ALASKA LEGISLATURE COMMITTEE FILES 1995-1996 8672

8933 SENATE LABOR & COMMERCE

SB
109

Alaska Statutes

Title 8. Business and Professions.

Chapter

01. Centralized Licensing (§§ 08.01.010 — 08.01.110)
02. Miscellaneous Provisions (§§ 08.02.010 — 08.02.030)
03. Termination, Continuation and Reestablishment of Regulatory Boards (§§ 08.03.010, 08.03.020)
04. Accountants (§§ 08.04.005 — 08.04.690)
06. Acupuncture (§§ 08.06.010 — 08.06.190)
08. Attorneys (§§ 08.08.010 — 08.08.250)
11. Audiologists (§§ 08.11.010 — 08.11.200)
13. Barbers and Hairdressers (§§ 08.13.010 — 08.13.220)
18. Construction Contractors (§§ 08.18.011 — 08.18.[illegible])
20. Chiropractors (§§ 08.20.010 — 08.20.200)
24. Collection Agencies (§§ 08.24.041 — 08.24.380)
32. Dental Hygienists (§§ 08.32.010 — 08.32.190)
36. Dentistry (§§ 08.36.010 — 08.36.370)
40. Electrical and Mechanical Administrators (§§ 08.40.005 — 08.40.490)
42. Morticians (§§ 08.42.010 — 08.42.200)
45. Naturopaths (§§ 08.45.010 — 08.45.200)
48. Architects, Engineers, and Land Surveyors (§§ 08.48.011 — 08.48.351)
52. Explosives Handlers (§§ 08.52.010 — 08.52.080)
54. Guides and Related Occupations (§§ 08.54.300 — 08.54.590)
55. Hearing Aid Dealers (§§ 08.55.010 — 08.55.200)
56. Hotels and Boardinghouses (§§ 08.56.010 — 08.56.070)
60. Junk Dealers and Junk Yards (§§ 08.60.010 — 08.60.100)
62. Marine Pilots (§§ 08.62.010 — 08.62.390)
64. Medicine (§§ 08.64.010 — 08.64.380)
66. Motor Vehicle Dealers (§§ 08.66.010 — 08.66.090)
68. Nursing (§§ 08.68.010 — 08.68.410)
70. Nursing Home Administrators (§§ 08.70.010 — 08.70.180)
71. Dispensing Opticians (§§ 08.71.010 — 08.71.240)
72. Optometrists (§§ 08.72.010 — 08.72.310)
76. Pawnbrokers and Secondhand Dealers (§§ 08.76.010 — 08.76.040)
80. Pharmacists and Pharmacies (§§ 08.80.010 — 08.80.490)
84. Physical Therapists and Occupational Therapists (§§ 08.84.010 — 08.84.200)
86. Psychologists and Psychological Associates (§§ 08.86.010 — 08.86.230)

Chapter
87. Real Estate Appraisers (§§ 08.87.010 — 08.87.900)
88. Real Estate Brokers and Salesmen (§§ 08.88.011 — 08.88.990)
92. Concert Promoters (§§ 08.92.010 — 08.92.090)
95. Clinical Social Workers (§§ 08.95.010 — 08.95.990)
98. Veterinarians (§§ 08.98.010 — 08.98.250)

Revisor's notes. — The provisions of this title were redrafted in 1982 to remove personal pronouns pursuant to § 4, ch. 58, SLA 1982, and to make other minor word changes. Additional minor word changes were also made throughout the title in 1987 and 1991.

Collateral references. — 51 Am. Jur. 2d, Licenses and Permits, §§ 1 — 151.

53 C.J.S., Licenses, §§ 1 — 102.

Chapter 01. Centralized Licensing.

Section
10. Applicability of chapter
20. Board organization
25. Public members
30. Quorum
35. Appointments and terms
40. Transportation and per diem
50. Administrative duties of department
60. Application for license
65. Establishment of fees
70. Administrative duties of boards
75. Disciplinary powers of boards
80. Department regulations
87. Investigative and enforcement powers of department
90. Applicability of the Administrative Procedure Act
100. License renewal, lapse and reinstatement
102. Citation for unlicensed practice or activity
103. Procedure and form of citation
104. Failure to obey citation
105. Penalty for improper payment
110. Definitions

Sec. 08.01.010. Applicability of chapter. This chapter applies to the

(1) Board of Public Accountancy (AS 08.04.010);

(2) State Board of Registration for Architects, Engineers and Land Surveyors (AS 08.48.011);

(3) Athletic Commission (AS 05.05 and AS 05.10);

(4) Board of Barbers and Hairdressers (AS 08.13.010);

(5) Big Game Commercial Services Board (AS 08.54.300);

(6) Board of Certified Real Estate Appraisers (AS 08.87.010);

(7) Board of Chiropractic Examiners (AS 08.20.010);

(8) Board of Clinical Social Work Examiners (08.95.010);

(9) Board of Dental Examiners (AS 08.36.010);

(10) Board of Dispensing Opticians (AS 08.71.010);

(11) Board of Electrical Examiners (AS 08.40.011);

(12) Board of Marine Pilots (AS 08.62.010);

(13) Board of Mechanical Examiners (AS 08.40.220);

(14) State Medical Board (AS 08.64.010);

(15) Board of Nursing (AS 08.68.010);

(16) Board of Nursing Home Administrators (AS 08.70.010);

ALASKA STATE LEGISLATURE

SENATOR JOHNNY ELLIS

SPONSOR STATEMENT FOR SENATE BILL 109
CHILD SUPPORT NONPAYMENT
LICENSING RESTRICTION AND REVOCATION

39,000 Alaskan parents currently owe over $330 million in uncollected back child support payments, according to an estimate by the Child Support Enforcement Divison (CSED). In addition, 18,597 CSED payees receive Aid to Families with Dependent Children (AFDC).

SB 109 provides a means to collect some of these old debts from self-employed obligors who currently are not subject to wage withholdings. Because they are self-employed, these individuals often hold an occupational, trade, or professional license or certificate. SB 109 prevents issuance or renewal of an occupational license or certificate when an applicant is $2500 or one year behind on payments of a child support order or judgement. A temporary license would be issued to achieve compliance or to allow the applicant the opportunity to contest the grounds for denial.

Further, SB109 provides for the revocation of an affected obligor's driver's license. After a notice and a 150 day waiting period to achieve compliance or allow for contest of the grounds of revocation, the obligor's license will be suspended by the Division of Motor Vehicles.

Additional revenues collected due to enactment of the provisions of this bill would directly aid families who are currently dependent upon public assistance, and would help repay the state and federal government for AFDC payments made to custodial parents. Approximately 88% of the cost of implementing this section would be paid by the federal government; the remainder would be more than offset by the increased revenues.

It is a recommendation of the U.S. Commission on Interstate Child Support that licensing agencies not issue a license to anyone who is delinquent in his or her support duty.

Approximately fifteen other states have passed similar legislation in recent years. Early reviews indicate that compliance of the affected obligors has increased by roughly 40 to 50% and less than 1% of their licenses or certificates are actually denied or revoked.

ALASKA STATE LEGISLATURE

SENATOR JOHNNY ELLIS

SB 109
Child Support Nonpayment
Licensing Restriction and Revocation
Sectional Analysis

Section 1: AS 25.27 is amended by adding new sections to read:

Section 25.27.244 Adverse Action against Delinquent Obligor's Occupational License

Subsection (a): Requires agency (CSED) to maintain, on a monthly basis, an updated certified list of obligors who are not in substantial compliance with a support order.

Subsection (b): Requires agency to compile above lists and provide copies, within 30 days, to each licensing entity. Licensing entities may not issue or renew a license to person on the list, except as provided under this section

Subsection (c): Requires agency to compare applicant to most recent list and, if found, immediately notify the applicant of the licensing entity's intent to withhold issuance or renewal of the license.

Subsection (d): Except for commercial fishing licenses, requires licensing entity to issue a 150-day temporary permit if applicant otherwise qualified. No extensions or additional temporary permits are allowed.

Subsection (e): Allows Dept. of Fish & Game to issue a regular commercial fishing license along with notification that the department will not reissue or renew the license the next year if the obligor is still on the list.

Subsection (f): Provides notification guidelines.

Subsection (g): Requires agency to establish review procedures so that an applicant may have his/her case investigated, modify an order, or receive assistance in establishing a payment schedule.

Subsection (h): Provides guidelines for applicant that challenges being included on the list. Requires agency to send a release to licensing entity if:

(1) applicant is found to be in compliance or negotiates an agreement;
(2) agency is too slow, through no fault of the applicant, in responding so that applicant is unable to request judicial relief before expiration of temporary license;
(3) request for judicial relief, through no fault of the applicant, will not be resolved before expiration of the temporary license; or
(4) applicant obtains judicial finding of compliance.

Subsection (i): Requires applicant to act diligently in responding to notices. Applicant's delay in acting, without good cause, does not justify an issuance or a release.

Subsection (j): Does not allow agency to issue a release except as provided in this section. Requires agency to notify applicant of options.

Subsection (k): Provides requirements for a request for judicial relief from the agency's decision. Requires court to hold hearing within 20 days. Limits issues on which the court may base its decision.

Subsection (l): Requires agency to issue a release if court finds obligor to be in substantial compliance.

Subsection (m): Provides guidelines for handling a release.

Subsection (n): Allows agency to enter into interagency agreements with other state agencies to implement this section.

Subsection (o): Allows licensing entities to levy surcharges to cover costs of this section.

Subsection (p): Subsection (h) is the only administrative remedy available. Administrative Procedure Act does not apply.

Subsection (q): Requires appropriate agencies and departments to adopt regulations to implement this section.

Subsection (r): Definitions. List of licenses included and excluded.

Section 25.27.246 Adverse Action Against Delinquent Obligor's Driver's License

Subsection (a): Requires agency (CSED) to maintain, on a monthly basis, an updated certified list of obligors who have a driver's license and are not in substantial compliance with a support order.

Subsection (b): Requires agency to serve notice under (d) of this section that the obligor's driver's license will be suspended in 150 days and will not be reissued or renewed unless the licensee receives a release from the agency.

Subsection (c): If the licensee fails to obtain a release during the 150-day period following notice under (b) and (d) of this section, requires agency to notify department (Dept. of Public Safety) that the licensee's driver's license should be suspended and further renewals or applications should be denied until the agency sends the department a release for the licensee. Funds paid for a suspended or denied license may not be refunded.

Subsection (d): Provides notification guidelines.

Subsection (e): Requires agency to establish review procedures so that an applicant may have his/her case investigated, modify an order, or receive assistance in establishing a payment schedule.

Subsection (f): Provides guidelines for applicant that challenges being included on the list. Requires agency to send a release to licensing entity if:

(1) applicant is found to be in compliance or negotiates an agreement;
(2) agency is too slow, through no fault of the applicant, in responding so that applicant is unable to request judicial relief before expiration of temporary license;
(3) request for judicial relief, through no fault of the applicant, will not be resolved before expiration of the temporary license; or
(4) applicant obtains judicial finding of compliance.

Subsection (g): Requires applicant to act diligently in responding to notices. Applicant's delay in acting, without good cause, does not justify an issuance or a release.

Subsection (h): Does not allow agency to issue a release except as provided in this section. Requires agency to notify applicant of options.

Subsection (i): Provides requirements for a request for judicial relief from the agency's decision. Requires court to hold hearing within 20 days. Limits issues on which the court may base its decision.

Subsection (j): Requires agency to issue a release if court finds obligor to be in substantial compliance.

Subsection (k): Provides guidelines for handling a release.

Subsection (l): Allows licensing entities to levy surcharges to cover costs of this section.

Subsection (m): Subsection (f) is the only administrative remedy available. Administrative Procedure Act does not apply.

Subsection (n): Requires appropriate agencies and departments to adopt regulations to implement this section.

Subsection (r): Definitions. List of licenses included and excluded.

Section 2: Requires the agency to submit a report to the legislature by 1/1/98 providing statistics to demonstrate the effectiveness of this measure.

Section 3: This act takes effect 1/1/96.

DIVISION OF LEGAL SERVICES
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M E M O R A N D U M March 21, 1995

SUBJECT: Sectional Summary of SB 109 (Work Order No. 9-LS0853\A)

TO: Senator Johnny Ellis
Attn Nina

FROM: Terri Lauterbach
Legislative Counsel

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

As a preliminary matter, please note that a sectional summary of a bill should not be considered an authoritative interpretation of the bill and the bill itself is the best statement of its contents If you would like an interpretation of the bill as it may apply to a particular set of circumstances, let me know In the meantime, I hope this summary is sufficient

Section 1. Enacts new laws that would require child support obligors to be in substantial compliance with their child support orders before they can receive or renew most kinds of licenses, including driver's licenses[1]

> Sec 25.27.244 This section relates to occupational licenses It provides that CSED will, on a monthly basis, send lists of delinquent obligors to licensing entities who must check the lists for the names of license applicants If an applicants' name is on the list, the licensing entity may issue only a 150-day license to the applicant and must notify the applicant that a release from CSED must be obtained in order to get a permanent license In the case of commercial fishing licenses, a delinquent obligor may be issued one season's license, but not another one until getting a release from CSED The section also provides review procedures, including court review, if an

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[1] In current laws the legislature has already provided that child support obligors are not eligible for a number of state loan programs if they have "past due child support." (See AS 03.10.030 - agricultural loans, AS 14.43.125 and 14.43.650 - student loans, AS 16.10.320 - commercial fishing loans, AS 18.56.096 and 18.56.440 - mortgage loans, AS 26.15.130 - veterans loans, AS 27.09.020 - mining loans, AS 45.88.020 - alternative energy loans, and AS 45.89.030 - residential energy conservation loans.) I do not know how this eligibility condition is enforced in practice; my guess is that loan applicants simply answer on their loan applications a question that asks if they owe any past due child support Whether there is any attempt to verify the accuracy of their answers is unknown Perhaps the child support enforcement agency (CSED) would know

applicant wants to challenge CSED's placement of his or her name on the list of delinquent obligors

Sec 25.27.246 This section relates to driver's licenses, including school bus endorsements and commercial endorsements In the case of these licenses, CSED will notify delinquent obligors that their licenses will be suspended and will not be renewed or granted if the licensee is still delinquent in child support payments 150 days after the notice is given If the obligor has not come into substantial compliance with the support order within 150 days, CSED will notify the Department of Public Safety that the department should suspend any current license and not renew or issue a new license to the obligor until the obligor obtains a release from CSED The section provides review procedures similar to those provided under AS 25.27.244

In both AS 25.27.244 and 25.27.246, an obligor will be considered to be in "substantial compliance" with a support order if no more than $2500 is past due as long as at least one month's worth of support payments has been made in the past 12 months In other words, an obligor who owes $200/month in child support may still obtain a license as long as the obligor's past due support is no more than $2500 and at least $200 has been paid in the last 12 months

<u>Sec. 2.</u> This section requires CSED to make a report to the legislature about what effect this bill may have had on license issuance However, this section, as currently written, does not require the report to include an estimate of how much extra child support may have been collected because of the bill

<u>Sec. 3.</u> This section gives the bill a January 1, 1996 effective date

TML pl klb
95-065 plm

STATE OF ALASKA

DEPARTMENT OF REVENUE

CHILD SUPPORT ENFORCEMENT DIVISION

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March 15, 1995

Senator Johnny Ellis
State Capitol
Juneau, AK 99801

Dear Senator Ellis:

The Child Support Enforcement Division (CSED) of the Alaska Department of Revenue supports the Senate Bill 109. With the passage of SB 109, Alaska will join 17 other states in asserting the rights of children to be supported by their parents.

CSED anticipates that, because of this legislation, Alaskan children will see a dramatic increase in the collection of support from parents who otherwise would not pay. Additionally, this bill will help to decrease the AFDC rolls, thereby reducing the state's costs of supporting children for whom an absent parent refuses to support.

The success of this type of program enacted in other states has been significant. Many states dramatically increased collections, while minimizing the number of instances where people lost their licenses.

This legislation wins on all counts. Approximately 88% of the costs of enacting SB 109 will be paid by the federal government and the remainder will be offset by increased revenues to the state through AFDC collections. It is a readily implemented, cost-effective strategy for returning responsibility where it belongs - to the parents.

SB 109 also provides for fairness in support enforcement. Under present statutes, it is much easier to collect child support from a parent who works for wages and pays taxes than it is to collect from someone who works under the table or owns a business or professional practice. **Ironically, child support is often avoided by those who are most able to pay.** SB 109 would ensure that those who have been able to hide their income will no longer be rewarded for such activity.

Finally, we believe that SB 109 represents the future of America. Serious discussions of welfare reform at all levels of government include issues of personal responsibility and the basic right of children to be supported by their parents. Licensing suspension and/or non-renewal is an effective method to enforce compliance with the law.

Sincerely,

Glenda J. Straube
Director

TABLE II

Obligor arrears is $2,500 or greater
OR
Obligor has paid less than one full month's obligation
during previous twelve month period

Case Status	Number of Cases	Arrearages
AFDC Active ($2,500=>)	3,215	$91,186,401
Non-AFDC Active ($2,500=>)	4,010	98,277,105
AFDC Active (< 1 month)[1]	378	461,008
Non-AFDC Active (<1 month)[1]	356	384,911
TOTALS	7,959	$190,309,425

TABLE V

Inactive Cases With Arrears $2,500 or More
With No Ongoing Obligations Due[2]

Case Status	Number of Cases	Arrearages
AFDC Inactive	1,337	$22,491,782
Non-AFDC Inactive	1,406	36,722,240
TOTALS	**2,743**	**$5[illegible],214,002**

[2]This information not included in other tables, but these totals could be added to each table.

CSED LICENSE RESTRICTION/REVOCATION HIGHLIGHTS

	Implemented	Affected Obligors	# Brought into Compliance	Success Rate	Amount Collected	Licenses Revoked
California	11/92	16,117	6,831	42%	$6,000,000	NA
Maine	8/93	21,018	12,158	58%	$21,071,596	40
South Dakota*	10/93	11,000	3,000	27%	NA	5**

*South Dakota has just implemented their law
and have only assigned one attorney and one paralegal to this task.
Over time, they expect their backlog of cases to reduce
and their compliance rate to increase.

** SD issues approximately 40 temporary licenses/month (120 total)

Prepared by the Office of Representative John Davies

No license to evade child support

ELLEN GOODMAN

In the entry to the Augusta, Maine Department of Human Services there is a small, rather discreet sign that reads simply: "Make Child Support Payments Here." It's a modest request but it might very well become a state motto.

Here in the Northeast corner of the country, the Pine Tree State has done what other states are threatening to do. It is enforcing the first law in the country that takes away licenses – business licenses, professional licenses, and especially driver's licenses – from parents who don't support their children.

And the hopeful fact – or is it the depressing fact? – is that it's working.

For years, the Children's Defense Fund has pointed out that less than 3 percent of people default on used car payments while 49 percent default on child support agreements. Now it seems that the most feared Repo Man is the one who can repossess a driver's license.

Today the deadbeat dad has become the poster boy of irresponsibility. Despite all the careful gender-neutral language of the law, we know that 97 percent of the "non-compliant non-custodial parents" are fathers. In 1992, they owed nearly $31 billion to their 23 million children.

Each one may have a story about why he can't or won't or shouldn't have to pay what the court has ordered. But Colburn Jackson, the burly, longtime head of support enforcement for Maine says flatly that the primary reason men don't pay is: "They've been able to get away with it."

Jackson's own view is closer to a judicial malaprop he remembers with humor. Not long ago, a Maine judge meant to rule that a father had proven his inability to pay. By mistake, the judge wrote that the father had "demonstrated an ability to not pay child support." That, Jackson says, is closer to the truth.

But Maine has tried something different. Last August, the state sent out notices of the new law to 17,400 parents who were more than 90 days late in their payments. Some of these parents hadn't paid "since antiquity," some had hidden their assets, some had gone into business under other names. All were warned to pay up, to make a payment plan, or risk losing a license.

The response was overwhelming. A man with a license to run a junkyard – a father who hadn't paid child support in 10 years – came in the day after he got the notice and said, "Well, you got me now." A long-haul trucker came in and plunked down $19,000. Another man who said he had been "procrastinating for years" paid $4,000.

By June, they had collected $12.9 million from 10,000 people in a state of about one million. And that was before the first license had been taken away. A few weeks ago, eight men who collectively owe $140,000 shared the dubious honor of being first to lose their licenses to drive.

What Jane Sheehan, the commissioner of human services, learned – and she says this without a hint of irony in her voice – is that "you have to attack something near and dear to the heart of that individual." What others have learned is that sometimes the car or certainly a professional license was nearer and dearer than the kid.

In his Capitol office, Gov. John McKernan describes this law as another way of putting back together the Humpty-dumpty of responsibility. It's a program popular with most men as well as women. "Many fathers are struggling to pay for their own kids," he says, "and paying taxes for the kids of fathers who aren't paying anything."

Indeed, in the aftermath of Maine's success, a dozen states are considering similar laws that apply to AFDC and non-AFDC families alike. The idea has appeared as part of the Clinton welfare reform proposal. There are plans to make state laws reciprocal, so that parents with children in one state and licenses in another would be as vulnerable for child support violations as they are for driving violations.

But if what's happened here is a success story, it's not an entirely happy tale. For as long as I can remember, Americans have ruefully noted that you need a license to drive a car but not to raise a child. Now in this upside-down world, we have finally drawn a connection between parenting and licensing.

What an odd bumper sticker for our era: Support your kids, or get out of the driver's seat.

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Ellen Goodman is a columnist for The Boston Globe.

SB

119

SENATOR LOREN LEMAN

Northwest Anchorage

716 W 4th Ave, Suite 520, Anchorage, AK 99501 (907) 258-8189 Session: State Capitol, Juneau, AK 99801 (907) 465-2095

SPONSOR STATEMENT
SB119; Certificate of Merit

This bill requires review by a court appointed conciliation panel before litigation proceeds against an architect, engineer, or land surveyor.

The conciliation process is designed to ferret out baseless claims and help settle valid claims out of court. According to representatives of the Alaska Professional Design Council, review by conciliation panels in other states has helped reduce litigation.

Presently seven state have similar legislation--Arizona, California, Colorado, Georgia and Hawaii, Kansas, and New Jersey. Currently pursuing certificate of merit legislation are Missouri, Maine, and Washington.

In 1987, Ralph Anderson and Associates completed an analysis of the 1979 California Certificate of Merit law. The purpose of this analysis was to determine its effectiveness in California.

The principal findings and conclusions of the study are:

1. Fewer malpractice suits are filed against design professionals.
2. More malpractice lawsuits against design professionals are dismissed as a result of the law, resulting in fewer jury trials.
3. Design professionals support the certificate of merit law.
4. Costs of the consultation required under the law are not significant.
5. There is support for retention of the law among those directly involved in design malpractice litigation.

I have long been a supporter of alternative dispute resolution to reduce the time and cost for litigation, while still protecting the rights of the involved parties. The conciliation panel approach meets these objectives.

AMERICAN CONSULTING
ENGINEERS COUNCIL

CERTIFICATE OF MERIT

BRIEFING PACKET

AMERICAN CONSULTING
ENGINEERS COUNCIL

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AMERICAN CONSULTING
ENGINEERS COUNCIL

To: Member Organization Le[illegible]

From: ACEC Legal Department

Date: November 27, 1995

Re: Certificate of Merit Laws

The intent of this memorandum is to provide Member Organizations with an introduction to certificate of merit laws, which are currently enforced in Arizona, California, Colorado, Georgia, Hawaii, Kansas and New Jersey. This memorandum begins with a brief explanation of the reasons for certificate of merit legislation, then proceeds to an overview of ACEC's involvement in certificate of merit advocacy (particularly, the ACEC Risk Management Committee),[1] and concludes with a summary of each state's certificate of merit law. This memorandum is supplemented with the following:

1. A comparison chart of state certificate of merit laws.

2. The full texts of the certificate of merit laws of California,[2] Hawaii,[3] and New Jersey (representative of the three categories of certificate of merit laws).

3. The full text of the Proposed Model Act with Regard to Suits or Claims Against Design Professionals (the ACEC model certificate of merit law).

4. "Certificate of Merit and Review Panels: Conditions Precedent to Civil Actions Against Design Professionals," published in Construction Lawyer (April 1995).

5. "Certificates of Merit: A First Step in the Rational Economical Approach to the Resolution of Design Claims," published in Virginia Lawyer (September 1993).

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1 The NSPE-PEPP Professional Liability Committee is also preparing a packet on this topic.

2 The California statute appears in *West's Annotated California Codes, Code of Civil Procedure* and was reprinted with the permission of the West Publishing Company.

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negligence against a design professional must file a claim with a three-person review panel. The panel conducts an informal hearing, during which the panel may review evidence submitted by both parties. Since formal rules of evidence are waived, the panel's findings and verdict are inadmissible in any subsequent legal proceedings. The model law provides a list of four verdicts the panel may render; the panel must select at least one verdict from the list, although it may choose to include more than one. The verdict of the panel is non-binding.

The plaintiff can still reject the panel's verdict and file a formal complaint in court. The complaint must be accompanied by an affidavit from a licensed member of the defendant's profession. The affidavit must state the existence of at least one act of negligence and its factual origins. If obtaining an affidavit would cause the statute of limitations on the claim to expire, the plaintiff is given an additional forty-five days to comply, and the defendant is given thirty days to respond once the affidavit is filed.

Certificate of Merit Laws at the State Level

The certificate of merit laws which are currently in force at the state level share common characteristics and distinct differences, resulting in varying degrees of success in terms of reducing the number of frivolous lawsuits. Despite their unique characteristics, state certificate of merit laws can be divided into three categories: those requiring a certificate drafted by an attorney, those requiring an affidavit from a design professional, and those requiring the resolution of the dispute by a screening panel. The general requirements of the seven states which presently have certificate of merit laws are summarized below.

Arizona (Arizona Revised Statutes, Title 12, Chapter 17)

Arizona's certificate of merit law only applies to "registered professionals," which are defined as engineers, architects, assayers, geologists, landscape artists, land surveyors as well as contractors. The law requires that, in any action by a non-registered professional alleging professional negligence on the part of a registered professional, an affidavit from a licensed member of the defendant's profession must be submitted with the claim.

The affidavit must state "the acts or omissions" and the "factual basis" underlying the claim, as well as "how the acts or omissions" were responsible for causing the plaintiff's injury. If the statute of limitations for the claim would expire while an affidavit is being obtained, the affidavit may be submitted forty-five days after the initial claim is filed. Also, a plaintiff who obtains an affidavit before a claim is filed but fails to submit the affidavit with the claim due to "excusable neglect or mistake" may be given leave by a judge to correct the error without penalty. Otherwise, failure to submit the affidavit with the claim results in automatic dismissal of the claim.

the affidavit may be submitted forty-five days after the complaint is filed. Non-compliance can be grounds for a dismissal only if the defendant's initial responsive pleading mentions the error.

Hawaii (Hawaii Revised Statutes, Volume 13, Chapter 672)

Hawaii's certificate of merit/screening panel law applies to situations where a plaintiff is seeking damages for acts of professional negligence committed by persons who are licensed professional engineers, architects, surveyors and landscape architects. Before filing a formal complaint in court, the plaintiff must file a claim with the Design Professional Conciliation Panel. This requirement is waived under certain circumstances if the judge rules (upon a party's motion) that the subject matter of the claim is not appropriate for the panel's review.

The plaintiff must submit a certificate of merit ("certificate of consultation") at the same time the claim is filed with the panel. If obtaining a certificate would create a statute of limitations problem, the certificate may be submitted within thirty days of filing the claim with the panel. The certificate must state that the attorney has consulted with a licensed member of the defendant's profession, and based upon that consultation, the attorney has found enough merit to the claim to warrant further legal action. A certificate does not have to be obtained when an attorney has made three attempts to obtain a consultation and was refused each time, or when an attorney's case is based upon a claim that the defendant failed to disclose the ramifications of a procedure to the plaintiff.

The screening panel consists of a dispute resolution expert, a trial attorney, and a member of the defendant's profession; the panel's costs are divided equally among the parties. The panel's deliberations are informal, and during a hearing the panel may consider a wide variety of evidence. The panel may also encourage the parties to voluntarily settle the case. Thirty days after the completion of a hearing, the panel renders a non-binding decision which includes assignment of liability and any appropriate award of damages (punitive damages may not be awarded). The statute of limitations begins to run again after the panel has rendered its decision. If a party rejects the panel's decision and pursues the matter in court, the panel's findings, statements, and conclusions are inadmissible as evidence.

Kansas (Kansas Statutes Annotated, Chapter 60, Article 35, Sections 60-3501 - 60-3509)

The Kansas statute provides for the establishment of screening panels, which review the actions of engineers, architects, and other licensed individuals. The law applies in cases where a plaintiff files a "professional liability malpractice action" alleging damages caused by the "rendering or failure to render services" on the part of a licensed professional. A judge presiding over such an action will authorize the convening of a screening panel, but only if one of the parties to the action makes such a request. The four-person screening panel consists of a licensed professional chosen by the plaintiff,

have faced even greater difficulty such as Wyoming which had passed a certificate of merit law only to have the Wyoming Supreme Court declare the statute unconstitutional.

Wyoming (Wyoming Statutes § 9-2-1802)

The Wyoming statute had established a screening procedure for professional malpractice claims. In 1990, The Wyoming Supreme Court declared the statute unconstitutional on equal protection grounds. Since the act was very broad and also covered health care professionals, the court found that the statute treated medical malpractice victims differently than persons injured by someone other than a health care professional since the medical malpractice victims had no direct access to the courts, they first had to go through the screening procedure. The court gave great deference to the general public health and did not want an extra hurdle for medical malpractice victims. It is therefore wise to limit the list of professionals covered in a certificate of merit act, although experts do not foresee the Wyoming Supreme Court's holding to affect any of the certificate of merit laws outside of Wyoming.

Political Realities

Rarely, if ever, has there been time when legal reform has been as popular as it is today. From state houses to the halls of Congress, the issue of how to reign in crippling litigation is near the top of the national agenda. However, in spite of the significant public opinion in favor of reform, significant obstacles still exist. The trial lawyer lobbying organizations have been successful in defeating past tort reform efforts -- including certificate of merit legislation. With that in mind, the following questions should be asked before embarking on a legislative initiative to pass a certificate of merit statute in your state:

- Whether current political climate in your state is favorable for passage of tort reform?
- Whether your state has enacted a medical screening panel law which can serve as a model for a law covering design professionals?
- How strong is the trial lawyer lobby in your state?
- How involved is your organization in A/E and state tort reform coalitions?
- Whether the proposed legislation should include all professionals or only design professionals?

Keeping these questions in mind and by reviewing the certificate of merit laws that are currently enforced as well as those that failed, increases the chances of passing a constitutionally sound certificate of merit law.

California

Certificate of Merit Law

As of June 1995

establishes a rebuttable presumption that the fees were not paid. This presumption is a presumption affecting the burden of producing evidence.

(Added by Stats.1982, c. 1543, p. 6007, § 3. Amended by Stats.1994, c. 587 (A.B.3600), § 3.7.)

Historical and Statutory Notes

1982 Legislation.

Former § 411.20 was repealed by Stats.1982, c. 1543, p. 6007, § 2.

1994 Legislation

The 1994 amendment, in subd. (a), inserted "except as provided in subdivision (d)," following "fee,"; and added subds. (d) and (e), relating to payment of the fee when a hearing is scheduled before the expiration of the 20-day period and the suspension of proceedings if the clerk performs a service and payment is made by check which is returned without payment.

Derivation: Former § 411.20, added by Stats.1969, c. 1610, p. 3363, § 3, amended by Stats.1970, c. 480, p. 952, § 7.

Library References

California Practice Guide: Civil Procedure Before Trial, Weil & Brown, see Guide's Table of Statutes for chapter paragraph number references to paragraphs discussing this section.

Notes of Decisions

1. In general

Where the husband and wife intend that a property-settlement agreement be incorporated into a court judgment to dissolve their marriage, the clerk should not file the agreement without the fee required for a "first paper" on behalf of a defendant. 61 Ops.Atty.Gen. 80, 2-28-78.

§ 411.30. Repealed by Stats.1986, c. 247, § 1, operative Jan. 1, 1989

Historical and Statutory Notes

The repealed section, added by Stats.1978, c. 1165, § 1, amended by Stats.1979, c. 988, § 1; Stats.1982, c. 1040, § 2; Stats.1983, c. 429, § 1; Stats.1984, c. 1705, § 1; Stats.1986, c. 247, § 1, relating to malpractice action, was repealed by its own terms on Jan. 1, 1989.

Notes of Decisions

In general 1
Certificate of merit 2
Validity ½

½. Validity

Requirement of filing of certificate of merit in medical malpractice suit, which did not toll § 583, was not equal protection violation, as requirement was rationally related to legitimate legislative purpose of ameliorating malpractice insurance crisis. Adams v. Roses (App. 2 Dist.1986) 228 Cal.Rptr. 339, 183 C.A.3d 498.

1. In general

Amendment to this section, effective in 1980, that operated to authorize filing of certificate of merit after filing of medical malpractice complaint, rather than requiring, as before, that complaint be accompanied by certificate of merit, was procedural, since new cause of action was not created, malpractice defendant was not deprived of any defense on merits and no vested rights were affected; thus, although plaintiff did not accompany complaint with certificate of merit as required when complaint was filed and when trial court in 1979, granted plaintiff's motion for relief from late filing, the failure was demurrable only and curable by filing of certificate as allowed by intervening amendment effective in 1980. Strauch v. Superior Court of Sacramento County (1980) 165 Cal.Rptr. 552, 107 C.A.3d 45.

2. Certificate of merit

Requirement that attorney's certificate of merit filed in medical malpractice action must indicate that plaintiff's counsel has consulted with licensed professional does not require that plaintiff's counsel consult with professional licensed in same discipline as defendant; rather, if after consultation with expert and review of facts, attorney concludes that there is reasonable and meritorious cause for filing action, objective of subd. (b)(1) of this section has been satisfied. Ammon v. Superior Court (Carpenter) (App. 1 Dist.1988) 252 Cal.Rptr. 748, 205 Cal.App.3d 783.

Counsel for patient bringing medical malpractice action against chiropractor satisfied requirement of certificate of merit, indicating that attorney has consulted with licensed physician and surgeon, dentist, podiatrist, or chiropractor, by submitting certificate of merit with complaint indicating that attorney consulted with licensed physician. Ammon v. Superior Court (Carpenter) (App. 1 Dist.1988) 252 Cal.Rptr. 748, 205 Cal.App.3d 783.

§ 411.35. Malpractice actions; architects, engineers, surveyors

(a) 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 issued pursuant to Chapter 3 (commencing with Section 5500) of Division 3 of the Business and Professions Code, or of a person holding a valid registration as a professional engineer issued pursuant to Chapter 7 (commencing with Section 6700) of Division 3 of the Business and Professions Code, or a person holding a valid land

Additions or changes indicated by underline; deletions by asterisks * * *

(l) For purposes of this section, "action" includes a complaint or cross-complaint for equitable indemnity arising out of the rendition of professional services whether or not the complaint or cross-complaint specifically asserts or utilizes the terms "professional negligence" or "negligence."

(Added by Stats.1979, c. 973, p. 3334, § 1. Amended by Stats. 1983, c. 414, § 1; Stats.1986, c. 1231, § 1; Stats. 1988, c. 1070, § 1; Stats.1990, c. 204 (S.B.2089), § 1; Stats.1991, c. 272 (S.B.527), § 1.)

Repeal

Section 411.35 is repealed by its own terms on Jan. 1, 1997.

Historical and Statutory Notes

1983 Amendment. In subd. (a), substituted "every" for "any" preceding "action", inserted "including a cross-complaint", and inserted "or indemnity", and substituted "by" for "in" preceding "subdivision"; in subd. (b), inserted "or cross-complainant" in the first sentence; in subd. (b)(1), inserted a comma following "state", inserted "who" preceding "teaches", inserted "is licensed to practice in the state or any other state, in the same discipline as the defendant or cross-defendant and", and added the second sentence; in subd. (c), deleted "such" preceding "certificate", and added a comma following "filed"; in subd. (e), substituted "The" for "Such" preceding "privilege"; in subd. (g), inserted "in accordance with" and "or a motion to strike pursuant to Section 435"; and, in subd. (h), substituted "1987" for "1984", and substituted "that" for "such" preceding "date".

1986 Legislation

The 1986 amendment, in subd. (h), substituted "1989" for "1987".

1988 Legislation

The 1988 amendment rewrote subd. (h) which read: "This section shall remain in effect only until January 1, 1989, and as of that date is repealed."

1990 Legislation

The 1990 amendment added subd. (l) defining action; and made nonsubstantive changes in subd. (a).

1991 Legislation

The 1991 amendment in subd. (h), in the second paragraph, substituted "January 1, 1997" for "January 1, 1992" as the repeal date of the section.

Law Review Commentaries

Review of selected 1990 California legislation. 22 Pac. L.J. 437 (1991).

Library References

Negligence ⇐104.
C.J.S. Negligence §§ 178 to 180.
California Practice Guide: Civil Procedure Before Trial, Weil & Brown, see Guide's Table of Statutes for chapter paragraph number references to paragraphs discussing this section.
Legal Secretary's Handbook, Legal Secretaries, Inc. see Handbook's Table of Codes for paragraph number references to paragraphs discussing this section.

Notes of Decisions

Attorney fees 3
Failure to file 4
Purpose 1
Reasonable expenses 2

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1. Purpose

Purpose of statute requiring filing of certificate of merit in action against engineer for professional negligence is to discourage frivolous professional negligence suits against registered civil engineers. Guinn v. Dotson (App. 4 Dist. 1994) 28 Cal.Rptr.2d 409, 23 Cal.App.4th 262.

2. Reasonable expenses

Statute, stating that trial court may order payment of any reasonable expenses, including attorney fees, incurred by another party as result of failure to comply with statute requiring filing of certificate of merit in action against engineer for professional negligence, allows court to award as reasonable expenses, including attorney fees, expenses incurred in successful pursuit of fee award. Guinn v. Dotson (App. 4 Dist. 1994) 28 Cal.Rptr.2d 409, 23 Cal.App.4th 262.

3. Attorney fees

Reasonable paralegal fees, billed to prevailing civil engineer in property owners' negligence action against engineer arising from construction of street, were included as compensable element in term "attorney's fees" in statute stating that trial court may order payment of any reasonable expenses, including attorney fees, incurred by another party as result of failure to comply with statute requiring filing of certificate of merit in action against engineer for professional negligence. Guinn v. Dotson (App. 4 Dist. 1994) 28 Cal.Rptr.2d 409, 23 Cal.App.4th 262.

Court of Appeal could look to judicial construction of similar language in analogous statute to determine whether legislature intended term "attorney's fees," as used in statute stating that trial court may order payment of any reasonable-expenses, including attorney fees, incurred by another party as result of failure to comply with statute requiring filing of certificate of merit in action against engineer for professional negligence, to include paralegal fees as element. Guinn v. Dotson (App. 4 Dist. 1994) 28 Cal.Rptr.2d 409, 23 Cal.App.4th 262.

4. Failure to file

Civil engineer was entitled to award of reasonable attorney fees for reasonable services of attorney and paralegals in obtaining order awarding to engineer reasonable expenses in property owners' negligence action against engineer due to owners' failure to comply with statute requiring filing of certificate of merit in an action

Hawaii

Certificate of Merit / Screening Panel Law

As of June 1995

CHAPTER 672

DESIGN PROFESSIONAL CONCILIATION PANEL

Sec.
672-1. Definitions.
672-2. Actions against architects, professional engineers, surveyors, and landscape architects.
672-2.1. Determination of unsuitability.
672-2.5. Certificate of consultation.
672-3. Design professional conciliation panel; composition, selection, compensation.
672-4. Review by panel required; notice; presentation of claims; termination.
672-5. Design professional conciliation panel hearing; fact-finding; evidence; voluntary settlement.
672-6. Same; persons attending hearings of panel.
672-7. Same; decisions.
672-8. Subsequent litigation; excluded evidence.
672-9. Immunity of panel members from liability.
672-10. Statute of limitations tolled.
672-11. Duty to cooperate; assessment of costs and fees.
672-12. Annual report.
672-13. Administration of chapter.
672-14. Retroactive application.

Cross references. — As to professional engineers, architects, surveyors and landscape architects, see Chapter 464.

§ 672-1. Definitions.

For the purposes of this chapter:

"Design professional" means a professional engineer, architect, surveyor, or landscape architect.

"Entities employing design professionals" means professional corporations or other business structures under which design professionals may practice and does not include nondesign professional entities. [L 1981, c 228, pt of § 1; am L 1985, c 36, § 2]

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

In any action for damages arising out of the alleged professional negligence of actions performed in the professional practice of a person holding a license as a professional engineer, architect, surveyor, or landscape architect under chapter 464, before the time of filing the complaint, the aggrieved person shall file a claim with the design professional conciliation panel. [L 1981, c 228, pt of § 1; am L 1985, c 36, § 3]

[§ 672-2.1]. Determination of unsuitability.

Any party or any person served with notice of a claim 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

(b) Where an attorney intends to rely solely on a failure to inform of the consequences of a procedure, this section shall be inapplicable. The attorney shall certify upon filing of the claim that the attorney is relying solely on the failure to inform of the consequences of a procedure and for that reason is not filing a certificate as required by this section.

(c) For the purposes of this section, the attorney shall not be required to disclose the names of design professionals consulted to fulfill the requirements of subsection (a).

(d) Unless a certificate is filed pursuant to subsection (a) or (b), the claim shall not be received for filing by the department. [L 1985, c 36, pt of § 1]

§ 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 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 registration of professional engineers, architects, 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 $300 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 and they shall be paid by the department of commerce and consumer affairs from funds collected from the claimant and defendant, 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. The 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

(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]

§ 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 within thirty days 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 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

(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

§ 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]

CHAPTER 672

DESIGN PROFESSIONAL CONCILIATION PANEL

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

§ 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

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.

§ 672-5. 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

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

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 [2][; 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] [4][[3]; 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%[3]][4] . The[2] person shall have no financial interest in the [2]outcome of the[2] 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.

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.

[illegible]

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.

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 it 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.

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.

Legislation Division Update

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, nonbinding opinion. Currently, only a handful of states have enacted such legislation.[1]

Similar legislation has periodically been introduced in other states without success.[2] 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[3] and engineers.[4]

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."[5] Similarly, the Georgia statute applies to "any action for damages alleging professional malpractice."[6]

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 professionals. In this case, *Martinez v. Badis*,[7] 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.[8] 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."[9] 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.[10] 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.[11]

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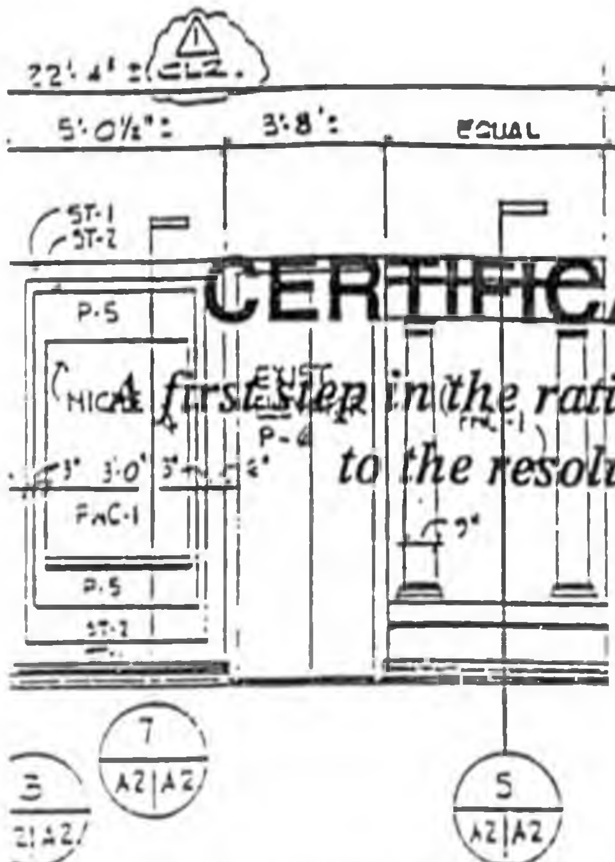
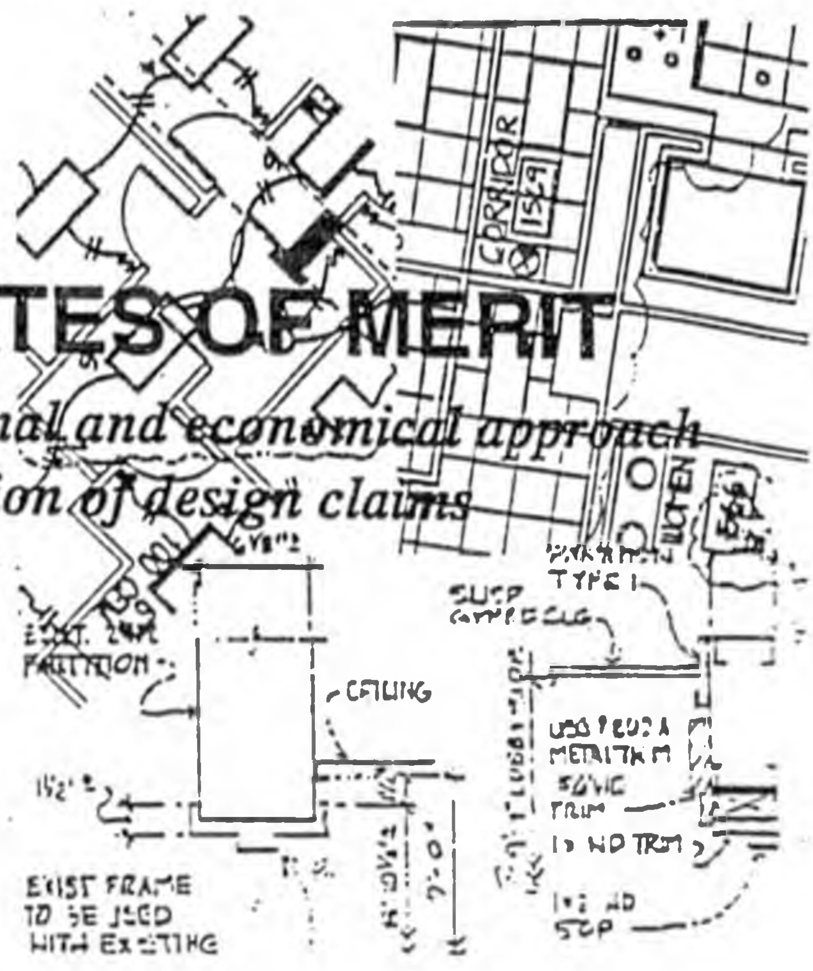
Editor's Note: This column was written by Paul E. Davis of the National Institute of Construction Law, Inc., in Greensboro, North Carolina, and is based on an article that originally appeared in the February 1994 issue of the *Construction Law Adviser* published by Clark Boardman Callaghan.





CERTIFICATES OF MERIT

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

by BRUCE E. TITUS
and CHRISTINE M. MCANNEY

Certificates 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,[1] Georgia,[2] and Colorado.[3] In addition, Hawaii[4] has statutorily established a process in which claimants present their claims to a panel of industry experts for a non-binding review.[5]

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.[6]

California was the first state to require, by statute, a certificate of merit in cases arising out of alleged design defects.[7] Section 411.35 of the California Code of Civil Procedure 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.[8]

➤ 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.[9]

➤ 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.[10]

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

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.[25] Each party to the claim is required to pay $450 to bring the action to the Panel.[26] The Panel may receive oral and documentary evidence and has the power to subpoena witnesses and documents and hire consultants.[27]

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.[28] 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.[29]

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.[30]

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.[31] 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;[32]
- Problems referred to the court where court regulated discovery is necessary;[33]
- 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;[34]
- Whether the design professional's involvement is secondary in importance to involvement of parties not covered by the statute;[35]
- The potential for unreasonable delay in reaching a resolution by referral to the Panel;[36]
- Whether there are too many parties or issues involved to be effectively handled by the Panel process;[37] 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.[38]

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.[39] 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,[40] Maryland[41] and the District of Columbia[42] generally recognize and enforce such contractual agreements which establish preconditions 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.[43] For example, in *James Julian, Inc. v. State Highway Administration*,[44] 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.

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 441.35 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

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SENATE COMMITTEE RE
First Committee of Referral

DATE: 3/9/95

FURTHER: Judiciary

Date of 5-Day Notice: 2/15/96
(in accordance with Uniform Rule 23)

DATE TURNED
INTO OFFICE: 2/22/96

Labor and Commerce Committee considered SB 119

Requiring conciliation panel review in a civil action against an architect, engineer, or land surveyor; efd.

and recommends:

[X] be replaced with _____ CS SB119 (L&C)
[ ] adopt previous _____ CS __________ ( )
[ ] attached amendment(s)
[ ] adopt Letter of Intent by __________ Committee
[ ] further referral to the __________ Committee

Senate Bill:
[ ] same title
[ ] new title
House Bill:
[ ] same title
[ ] technical title
[ ] new: SCR* _____

SIGNING DO PASS	DP	OTHER RECOMMENDATIONS	NR	DNP	AM
Mike Miller	✓	[illegible]			
John Torgerson	✓				
		J. E. Salo	✓		
CHAIR: Tim Kelly	✓				

NEW FISCAL NOTE(S):

Department	Date	Zero	Fiscal
DCED	2/21/96		10.6
AK. Ct. System	2/20/96	X	

PREVIOUS FISCAL NOTE(S):*

Department	Date	Zero	Fiscal

[ ] APPROPRIATION -- no fiscal note

*Include fiscal notes accompanying Governor's bill

SENATOR DAVE DONLEY

ALASKA STATE LEGISLATURE

Sponsor Statement
CS for SB 197
Prohibiting Insurance Companies from Discriminating
Against Victims of Domestic Violence
2/14/96

CS SB 197 amends SB 197 to add protection to victims of domestic violence against insurance company discrimination. SB 197 only protected domestic violence victims from insurance premium increases. The Committee Substitute will additionally protect victims from having insurance cancelled or from having claims denied. Additionally, it prohibits insurers from using or disclosing records which reflect the insured as a victim of domestic violence. It also requires insurers to disclose the reason insurance coverage or an application was denied.

SB 197 was amended with the advise and support of the Division of Insurance.

CS SB 197 prohibits insurance companies from refusing to provide coverage, from canceling a policy, and from increasing premiums only on the basis that the insured is a victim of domestic violence.

These precautions are necessary to protect victims of domestic violence. An informal survey by the Sub-Committee on Crime and Criminal Justice of the United States Judiciary Committee shows that eight out of sixteen of the largest insurance companies use domestic violence as a factor while rating insurance. Insurance companies should not use domestic violence as a factor when determining coverage.

In 1995, seven states passed legislation similar to CS SB 197 including Florida, Connecticut, Iowa, Delaware, California, New Jersey, and Massachusetts. Legislation similar to CS SB 197 passed California's legislature with only one opposing vote. There is legislation similar to CS SB 197 pending in four states and in Congress.

Currently, there is no protection for victims of domestic violence against insurance premium increases, cancellation, or denial. CS SB 197 protects innocent victims of domestic violence from being unfairly discriminated against by insurance companies. While there are no recorded occurrences of insurers discriminating against domestic violence victims in Alaska, it has been a problem in other states.

CS SB 197 is a necessary step in protecting innocent victims from insurance premium increases, cancellation, or denial.

If you have any question regarding CS SB 197, please contact myself or Amber Ala of my staff at 465-3892.

DD/aa

January-May: STATE CAPITOL • JUNEAU, AK • 99801-1182 • (907) 465-3892 • FAX: (907) 465-6595
June-December: 716 W. 4TH AVE. • STE. 430 • ANCHORAGE, AK • 99501 • (907) 258-8181 • FAX: (907) 258-1648

MEMBER: Senate Finance Committee • Senate State Affairs Committee

Produced in House

STATE OF ALASKA

TONY KNOWLES, GOVERNOR

DEPARTMENT OF COMMERCE AND
ECONOMIC DEVELOPMENT

DIVISION OF INSURANCE

P.O. BOX 110805
JUNEAU, ALASKA 99811-0805
PHONE: (907) 465-2515
FAX: (907) 465-3422
TDD: (907) 465-5437

February 16, 1996

The Honorable Tim Kelly
Chairman
Senate Labor & Commerce Committee
State Capitol, Room 101
Juneau, AK 99801-1182

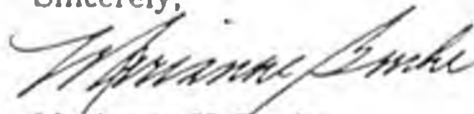
Dear Senator Kelly:

Re: CS for SB 197 (9-LS1218\C Ford 2/15/96)

Thank you for the opportunity to testify last Thursday on SB 197, relating to insurance coverage for victims of domestic violence. I am aware of the kinds of responses that are occurring in other states to this issue. Typically, these responses tend to create a special class of persons as a means of addressing egregious action by a few insurers. The proposed committee substitute bill submitted by Senator Donley avoids this mistake while directly addressing the issue in a reasonable and workable manner.

This legislation makes the use of the fact that a person is a victim of domestic abuse, an unfair trade practice, while preserving the right to insurers to underwrite based on existing medical conditions. It avoids a mandate of coverage yet deals with the use of inappropriate information. The Division of Insurance supports this bill.

Sincerely,



Marianne K. Burke
Director

MKB/cw2378.ins
021696a
cc: Senator Donley

FISCAL NOTE

STATE OF ALASKA **BILL NO. CS SB 197 (L&C)**
1996 LEGISLATIVE SESSION

Revision Date: February 20, 1996
Title: Prohibit Increase in Ins. for Domestic Violence
Sponsor: Senators Donley, Ellis, Salo
Requestor: Senate L&C Committee

Department: Commerce and Economic Development
BRU: Insurance
Component: Operations
COMPONENT SERIAL NO. #354

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						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
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 General Fund						
1005 GF/Program Receipts						
1006 GF/MHTIA						
Other						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

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

POSITIONS	FY 97	FY 98	FY 99	FY 00	FY 01	FY 02
FULL-TIME	0	0	0	0	0	0
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)
No fiscal impact.

Prepared by: Joan Brown, Administrative Officer Phone: 465-2597
Division: Insurance Date: 2/20/96
Approved by Commissioner: William L. Hensley Date: 2-20-96
Agency: Commerce and Economic Development

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SENATE BILL NO. 119

IN THE LEGISLATURE OF THE STATE OF ALASKA

NINETEENTH LEGISLATURE - FIRST SESSION

BY SENATOR LEMAN

Introduced: 3/9/95
Referred: L&C, JUD

A BILL

FOR AN ACT ENTITLED

1 **"An Act requiring conciliation panel review in a civil action against an architect,**
2 **engineer, or land surveyor; and providing for an effective date."**

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

4 **Section 1.** AS 09.55 is amended by adding new sections to read:
5 ARTICLE 9. MALPRACTICE ACTION AGAINST DESIGN PROFESSIONAL.
6 Sec. 09.55.700. MANDATORY CONCILIATION PANEL REVIEW. (a) A
7 person who files a civil action against a design professional seeking damages resulting
8 from professional negligence shall also submit the claim to the court for review by the
9 design professional conciliation panel. Within 20 days after an answer to the
10 complaint is filed, the court shall appoint a three-person expert advisory panel to
11 review the claim, unless the parties sign a written agreement waiving the panel review
12 required under this section.
13 (b) The panel required under this section shall consist of one person, appointed
14 as chair, who is experienced in settling negligence claims, one person who is an

1 attorney licensed in this state, and one person who is a design professional. The panel
2 may compel the attendance of witnesses, interview the parties, physically examine the
3 claimant if alive, consult with specialists if appropriate, and compel the production of
4 and examine all relevant records or materials relating to the claim. The panel may
5 meet in camera, but shall maintain a record of any testimony or oral statements of
6 witnesses and shall keep copies of all written statements it receives.

7 (c) Not more than 30 days after the panel is appointed, the panel shall hold a
8 hearing on the claim. The hearing shall be informal and shall be attended, either in
9 person or by teleconference, by each party, each party's legal counsel, witnesses, and
10 consultants called by the panel. The panel may

11 (1) record the hearing;

12 (2) receive oral or documentary evidence;

13 (3) question witnesses, or allow examination of witnesses by a party;

14 (4) place a burden of proof or burden of going forward with evidence
15 on a party; and

16 (5) consider any relevant evidence.

17 (d) Within 15 days after the hearing, the panel shall file a written advisory
18 decision with the court and mail copies to each party. Each member of the panel
19 shall sign the decision, and the decision may include concurring or dissenting opinions.
20 The decision must contain one of the following conclusions:

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

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

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

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

1 (e) If the decision of the panel is rejected by a party, the action may proceed
2 in the appropriate court. The report of the panel with any dissenting or concurring
3 opinion is not admissible in evidence, and a member of the panel may not be called
4 by a party or cross-examined as to the contents of the report or of that member's
5 dissenting or concurring opinion.

6 (f) A member of a panel is not civilly liable for an act or omission occurring
7 when acting as a member of the panel unless the member acts with intentional
8 misconduct.

9 (g) A member of a panel serves without compensation, but is entitled to per
10 diem and travel expenses authorized by law for boards and commissions under
11 AS 39.20.180 for all time spent in preparing its report. All expenses incurred by the
12 panel shall be paid by the court. However, in any case in which the court determines
13 that a party has made a patently frivolous claim or a patently frivolous denial of
14 liability, it shall order that all costs of the expert advisory panel be borne by the party
15 making that claim or denial.

16 (h) In this section,

17 (1) "design professional" means an architect, engineer, or land surveyor
18 licensed in this state;

19 (2) "panel" means the design professional conciliation panel;

20 (3) "professional negligence" means a negligent act or omission by a
21 design professional in providing professional services;

22 (4) "professional services" means services provided by a design
23 professional that are within the scope of the services for which the design professional
24 is licensed.

25 * Sec. 2. This Act applies to causes of action that accrue on or after the effective date of
26 this Act.

27 * Sec. 3. This Act takes effect July 1, 1996.

SB
131

AS 13.46.110(b)

Section 13.46.110(b) has been amended to allow investments for custodians within the custodial relationship where permitted in the custodians discretion.

AS 13.60.060(b)

Section 13.60.060(b) is similarly amended to expand investments for custodians within the custodial relationship.

SB
157

FISCAL NOTE

STATE OF ALASKA
1995 LEGISLATIVE SESSION

BILL NO. SB 157

Revision Date:
Title: Regulation of Small Loan and Retail Installment Transactions

Sponsor: Senate Labor and Commerce
Requestor:

Department Affected: Commerce and Economic Development
BRU: Banking, Securities and Corporations
Component: Banking, Securities and Corporations

COMPONENT SERIAL NO. 1233

Expenditures/Revenues: (Thousands of Dollars)

OPERATING EXPENDITURES	FY 96	FY 97	FY 98	FY 99	FY 00	FY 01
PERSONAL SERVICES	0	0	0	0	0	0
TRAVEL	0	0	0	0	0	0
CONTRACTUAL	0	0	0	0	0	0
SUPPLIES	0	0	0	0	0	0
EQUIPMENT	0	0	0	0	0	0
LAND & STRUCTURES	0	0	0	0	0	0
GRANTS, CLAIMS	0	0	0	0	0	0
MISCELLANEOUS	0	0	0	0	0	0
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

FUND SOURCE (Thousands of Dollars)

FUND SOURCE	FY 96	FY 97	FY 98	FY 99	FY 00	FY 01
1002 Federal Receipts	0	0	0	0	0	0
1003 GF Match	0	0	0	0	0	0
1004 GF	0	0	0	0	0	0
1005 GF/Program Receipts	0	0	0	0	0	0
1006 GF/MHTIA	0	0	0	0	0	0
Other	0	0	0	0	0	0
TOTAL	0	0	0	0	0	0

Estimate of current year (FY 95) cost: $ 0

POSITIONS

POSITIONS	FY 96	FY 97	FY 98	FY 99	FY 00	FY 01
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.)

Prepared by: Willis F. Kirkpatrick
Division: Banking, Securities and Corporations
Phone: 465-2521
Date: 5-2-95

Approved by Commissioner: William L. Hensley
Agency: Commerce and Economic Development
Date: 5/3/95

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MAXIMUM SERVICE CHARGES ALLOWED FOR CONSUMER CREDIT

(Interest Rates on Consumer Loans)

CURRENT ANNUAL RATES IN ALL 15 WESTERN STATES
In Effect in April 1995

State	Revolving Credit Loan Assume $3,000 balance	Fixed Term Auto Loan Assume $10,000 balance
Arizona	No Limit	No Limit
California	No Limit	19.2%
Colorado	21.0%	16.4%
Hawaii	24.0%	24.0%
Idaho	No Limit	No Limit
Montana	No Limit	No Limit
Nevada	No Limit	No Limit
New Mexico	No Limit	No Limit
North Dakota	No Limit	No Limit
Oregon	No Limit	No Limit
South Dakota	No Limit	No Limit
Utah	No Limit	No Limit
Washington	No Limit (exp. 6-30-95)	No Limit (exp. 6-30-95)
Wyoming	21.0%	22.5%
Alaska:		
Current Law	12.8%	14.5%
SB 157 Proposal	18.0%	18.0%
Industry Request	24.0% or No Limit	24.0% or No Limit

— Maximum Service Charges for Credit in U.S.

Avco
Financial
Services.

3349 Michelson Drive
Irvine, CA 92715-1606
714 553 1200

May 3, 1995

The Honorable Tim Kelly
Chairman, Labor and Commerce Committee
Alaska State Senate
Juneau, Alaska

Re: SB-157

Dear Senator Kelly:

Avco Financial Services is located in Irvine, California but has an operating branch located in Anchorage. Avco supports SB-157, for the bill makes certain positive changes to the Alaskan statute that affects small loans and retail installment transactions. SB-157 and similar legislation could allow for the opening of branches and the expansion of the industry.

I want to thank you and your committee for considering this bill and would like to urge its passage.

Sincerely,

H. Lee Rowell

H. Lee Rowell
Vice President
Government Affairs

HLR:cb

THE CASE FOR LATE FEES FOR ALASKA RETAIL CREDIT GRANTORS

BACKGROUND FOR ALASKA SENATE BILL NO. 157

A "late fee" or "delinquency charge" is a fee imposed by a credit grantor on an overdue account. Retail credit customers who fail to remit their monthly minimum payment by the agreed due date cause the retailer to incur additional costs in attempting to collect the past due accounts. These collection costs are in addition to the normal costs incurred in extending credit and servicing the credit customer. The average of such costs for retailers operating under Alaska law is approximately $7.80. These additional costs, if not recouped by the credit grantor, may show up in higher merchandise prices, meaning that cash customers and those who properly make their payments provide a subsidy to those who don't adhere to agreed payment terms. Besides allowing the retailer to offset the additional costs incurred, late payment fees also provide an incentive for the customer not to miss the payment in the first place.

The best public policy response to this situation is to allow retailers to assess a late payment fee on delinquent credit customers at an amount which encourages the customer to make timely payment and enables the retailer to recover the additional costs which it incurs when the customer does not do so. Thus the Alaska Retail Installment Sales Act (RISA) has, since its enactment in 1962, authorized reasonable late fees on retail installment contracts; that is, closed-end (single purchase) credit contracts. However, unlike the law in over three-quarters of the states in the country, the Alaska act is silent with respect to the imposition of late fees on the now-prevalent revolving credit accounts.

Under federal law, some credit grantors can and do charge late fees on retail charge agreements. Such retailers extend credit through a federally-chartered "credit card bank" or through a national or state bank located in another state under whose laws they can legally impose late charges on delinquent accounts in Alaska. Several such retailers are currently imposing late fees on Alaska resident customers. This puts retailers operating under the Alaska RISA at a competitive disadvantage because customers will first pay those bills with a late fee. As a result, the bills from retailers operating under Alaska law go to the bottom of the stack and those from out-of-state creditors get paid first.

PROPOSED LEGISLATION - ALASKA SENATE BILL NO. 157

The proposed legislation, Senate Bill No. 157, would (in Section 10) correct the current inequity in the Alaska Retail Installment Sales Act by allowing the imposition of a reasonable delinquency fee not only when a payment on a retail installment contract is late, but also when a payment on a retail charge agreement is late. Senate Bill No. 157 restores fairness to creditors operating under Alaska's law and the vast majority of credit accountholders who pay their bills on time and should not be required to subsidize those who do not.

Current Alaska Laws on Service Charges

ALASKA RETAIL CREDIT GRANTORS
CURRENT SERVICE, DELINQUENCY AND DISHONORED CHECK CHARGES

RETAILER	STATE LAW GOVERNING ACCOUNTS	LEGAL SERVICE CHARGE RATE	SERVICE CHARGE RATE IN ALASKA	DELINQUENCY CHARGE IN ALASKA	DISHONORED CHECK CHARGE IN ALASKA
Chevron	Alaska	18% to $1,000; 10¼% above	18% to $1,000; 8% above		
Firestone	Ohio	25%	21.84%	-0-	-0-
Lamonts	Ohio	25%	19.8%	$10	$10
Fred Meyer	South Dakota	No statutory rate limit	22.44%	Lesser of $10 or 5% of missed payment	$15
Nordstrom	Colorado	21%	18% to $1,000; variable above	$10	$10
JCPenney	Alaska	18% to $1,000; 10¼% above	18% to $1,000; 7.92% above	-0-	$10
Radio Shack	Tennessee	24%	19.8%	$15	$10
Sears	Arizona	No statutory rate limit	21%	-0-	$10
Texaco	Nebraska	No statutory rate limit	21%	Lesser of $5 or 5% of missed payment	$15
Zales	Alaska	18% to $1,000; 10¼% above	18% to $1,000; 8% above	-0-	-0-

The information in this chart is based upon credit applications collected in 1994 and 1995.

April 25, 1995

RETAIL REVOLVING CREDIT (2 PARTY)
STATES THAT AUTHORIZE LATE PAYMENT FEES/YEAR AUTHORIZED

State	Year	Maximum Late Payment Fee Authorized
Arizona	1980/1995	5% of monthly payment up to maximum of $10.00 [if late payment $25 or less, $5.00; if late payment more than $25, $10.00 (effective 7/12(?)/95]
California	1994	$10.00
Colorado	1993	$15.00
Florida	1984	5% of monthly payment up to maximum of $5.00; none allowed if 5% is less than $1.00
Georgia	1991	$5.00 [$10.00, effective __/__/95]
Hawaii	1984	5% of monthly payment up to maximum of $50.00
Idaho	1993	$5.00 or 5% of monthly payment if greater
Illinois	1993	$10.00 or 5% of monthly payment if greater
Indiana	1994	$14.50
Kansas	1988/1994	5% of monthly payment up to maximum of $25.00; alternatively, if late payment $25 or less, $5.00; if late payment more than $25, $10.00
Louisiana	1986/1990	5% of monthly payment up to maximum of $15.00/parity with fees imposed on residents by out-of-state banks
Maine	1994	5% of monthly payment up to maximum of $10.00
Maryland	1986	No statutory limit
Massachusetts	1993	10% of monthly payment up to maximum of $10.00
Michigan	1993	$5.00
Mississippi	1990	$10.00
Missouri	1994	$10.00 or $5.00 if delinquent installment less than $25.00
Montana	1993	5% of monthly payment up to maximum of $15.00
Nevada	1993	No statutory limit
New Hampshire	1994	No statutory limit
New Jersey	1995	[$10.00; effective 6/5/95]
New York	1980	No statutory limit
North Carolina	1991	$5.00
Ohio	1980	5% of monthly payment up to maximum of $3.00
Oklahoma	1993	$15.00 or 5% of monthly payment if greater
Oregon	1963	Reasonable
Pennsylvania	1994	$12.00
Rhode Island	1994	$12.00
South Carolina	1992	5% of monthly payment (minimum $4.60) up to maximum of $11.50
South Dakota	1983	No statutory limit
Texas	1967	5% of monthly payment up to maximum of $5.00
Utah	1991	$20.00 or 5% of monthly payment if greater
Virginia	1987	No statutory limit
Washington	1963/1993	Reasonable; if less than 10 days late with balance of less than $100, 10% of balance with $2.00 minimum
West Virginia	1993	5% of monthly payment up to maximum of $5.00
Wisconsin	1994	$10.00

4/19/95

Alaska Small Loan Act

Adopted into law in 1955; last significant amendment in 1982.

Principal changes:

1. Application fee increased from $400 to $1,000 and annual fee increased from $200 to $500; multiple office license created with $2,000 annual fee for 10 offices.

2. Liquid Asset and bond requirements increased to $25,000 each from $20,000 and $5,000, respectively.

3. Standards for books and records made consistent with modern data processing concepts.

4. Irregular repayments authorized for Alaskans with seasonal income, e.g., fishermen or construction workers.

5. Loan agreements include cost of credit reports, $25 late payment fee and costs incurred in collections.

Alaska Retail Installment Sales Act ("ARISA")

Adopted into law in 1962; last significant amendment in 1980.

Principal changes:

1. Clarifies appropriate costs to be included in loans.

2. Amends service charges for fixed term and revolving charge agreements to 1 1/2% per month or 18% per year, simplifying the current complex rate structure.

SB

158

April 24, 1995

Labor and Commerce Committee
Alaska State Senate
State Capitol
Juneau, AK 99801-1102

Dear Senators,

On behalf of the Alaska Pharmaceutical Association and with the approval of the Alaska State Board of Pharmacy, I am requesting your favorable consideration of Senate Bill 153, "An Act relating to pharmacists and pharmacies".

This project was begun approximately four years ago when the pharmacy community recognized the need to revise and update antiquated, obsolete and inadequate statutes related to the practice of pharmacy in the state. The following problems were identified:

1. Most statutes were very dated (1950's, 1970's) and did not reflect current practice of pharmacy or the changing nature of the profession.

2. Many statutes were overly restrictive or specific in areas which were more appropriately addressed in regulation.

For example, AS 08.80.350 Technical Aids Required requires pharmacies to have reference texts which are no longer published. AS 08.80.300 requires records to be kept for five years while federal law only requires two years. AS 08.80.040 discusses renewal of licenses every four years while centralized licensing statutes require renewal of licenses every two years.

3. Existing statutes have been introduced in a very piecemeal, fragmented approach resulting in overlap, conflict, and ambiguity.

4. As evidenced in its annual report, the Board of Pharmacy has been recommending specific statute revisions every year since 1984.

5. There are major omissions in the existing statutes. For example, nowhere in existing statutes is the practice of pharmacy defined. The use of support personnel, pharmacy technicians, is not addressed.

6. The investigative personnel within the Division of Occupational Licensing have continually experienced difficulty in investigating and processing complaints against licensed personnel and facilities because of vague, inadequate or non-existent language regarding unprofessional conduct and disciplinary sanctions.

— LETTER FROM AK PHARMACEUTICAL ASSOCIATION —

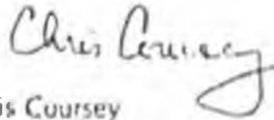
At that time the Alaska Pharmaceutical Association formed a task force to draft proposed statutes. The State Board of Pharmacy appointed two members to serve as liaison and represent the Board on this task force. Subsequently, using the Model State Pharmacy Act of the National Association of Boards of Pharmacy as a template, the task force completed its draft of proposed statutory changes. This was subsequently approved by the Association and the Board of Pharmacy.

Upon review by specific legislators and Legislative Legal Services, the proposed statutes were returned to the Alaska Pharmaceutical Association with the recommendation that they be rewritten within the existing framework of statutes, as opposed to a complete repeal and reenactment of the Pharmacy Practice Act. The Alaska Pharmaceutical Association asked myself, as an original draftor of the project, to accomplish that task. Senate Bill 158 represents years of effort and evaluation on the part of many people.

This bill is necessary to keep the practice of pharmacy in Alaska in step with national standards and to afford the public the safety and protection it deserves.

Thank you for your consideration

Sincerely,



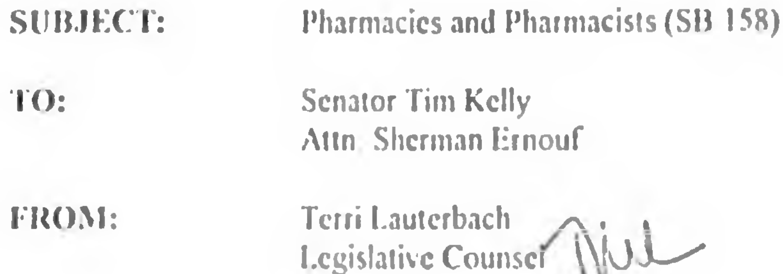
Chris Coursey
President, Alaska State Board of Pharmacy
Member, Alaska Pharmaceutical Association
work ph 264-1159

DIVISION OF LEGAL SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

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

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

MEMORANDUM April 24, 1995



SUBJECT: Pharmacies and Pharmacists (SB 158)

TO: Senator Tim Kelly
Attn Sherman Ernouf

FROM: Terri Lauterbach
Legislative Counsel

You have asked a number of questions relating to SB 158. This memo will give the answer I am best able to come up with, given the limitations of my understanding of the technical language used in the pharmacy profession I urge you to put these same questions to a member of the Board of Pharmacy who would be more familiar with the technical language of the profession and the effect of the changes in SB 158

Question #1: ***What effect does SB 158 have on an Advanced Nurse Practitioner's ability to "dispense" prescription drugs?***

To my knowledge, an ANP can only prescribe drugs and does not dispense them directly. I don't see anything in SB 158 that affects an ANP's prescriptive authority If an ANP can dispense drugs directly, then it appears to me that sec 25 of SB 158 might impose new requirements for dispensing that may not have existed before, in terms of record keeping, etc

Question #2: ***What effect does this bill have on physician assistants not practicing in a physician's clinic?***

I would give this question the same answer as Question #1

Question #3: ***How will SB 158 affect rural and specialty clinics that dispense drugs?***

There are no new requirements in SB 158 relating to clinics SB 158 does repeal the current law relating to clinics, AS 08 80 390, which requires either a pharmacist or the prescribing physician to dispense drugs at a clinic Under sec 4 of SB 158, in AS 08 80 030(b)(7), requirements relating to dispensing of drugs at clinics would be left to regulations These regulations may or may not be similar to current requirements so the effect of SB 158 on clinics is not certain

— MEMO FROM LEG LEGAL —

Question #4: ***Does SB 158 require that physicians and other practitioners dispensing"sample" drugs maintain the same records as a pharmacy?***

It appears to me that the answer to this question is "yes" under sec. 25 of the bill. I see no exception for "sample" drugs.

These are the best answers I have to your questions with the information currently available to me. Again, I suggest that the Board of Pharmacy be contacted about these issues. I would be glad to work with them on any clarifying language that may be necessary to either ensure the accuracy of the answers above or to clarify that the answers are not the intended result.

TML:klb
95-290 klb

SENATE BILL 158
"An Act Relating to Pharmacists and Pharmacies."

SECTION ANALYSIS AND COMMENTS
Prepared by:

Chris Coursey
President, Board of Pharmacy

Section 1: AS 08.02.010(a)

Amended to change verbage from registered to licensed for consistency with balance of statutes. A license is a permission to act granted by competent authority as opposed to register which indicates to enroll or record.

The next two sections along with the definition of the Practice of Pharmacy [08.80.003, 08.80.005, 08.08.480(39)] set forth the foundation upon which the Act is constructed. It clearly declares and acknowledges that safeguarding the public interest is the foremost compelling reason for regulating the Practice of Pharmacy and the distribution of drugs and related devices. It also circumscribes the activities included within the Practice of Pharmacy.

Section 2: AS 08.80.003 Practice of Pharmacy as a Profession

New. Pharmacy is a learned profession affecting public health and welfare and should be declared as such. The Practice of Pharmacy, from time to time, has been erroneously viewed as a commercial business rather than a profession. The status of pharmacy as a profession has been, and will continue to be, of particular importance in litigation.

AS 08.80.005 Statement of Purpose

New. The statement of purpose is designed to define the general scope of the Pharmacy Act. It provides for the control and regulation of the practice of pharmacy and the licensure of facilities engaged in the distribution of drugs and related devices. It should be noted that "distribution" is defined as delivery of a drug or device other than by administration or dispensing. Therefore, practitioner's offices and medical clinics would not be subject to licensure by the Board of Pharmacy.

- SECTIONAL ANALYSIS -

Section 3: AS 08.80.010 Creation and Membership of Board

Amended to establish term limits for officers elected by the Board. This is done to prevent any one person from serving in an office for up to eight years and to promote participation and leadership on a continuing basis.

Section 4: AS 08.80.030 Powers and Duties of the Board

Repealed and reenacted to empower the Board to make such regulations as are necessary to fully administer and implement the Act. The underlying philosophy of this approach is the Statute should create goals, guidelines, and policies in general areas, and permit the Board to provide the specifics in regulations. This approach recognizes that it is impossible for the legislature to enact comprehensive provisions regarding all matters with which the Board may be confronted or to anticipate the rapidly changing conditions of the professions and the delivery of health care. This section clarifies the responsibilities of the Board in order to protect the public health and welfare including licensure and renewal of licenses of personnel and facilities, regulation of pharmacists, interns, and technicians, the establishment of rules of conduct, professional standards and standards for education and training. Redundant language in the existing section is repealed.

Section 5: AS 08.80.047 Embargo Powers

New. This section provides for the ability to and guidelines for embargoing adulterated or misbranded drugs or related devices in order to protect the public safety and welfare.

Section 6: AS 08.80.060 Meetings of the Board

Amended to specify at least three meetings annually. This conforms to current practice (no increase in expenses) and is necessary to conduct the business of the Board.

Section 7: AS 08.80.065 Executive Secretary of the Board

New. Allows the Department of Commerce and Economic Development to employ an Executive Secretary of the Board if deemed necessary at some time. This position may include duties as inspector and investigator.

Section 8: AS 08.80.070 Quorom

Amended to change verbage from registration to licensure.

Section 9: AS 08.80.105 Removal of Board Members

Repealed and reenacted to specify that Board members may be removed only for cause.

Section 10: AS 08.80.110 Qualifications for Licensure by Examination

Repealed and reenacted to to change verbage from registration to licensure. Removes the vague phrase "freedom from addiction to the use of drugs or alcoholic liquors". Recognizes that applicants for licensure must pass multiple examinations (national board and state law exam, currently) and recognizes the score transfer process administered by the National Association of Boards of Pharmacy. Removes specifics from the internship training clause, allowing that to be modified by regulation as needed. Allows a mechanism for graduates of foreign colleges of pharmacy to receive licensure upon meeting strict requirements of the National Association of Boards of Pharmacy. Also anticipates NAFTA requirements.

Section 11: AS 08.80.116 Internship and Other Training Programs

Repealed and reenacted. Provides broad authority to establish internship and training requirements. Specific requirements are repealed which will be addressed in regulation.

Section 12: AS 08.80.120 Grading and Content of Examination

Repealed and reenacted. Specific requirements are repealed and will be addressed in regulation. Allows the Board to affiliate with the National Association of Boards of Pharmacy in using the national board examinations.

Section 13: AS 08.80.145 Reciprocity; License Transfer

New. Provides and clarifies guidelines for reciprocity of license from another state.

AS 08.80.147 Renewal of Licensure

New. Provides guidelines for renewal of licenses which have been lapsed for five years or more.

Section 14: AS 08.80.150 Temporary License

Repealed and reenacted. Grants the Board the authority to issue temporary licenses. Repeals specific language which can be modified as needed by regulation.

Section 15: AS 08.80.155 Emergency Permit

Repealed and reenacted. Grants the Board the authority to issue emergency permits. Repeals specific language which can be modified as needed by regulation.

Section 16: AS 08.80.157 Licensing of Facilities

Repealed and reenacted. Grants and clarifies authority of the Board to license and renew licenses of facilities involved in the practice of pharmacy or the manufacture, sale, or distribution of drugs. Allows the Board to determine classifications and criteria for licensure. Specifies that each location must be licensed and that a license is not transferable or assignable. Provides reporting requirements for licensed facilities and grounds for denying a license or taking disciplinary action against a license.

Section 17: AS 08.80.160 Fees

Amended for changes in terminology.

Section 18: AS 08.80.165 Continuing Education Requirements

New. Specifically grants the Board authority to establish continuing education requirements for pharmacists.

Section 19: AS 08.80.261 Grounds for Imposition of Disciplinary Sanctions

Amended. At the heart of the Pharmacy Act is the enforcement power of the Board. The Board must have the authority to discipline and/or prohibit unfit practitioners from continuing to threaten the public, if it is to fulfill its reponsibilities. The grounds for disciplinary action are written to insure protection of the public, while allowing the Board to adapt them to changing conditions as necessary. Board regulations will make the grounds for disciplinary action specific, understandable and reasonable. Also amended to clarify verbage.

Section 20: AS 08.80.261(h) Grounds for Imposition of Disciplinary Sanctions

New. Provides the Board with the ability to seal drugs during certain licensing actions to prevent the unlawful distribution of prescription drugs in the absence of a licensed pharmacist or valid pharmacy license.

Section 21: AS 08.80.295 Substitution of Equivalent Drug Products

Repealed and reenacted to continue authority for substitution of equivalent drug products while allowing the Board to address specific requirements in regulation. An equivalent drug product is defined in AS 08.80.480.

Section 22: AS 08.80.315 Confidentiality of Records

New. Clarifies the confidentiality of certain records and information.

Section 23: AS 08.80.330 Licensed Pharmacist as Pharmacist in Charge

Amended to standardize terminology to Pharmacist in Charge instead of manager. Also allows for owners who are pharmacists but not actively practicing to appoint a Pharmacist in Charge.

Section 24 & 25: AS 08.80.400 Practice of Medicine Not Affected

Amended. This statute was written when medical doctors were the only practitioners authorized to prescribe and dispense. Current federal laws including the Omnibus Budge Reconciliation Act (OBRA), impose requi. nents on all practitioners who dispense drugs to Medicaid patients. Most states have extended these requirements to all patients to avoid different standards of care for non-Medicaid patients.

It is the position of the Board that a pharmacist is held to standards and requirements in order to protect the public health and welfare.

If it is import int enough to require a pharmacist to label a bottle of prescription drugs dispensed to a patient (with name of drug, directions for use, etc.), then it follows that it should be important for any other health care provider who dispenses a prescription drug to a patient.

If it important enough to require a pharmacist to keep a record of a drug dispensed to a patient for a specific period of time, then it follows that it should be important enough for any other health care provider to maintain a record of a drug dispensed to a patient.

The Board is concerned from the viewpoint of the drug being dispensed: the quality of drug, the security and conditions of drug storage, the labeling and recordkeeping necessary fo the health and safety of the public. The Boa d of Pharmacy should be the entity responsible for establishing these standards. It is not the intent or the wish of the Board to affect the choice or selection of drugs by a prescribing practitioner.

Section 26: AS 08.80.410 Use of Term "Pharmacist" Prohibited

Amended to change terminology from registered to licensed.

Section 27. AS 08.80.430 Use of Pharmacy Symbols Prohibited

Amended. The symbol "Rx" is the universal characteristic pharmacy symbol. The statute as written is archaic.

Section 28 - 31: AS 08.80.480 Definitions

Amended to include new definitions for terms used in suggested amendments. Includes repeal of definitions of terms no longer used as result of suggested statute changes. Amended to update archaic language.

The definition of the "Practice of Pharmacy" is one of the most important clauses in the Act. The definition is purposely expressed in broad terms to provide latitude to the Board of Pharmacy in the adoption of implementing regulations. Pharmacy has been a very dynamic profession and a broad definition of the practice will permit the Board to make necessary changes from time to time to meet the changing practice. Such changes may be affected by new or amended regulations, which would be promulgated pursuant to the Administrative Procedures Act, affording all interested parties an opportunity to review and comment on any proposed regulations.

Included in the definition is the administration of drugs. This has been requested to address the changing nature of pharmacy such as pharmacies specializing in home health and infusion pharmacy in which the pharmacist may be required to connect pumps or change software dosing parameters on infusion pumps. Other circumstances [illegible]ude requests for hospital pharmacists to assist in administering drugs during cardiac arrest situations.

Section 32: Repealed.

AS 08.80.040 Duties of the Board
These duties would be specified in regulation based upon AS 08.80.030. Powers and Responsibilities of the Board.

AS 08.80.130 Reexamination
Specific requirements will be addressed in regulation.

AS 08.80.220 Prescription Department Required for Issuance of License
Specific standards to be addressed by regulation.

AS 08.80.230 Sanitary Conditions Required for Issuance of License
Specific standards to be addressed by regulation.

AS 08 80 240 Form and Display of Registration Certificate and License
Specific standards to be addressed by regulation.

AS 08.80.270 Report of Employee
Overly burdensome and unnecessary. More appropriately addressed in regulation if needed.

AS 08.80.280 Responsibility for Goods Sold
Only addresses those drugs dispensed by the owner or manager - not other employee pharmacists. Does not account for manufacturing problems which may affect quality and be unknown or uncontrollable by the owner or manager.

AS 08.80.290 Affixing of Label
More appropriately addressed in regulation.

AS 08.80.300 Record of Prescriptions
More appropriately addressed in regulation

AS 08.80.310 Record of Sales
More appropriately addressed in regulation.

AS 08.80.320 Pharmacist Required
Specific requirements addressed in regulation.

AS 08.80.340 Who May Prepare Prescriptions
Specific requirements addressed in regulation.

AS 08.80.350 Technical Aids Required
More appropriately addressed in regulation. Existing statute specifies texts no longer published.

AS 08.80.360 Sale of Dangerous Materials
More appropriately addressed in regulation.

AS 08.80.365 Partial Closure of Pharmacy
Facility requirements addressed in regulation to allow for modification as necessary.

AS 08.80.370 Vending Machine Sales Prohibited
Unnecessary. Powers of the board give the board the authority to prohibit this.

AS 08.80.390 Pharmacists Required in Hospital and Clinics
Specific facility requirements more appropriately addressed in regulation.

AS 08.80.440 Denial of Examination or License.
Overly restrictive Current statutes and suggested amendents to licensing standards replace this section.

AS 08.80.475 Federal Facilities Not Affected.
Since federal facilities are not licensed by the Board this section is unnecessary.

PHARMACISTS

Margaret D. Soden, RPh
PO Box 61328
Fairbanks, AK 99706-1328

April 17, 1995

Senator Mike Miller
Senate District Q
State Capitol, Room 125
Juneau, AK 99801-1182

RE: SB 158 "An Act relating to pharmacists and pharmacies"

Dear Senator Miller:

I am writing to urge you to support SB 158, "An Act relating to pharmacists and pharmacies." This bill will revise and update the antiquated, obsolete and inadequate statutes that currently govern the practice of pharmacy in Alaska. Many of our current statutes were enacted in a piecemeal fashion in the 1950's and 1960's and no longer reflect the current practice of pharmacy nor the changing nature of our profession. This has resulted in much overlap, ambiguity, vagueness, and omission, and there is often a conflict with federal law or other state statutes that also govern parts of our daily practice. Because of vague, inadequate, or non-existent language regarding unprofessional conduct and disciplinary sanctions, the Alaska Board of Pharmacy's investigators in the Division of Occupational Licensing have difficulty investigating and processing complaints against licensed personnel and facilities.

When I served on the Alaska Board of Pharmacy from 1981-1989, we made numerous unsuccessful attempts to revise our statutes in response to Legislative Audit Committee recommendations. Realizing the need to have the statutes governing our profession move into the 1990's and beyond, a task force from the Alaska Board of Pharmacy and the Alaska Pharmaceutical Association was formed with this goal in mind. The task force has been working for the last four years to draft these proposed statutory changes using the Model State Pharmacy Act of the National Association of Boards of Pharmacy as a guide. The membership of both groups have approved the changes proposed by the task force.

As a pharmacist, I work every day to care for the medication needs of my patients. I have worked in my chosen profession for 30 years and hope to work for 30 more. Because it is dynamic and ever changing, the laws that govern pharmacy practice need to be written to allow for change while still protecting the public's health I believe this revision of the pharmacy statutes will accomplish this and urge you to support SB 158 in its entirety.

Sincerely yours,

Margaret D. Soden RPh

Margaret D. Soden, RPh

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- LETTER OF SUPPORT -

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# of pages ▸ 1	
To Sen. Kelly	From Lynn Rodda
Co. Ak Legislature	Co.
Dept.	Phone # 261-3078
Fax # 465-3756	Fax # 261-4961

Lynn E. Rodda
8251 Pioneer Drive
Anchorage, AK 99504
home: 338 - 1995
work: 261 - 3078
FAX: 261 - 4961

Senator Tim Kelly
State Capitol
Juneau, AK 99801-1182
FAX : 465-3756

April 23, 1995

Dear Senator Kelly:

The Alaska Pharmaceutical Association in conjunction with the Alaska Board of Pharmacy has presented a bill this legislative session that will revise the current pharmacy statutes. Senator Miller has introduced this legislation (SB 158), which is being co-sponsored by Senators Lehman and Taylor.

SB 158 is need for the following reasons.

1. The present statues do not reflect the current practice of pharmacy nor do they reflect the changing nature of the profession. Most of the present statutes date from the 1950s and the 1970s.
2. Many of the present statutes are overly restrictive and are more appropriately addressed in regulations.
3. Existing statutes have been introduced in a very piecemeal, fragmented approach resulting in overlap, conflict and ambiguity.
4. The Board of Pharmacy has been recommending specific statute changes since 1984, as evidenced in the Board's annual reports.
5. There are major omissions in the existing statutes. For example, nowhere in the existing statutes is the practice of pharmacy defined. The use of support personnel (ie: pharmacy technicians) is not addressed.
6. Investigative personnel within the Division of Occupational Licensing have experienced ongoing difficulty in investigating and processing of complaints against licensed personnel and facilities because of vague, inadequate or non-existent language regarding unprofessional conduct and disciplinary sanctions.

As a past president of the Alaska Pharmaceutical Association and one of your constituents, I urge you to support the passage of SB 158, important legislation for Alaskans and for the profession and practice of pharmacy in Alaska. If I can provide you with further information regarding the urgent need for SB 158, please do not hesitate to contact me.

Sincerely,

Lynn E. Rodda

Alaska State Legislature

SENATOR
MIKE MILLER
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Senate District Q

Senate

SPONSOR STATEMENT
SB 158
"An Act Relating to Pharmacists and Pharmacies"

The passage of this legislation is necessary to keep the practice of pharmacy in Alaska in step with national standards and to afford the public the safety and protection it deserves.

Current statutes are antiquated and obsolete. For example, investigative personnel within the Division of Occupational Licensing have continually experienced difficulty in investigating and processing complaints against licensed personnel and facilities because of vague, inadequate or non-existent language regarding unprofessional conduct and disciplinary sanctions. Many of the statutes are dated from the 1970's and do not reflect the current practice of pharmacy or changing nature of the profession.

Using the Model State Pharmacy Act of the National Association of Boards of Pharmacy as a template, this legislation reflects over four years of work by the pharmacy community and is supported by the Alaska Pharmaceutical Association and the Alaska Board of Pharmacy.

CSSB 158 (L & C)

Section 1: Amends AS 08.02.010(a) to change verbage from registered to licensed for consistency with balance of statutes. A license is a permission to act granted by competent authority as opposed to register which indicates to enroll or record.

Section 2: Amends AS 08.80 by adding new sections AS 08.80.003 "Practice of Pharmacy as a Profession" and AS 08.80.005 "Statement of Purpose." Pharmacy is a learned profession affecting public health and welfare and should be declared as such. The statement of purpose is designed to define the general scope of the Pharmacy Act. It provides for the control and regulation of the practice of pharmacy and the licenser of facilities engaged in the distribution of drugs and related devices. Because "distribution" is defined as delivery of a drug or device other than by administration or dispensing, practitioner's offices and medical clinics would not be subject to licenser by the Board of Pharmacy.

Section 3: Amends AS 08.80.010 by adding a new subsection (b) which establishes term limits for officers elected by the Board.

Section 4: Repeals AS 08.80.030 and reenacted to empower the Board to make such regulations as are necessary to fully administer and implement this Act. This section clarifies the responsibilities of the Board in order to protect the public health and welfare including licenser and renewal of licenses of personnel and facilities, regulation of pharmacists, interns, and technicians, the establishment of rules of conduct, professional standards and standards for education and training. Redundant language in the existing section is repealed.

Section 5: Amends AS 08.80.060 to specify at least three meetings annually, which is current practice.

Section 6: Amends AS 08.80.070 technical change by replacing "registration" with "licenser."

Section 7: Repeals and reenacts AS 08.80.110 by changing verbage from registration to licenser. Recognized that applicants for licenser must pass multiple examinations and recognizes the score transfer process administered by the National Association of Boards of Pharmacy. Removes specifics from the internship training clause, allowing that to be modified by regulation as needed. Allows a mechanism for graduates of foreign colleges of pharmacy to receive licenser upon meeting strict requirements of the National Association of Boards of Pharmacy

Section 8: Repeals and reenacts AS 08.80.116 by providing broad authority to establish internship and training requirements. Specific requirements are repealed which will be addressed in regulation.

Section 9: Repeals and reenacts AS 08.80.120 states the examination or examinations shall be prepared to measure the competence of the applicant to engage in the practice of pharmacy. They board may employ, cooperate, and contract with an organization or consultant in the preparation and grading of an examination. The board shall retain sole discretion and responsibility for determining which applicants have successfully passed the examination.

Section 10: Amends AS 08.80 by adding two new sections As 08.80.145, which provides and clarifies guidelines for reciprocity of license from another state, and AS 08.80.147 which provides guidelines for renewal of licenses which have been lapsed for five years or more.

Section 11: Repeals and reenacts AS 08.80.150 which grants the Board the authority to issue temporary licenses. Repeals specific language which can by modified as needed by regulation.

Section 12: Repeals and reenacts AS 08.80.155 which grants the Board the authority to issue emergency permits. Repeals specific language which can by modified as needed by regulation.

Section 13: Repeals and reenacts AS 08.80.157 which grants and clarifies the authority of the Board to license and renew licenses of facilities involved in the practice of pharmacy or the manufacture of drugs. Allows the Board to determine classifications and criteria for licenser. Specifies that each location must be licensed and that a license is not transferable or assignable. Provides reporting requirements for licensed facilities and grounds for denying a license or taking disciplinary action against a license.

Section 14: Amends AS 08.80.165 by changing the fees terminology.

Section 15: Amends As 08.80 by adding a new section AS 08.80.165 granting the Board authority to establish continuing education requirements for pharmacists.

Section 16: Amends AS 08.80.261 by changing grounds for disciplinary action to insure protection of the public, while allowing the Board to adapt them to changing conditions as necessary. Board regulations will make the grounds for disciplinary actn specific, understandable and reasonable.

Section 17: Adds a new section AS 08.80.261(b) which gives the Board the ability to seal drugs during certain licensing actions to prevent the unlawful distribution of prescription drugs in the absence of a licensed pharmacist or valid pharmacy license.

Section 18: Repeals and reenacts AS 08.80.295 which continues authority for substitution of equivalent drug products (as defined in AS 08.80.480) while allowing the Board to address specific requirements in regulation.

Section 19: Adds a new section AS 08.80.315 which clarifies the confidentuality of certain records and information.

Section 20: Amends AS 08.80.330 to standardize terminology to Pharmacist in Charge instead of manager. Also allows for owners who are pharmacists but not actively practicing to appoint a Pharmacist in Charge.

Section 21: Amends AS 08.80.400 to specify that this chapter does not affect the practice of medicine by a licensed medical doctor, and does not limit a licensed medical doctor, physician assistant, advanced nurse practitioner, dentist, dispensing optician, or optometrist in supplying a patient with any medicinal preparation or article within the scope of the person's license.

Section 22: Amends AS 08.80.410 by changing the word "registered" to "licensed."

Section 23: Amends AS 08.80.430 prohibits the use of the symbol "Rx" unless the business has a pharmacist licensed under this chapter.

Sections
24-27: Repeals and reenacts AS 08.80.480(11), 08.80.480(14) and amends AS 08.80.480. These are updated definitions for terms used in this bill. The definition of the "Practice of Pharmacy" is one of the most important clauses in the Act because it is expressed in broad terms to provide latitude to the Board of Pharmacy in the adoption of implementing regulations.

Section 28: Repeals numerous sections that are better addressed through regulation by the Board of Pharmacy.

FISCAL NOTE

STATE OF ALASKA — **BILL NO. SB 158**

1995 LEGISLATIVE SESSION

Revision Date: April 21, 1995

Department: Commerce and Economic Development

Title: An Act relating to pharmacists and pharmacies

BRU: Occupational Licensing

Component: Operations

Sponsor: Senator Miller

Requestor: Senator Miller

COMPONENT SERIAL #: 1844

Expenditures/Revenues (Thousands of Dollars)

OPERATING EXPENDITURES	FY 96	FY 97	FY 98	FY 99	FY 00	FY 01
PERSONAL SERVICES	56.5	56.5	56.5	56.5	56.5	56.5
TRAVEL	2.4	2.4	2.4	2.4	2.4	2.4
CONTRACTUAL	5.7	5.7	5.7	5.7	5.7	5.7
SUPPLIES	1.0	1.0	1.0	1.0	1.0	1.0
EQUIPMENT	8.0					
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	73.6	65.6	65.6	65.6	65.6	65.6
CAPITAL EXPENDITURES						
CHANGE IN REVENUES	73.6	65.6	65.6	65.6	65.6	65.6

FUND SOURCE (Thousands of Dollars)

FUND SOURCE	FY 96	FY 97	FY 98	FY 99	FY 00	FY 01
1002 Federal Receipts						
1003 GF Match						
1004 General Fund						
1005 GF/Program Receipts	73.6	65.6	65.6	65.6	65.6	65.6
1006 GF/MHTIA						
Other						
TOTAL	73.6	65.6	65.6	65.6	65.6	65.6

Estimate of any current year (FY 95) cost: 0.0

POSITIONS

POSITIONS	FY 96	FY 97	FY 98	FY 99	FY 00	FY 01
FULL-TIME	1	1	1	1	1	1
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

SB 158 is a rewrite of the pharmacy statutes based on the Model State Pharmacy Act of the National Association of Boards of Pharmacy (NABP). There are significant changes in the bill upon which this fiscal note is based. The attached pages explain the details of the costs shown above.

Prepared by: Jennifer Strickler, Admin. Officer — Phone: 465-2144

Division: Occupational Licensing — Date: 4/21/95

Approved by Commissioner: William L. Hensley — Date: 4/24/95

Agency: Commerce and Economic Development

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FISCAL NOTE

FISCAL NOTE

STATE OF ALASKA
1995 LEGISLATIVE SESSION

BILL NO. SB 158

ANALYSIS: (Continued)

DEPARTMENT OF COMMERCE AND ECONOMIC DEVELOPMENT
FISCAL NOTE CALCULATIONS FOR SB 158

PERSONAL SERVICES: $56.5

Established by Section 7 of the bill:

Executive Secretary, Partially-Exempt (XE), Range 18A, permanent full-time position, located in Anchorage

TRAVEL: $2.4

Section 6 of the bill establishes a minimum of three board meetings each year. Funding of three meetings is already included in the board's annual budget allocation; therefore, no additional travel funds are needed for this purpose.

The travel funds included in this fiscal note will provide the following:

Travel and per diem for the Executive Secretary to attend two board meetings (assuming the third meeting is held in Anchorage), and at least one trip to the division headquarters in Juneau for administrative training Funding is based on $800 per trip x 3 trips.

CONTRACTUAL SERVICES: $5.7

Section 20 authorizes the board to seal all drugs from a licensee at the time a license is suspended, revoked, or denied renewal The procedure to "seal all drugs" must be established in regulations. If the procedure is to include confiscation of drugs by the board, funding to store the drugs in a secure location will be needed. However, since the procedure is not addressed in statute, any cost associated with this provision is not included in this fiscal note.

Advertising printing, postage, and other costs associated with adopting new *regulations* under the bill are estimated at $1.5.

SB 158, continued

Printing of new statute and regulation books at $1.80 per book x 1,500 (minimum), $2.7.

Communication costs associated with the Executive Secretary position, $1.5.

SUPPLIES: $1.0

Daily operating supplies (paper, pens, etc) for the Executive Secretary position.

EQUIPMENT: (one-time cost) $8.0

Office space and equipment costs to establish the Executive Secretary position.

Total Cost: $73.6

REVENUE:

For the purposes of this fiscal note, general fund program receipt revenue equal to the costs are shown in each fiscal year since costs must be covered. At the start of FY 95, the Board of Pharmacy reported 492 licensees. Licenses are due for renewal on June 30, 1996 and licensing fees will be adjusted to cover costs associated with SB 158 prior to the license renewal period. Based on 492 licensees each licensee can be expected to pay a fee increase of approximately $283.00 (Biennial cost of $139.2 divided by 492).

Under AS 08.01.065, licensing fees must cover the full regulatory costs of each occupation.