abandon its well and install a connection to the municipal water system. It will also have to upgrade its onsite wastewater system. Cost, about \$2 million - and this doesn't include the cost to the individual homeowners.

**HB**

**432**

# FISCAL NOTE

STATE OF ALASKA  
1996 LEGISLATIVE SESSION

BILL NO. HB 432

Revision Date: \_\_\_\_\_  
Title: An Act relating to the practice of veterinary medicine.

Department: Commerce and Economic Development  
BRU: Occupational Licensing  
Component: Operations

Sponsor: House Labor & Commerce  
Requestor: House Labor & Commerce

COMPONENT SERIAL NO. 1844

**Expenditures/Revenues**

(Thousands of Dollars)

OPERATING EXPENDITURES	FY 97	FY 98	FY 99	FY 00	FY 01	FY 02
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
<b>TOTAL OPERATING</b>	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES						
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CHANGE IN REVENUES						
--------------------	--	--	--	--	--	--

**FUND SOURCE**

(Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 General Fund						
1005 GF/Program Receipts						
1006 GF/MHTIA						
Other 1091 Designated PR						
<b>TOTAL</b>	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY 98) cost: \$ 0.0

**POSITIONS**

FULL-TIME						
PART-TIME						
TEMPORARY						

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

HB 432 amends the veterinary licensing statutes (AS 08.98) to clarify existing provisions and add new conditions prohibiting the practice of a veterinary medicine unless the person is licensed. New funds are not required to implement the bill.

Prepared by: Jennifer Strickler, Administrative Officer  
Division: Occupational Licensing  
Approved by Commissioner: William L. Hensley  
Agency: Commerce and Economic Development

Phone: 465-2144  
Date: February 15, 1998  
Date: \_\_\_\_\_

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1996 LEGISLATIVE SESSION

Revision Date: \_\_\_\_\_  
 Title: Veterinary Licensing  
 Sponsor: H.Labor & Commerce  
 Requestor: H.Labor & Commerce

Dept. Affected: Public Safety  
 Component: DPS Statewide Support  
Commissioner's Office  
 COMPONENT SERIAL NO. 0523

EXPENDITURES/REVENUES: (Thousands of Dollars) (inflation not included)

OPERATING	FY 97	FY 98	FY 99	FY 00	FY 01	FY 02
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL EXPENDITURES	-0-	-0-	-0-	-0-	-0-	-0-
CHANGE IN REVENUES ( )	-0-	-0-	-0-	-0-	-0-	-0-
Code Revenue						

FUNDING: (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1006 GF/MHTIA						
Other						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

Estimate of current year (FY 96) impact: \$ \_\_\_\_\_

POSITIONS:

FULL-TIME	0	0	0	0	0	0
PART-TIME	0	0	0	0	0	0
TEMPORARY	0	0	0	0	0	0

ANALYSIS: (Attach a separate page if necessary.)  
 No fiscal impact is anticipated to the Department of Public Safety

Prepared By: Sandy Perry-Provost, Special Assistant to the Commissioner Phone: 465-4322  
 Division: Commissioner's Office Date: 1/24/96  
 Approved by Commissioner: *Ronald L. Otte* Date: 1/24/96  
 Agency: Ronald L. Otte, Dept. of Public Safety

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# FISCAL NOTE

STATE OF ALASKA  
1996 LEGISLATIVE SESSION

BILL NO. HB 432

Revision Date: \_\_\_\_\_ Dept. Affected: Corrections  
 Title: "An Act relating to the practice of veterinary BRU: State Wide Programs  
medicine." Component: \_\_\_\_\_  
 Sponsor: House Labor and Commerce Committee  
 Requester: House State Affairs COMPONENT SERIAL NO. #1381

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

OPERATING EXPENDITURES	FY 97	FY 98	FY 99	FY 00	FY 01	FY 02
PERSONAL SERVICES	0.0	0.0	0.0	0.0	0.0	0.0
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
<b>TOTAL OPERATING</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

CAPITAL EXPENDITURES						
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CHANGE IN REVENUES ( )						
------------------------	--	--	--	--	--	--

**FUND SOURCE** (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1006 GF/MHTIA						
Other						
<b>TOTAL</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

Estimate of any current year (FY96) cost: \$ 0.0

**POSITIONS**

FULL-TIME						
PART-TIME						
TEMPORARY						

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

According to the Division of Occupational Licensing, they expect few if any cases would be prosecuted under this bill. If convicted for this misdemeanor offense a fine rather than incarceration is a more likely sentence. The Department of Correction expects no fiscal impact.

Prepared by: Jerry Shriner  
 Division: Office of the Commissioner  
 Approved by Commissioner: Margaret H. Pugh Margaret Pugh  
 Agency: Department of Corrections

Phone: 465-4652  
 Date: 1/30/96  
 Date: 1/30/96

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# FISCAL NOTE

STATE OF ALASKA  
1996 LEGISLATIVE SESSION

BILL NO. HB 432

Revision Date: _____	Dept. Affected: <u>Department of Law</u>
Title: <u>"An Act relating to the practice of veterinary medicine."</u>	BRU: <u>Civil Division</u>
Sponsor: <u>House Labor and Commerce Committee</u>	Component: <u>General Legal Services</u>
Requester: <u>House Labor and Commerce Committee</u>	COMPONENT SERIAL NO. <u>2087</u>

**Expenditures/Revenues**

(Thousands of Dollars)

OPERATING EXPENDITURES	FY 97	FY 98	FY 99	FY 00	FY 01	FY 02
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
<b>TOTAL OPERATING</b>	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES						
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CHANGE IN REVENUES ( )						
------------------------	--	--	--	--	--	--

**FUND SOURCE**

(Thousands of Dollars)

FUND SOURCE	FY 97	FY 98	FY 99	FY 00	FY 01	FY 02
1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1006 GF/MHTIA						
Other						
<b>TOTAL</b>	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY96) cost: \$ 0.0

**POSITIONS**

POSITIONS	FY 97	FY 98	FY 99	FY 00	FY 01	FY 02
FULL-TIME	0.0	0.0	0.0	0.0	0.0	0.0
PART-TIME						
TEMPORARY						

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

This bill amends AS 08.98.120 to require the licensing of veterinary technicians under Alaska's occupational licensing laws. The bill also provides for criminal penalties for persons practicing or attempting to practice veterinary medicine, surgery or dentistry without being properly licensed. Although inclusion of a new regulated profession tends to increase the Department of Law's workload over time, the cost of regulatory enforcement is reimbursed to the Department of Law by the Division of Occupational Licensing. It does not appear that the bill will cause any significant workload increase in the foreseeable future.

Prepared by:	<u>Richard I. Pegues, Director</u>	Phone:	<u>465-3672</u>
Division:	<u>Administrative Services Division</u>	Date:	<u>1/25/96</u>
Approved by Commissioner:	<u>Bruce M. Botelho, Attorney General</u>	Date:	<u>1/25/96</u>
Agency:	<u>Department of Law</u>		

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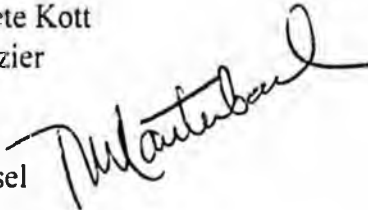
130 Seward Street, Suite 409  
Juneau, Alaska 99801-2105

## MEMORANDUM

February 6, 1996

**SUBJECT:** Sectional Summary of HB 432. (An Act relating to the practice of veterinary medicine)

**TO:** Representative Pete Kott  
Attn: George Dozier

**FROM:** Terri Lauterbach   
Legislative Counsel

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

As a preliminary matter, note that a sectional summary of a bill should not be considered an authoritative interpretation of the bill and the bill itself is the best statement of its contents. If you would like an interpretation of the bill as it may apply to a particular set of circumstances, please advise.

Section 1. Requires veterinary technicians to be licensed.

Section 2. Prohibits certain conduct and prescribes a penalty for violating the prohibitions.

Section 3. Changes the description of the examination that may be used for veterinarian licensure.

Section 4. Changes the name of various examinations.

Section 5. Requires the board to adopt regulations for licensure of veterinary technicians.

Section 6. Changes the name of another examination.

Section 7. Changes the definition of "practice of veterinary medicine" with respect to prohibited use of descriptions, titles, abbreviations, etc.

TML:klb  
96-069.klb

(7)

HOUSE COMMITTEE REPORT

Date Referred to Committee: February 15, 1996

FURTHER REFERRALS:

Date of Committee Action: 3-25-96

The LABOR AND COMMERCE Committee considered:

HB 432

HOUSE BILL NO. 432

VETERINARY LICENSING

"An Act relating to the practice of veterinary medicine."

recommends it be replaced with the following committee substitute \_\_\_\_\_  the same title  a new title

additional referral to \_\_\_\_\_ Committee  attached amendment(s)

ADOPTS: \_\_\_\_\_ Letter of Intent

ATTACHES NEW FISCAL NOTE(S): (Dept) \_\_\_\_\_ APPROVES PREVIOUS: (Dept/Date) \_\_\_\_\_  fiscal note(s) \_\_\_\_\_  fiscal note(s) \_\_\_\_\_

zero fiscal note(s) CEC; Pub. Safety; Collections; DOL  zero fiscal note(s) Admin

SIGNING WITH RECOMMENDATIONS	DP	DNP	NR	AM
<i>[Signature]</i>	✓			
<i>[Signature]</i>	✓			
<i>[Signature]</i>			✓	
<i>[Signature]</i>			✓	
<i>[Signature]</i>			✓	
<i>[Signature]</i>	✓			

CHAIR'S SIGNATURE *[Signature]*

VCA Eagle River Animal  
Hospital

12320 Old Glenn Highway,

Eagle River, AK 99577

**FAX**Date: 03/21/96Number of pages including cover sheet: 1**To: Representative Pete Kott****Attention: George**Phone: 907-465-3777Fax Phone: 907-465-2819

CC: \_\_\_\_\_

**From: Jonathan Bettridge, DVM**Member of: Board of Veterinary ExaminersMedical Director of: VCA Eagle River Animal  
HospitalHome Phone: 907-694-7754Home Fax: 907-696-2444Work Phone: 907-694-3800Work Fax: 907-694-2918**REMARKS:**     Urgent     For your review     Reply ASAP     Please comment

Dear Representative Kott:

I am writing to urge you to support HB432. This bill is the culmination of several years of effort by the Board of Veterinary Examiners to update our practice act.

The bulk of HB432 consists of vocabulary changes to bring our Alaska Practice Act into conformity with the terminology used in the practice acts of most other states. An example would be to change the term "registered" veterinary technician to the term "licensed" veterinary technician.

In years past, the Board of Veterinary Examiners has been powerless to protect the citizens of Alaska and their animals from uneducated, non-licensed individuals who, purporting to be veterinarians, dispense advice and medication. HB432 changes this by providing for penalties for such behavior.

Sincerely,

Jonathan Bettridge, D.V.M.

Member of Board of Veterinary Examiners

# House Labor & Commerce Committee

State Capitol  
Juneau, Alaska 99801-1182  
907-465-4954

## SPONSOR STATEMENT HB 432

HB 432, which is sponsored by the House Labor and Commerce Committee, has the principal effect of conforming Alaska's veterinarian licensure statues to current nationwide licensure standards. Under existing statutes, references are made to examinations administered under the auspices of the National Board of Veterinary Medical Examiners and the American Veterinary Association's Education Commission For Foreign Veterinary Graduates. These exams are no longer given by these organizations. Instead, they are administered by the National Board Examination Committee and the National Board Examination Committee's Education Commission for Foreign Veterinary Graduates. HB 432 makes the necessary changes.

HB 432 also acts to promote public welfare by clearly defining the unauthorized practice of veterinary medicine and imposing penalties for violations.

I urge your support.