Alaska's English Rule: Attorney's Fee Shifting in Civil Cases

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acknowledgments

We undertook the Judicial Council's first in-depth study of the civil justice system in Anchorage for some years with great curiosity about what we would find. The national focus on fee shifting, and Alaska's long-standing but little-noticed experience with it further piqued our interest. Our findings richly repaid our investment of time and resources, by bringing out a wealth of information about how fee shifting affects the courts, attorneys, and the community. Attorneys, judges, insurance company representatives, citizens, and policymakers contributed immensely, telling us about their experience with fee shifting which we in turn have tried to communicate through this report. We thank all of the hundreds of those who told us what we needed to know. Our Advisory Committee members - Justice Jay A. Rabinowitz of the Alaska Supreme Court, Professor Herbert Kritzer of the School of Political Science, University of Wisconsin at Madison, and Francis K. Zemans, Executive Vice President of the American Judicature Society - all added very substantially to the coherence, depth and knowledge contained in the report. Our staff colleagues, particularly Susan McKelvie, who collected and analyzed much of the case file data, laid the groundwork for the findings and recommendations. And finally, we particularly thank our administrative staff who have helped us throughout the project to structure our thoughts and keep all of the appointments, drafts, and final words in order.

Alaska Rule of Civil Procedure 82. Attorney's Fees

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

(b) Amount of Award.

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

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

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

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

(A) the complexity of the litigation;

(B) the length of trial;

(C) the reasonableness of the attorneys' hourly rates and the number of hours expended;

(D) the reasonableness of the number of attorneys used;

(E) the attorneys' efforts to minimize fees;

(F) the reasonableness of the claims and defenses pursued by each side;

(G) vexatious or bad faith conduct;

(H) the relationship between the amount of work performed and the significance of the matters at stake;

(I) the extent to which a given fee award may be so onerous to the non-prevailing party that it would deter similarly situated litigants from the voluntary use of the courts;

(J) the extent to which the fees incurred by the prevailing party suggest that they had been influenced by considerations apart from the case at bar, such as a desire to discourage claims by others against the prevailing party or its insurer; and

(K) other equitable factors deemed relevant.

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

(c) Motions for Attorney's Fees. A motion is required for an award of attorney's fees under this rule. The motion must be filed within 10 days after the date shown in the clerk's certificate of distribution on the judgment as defined by Civil Rule 58.1. Failure to move for attorney's fees within 10 days or such additional time as the court may allow, shall be construed as a waiver of the party's right to recover attorney's fees. A motion for attorney's fees in a default case exceeding $50,000 must specify actual fees.

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

(e) Effect of Rule. The allowance of attorney's fees by the court in conformance

with this rule shall not be construed as fixing the fees between attorney and client.

[Amended effective January 15, 1989; January 15, 1990; July 15, 1991; July 15, 1992; repealed and reenacted July 15, 1993.]

Note

Ch. 41, Sec. 9, SLA 1989 provided that AS 46.03.763, as enacted by ch. 41, Sec. 4, SLA 1989, amended Civil Rule 82 by allowing the recovery of full reasonable attorney fees and costs by the state in certain actions involving unpermitted oil discharge.

AS 10.06.435, as enacted by ch. 166, Sec. 1, SLA 1988, amended Civil Rule 82 by changing the criteria for awarding attorney fees to the plaintiff in a shareholder derivative action. AS 10.06.580(e), as enacted by ch. 166, Sec. 1, SLA 1988, amended Civil Rule 82 by changing the criteria for awarding attorney fees in an action to determine the value of a dissenting shareholder's interest in a corporation.

See Civil Rule 23.1(j) concerning attorney fees in shareholder derivative actions.

AS 09.55.601, added by ch. 57, Sec. 5, SLA 1991, amended Civil Rule 82 by requiring an award of full reasonable attorney fees to prevailing victims of certain crimes.

Publishers Note

Laws 1972, c. 18, Sec. 1, which adopted AS 09.60.015, had the effect of changing Rule 82(a) by "specifically providing for attorney fees in small tort actions." Laws 1972, c. 18, Sec. 2.

Laws 1986, c. 139, Sec. 4, which amended AS 09.06.010, had the effect of amending Rule 82 by "prohibiting the award of attorney fees in certain civil actions based on fault, unless allowed by statute or by agreement of the parties or unless the civil action is contested without trial or fully contested." Laws 1986, c. 139, Sec. 8.

Laws 1989, c. 41, Sec. 4, which adopted AS 46.03.763, had the effect of amending Rule 82 "by allowing the recovery of full reasonable attorney fees and costs in certain actions." Laws 1989, c. 41, Sec. 9.

Supreme Court Order No. 1118 amended, dated January 7, 1993, which repealed and reenacted Rule 82, also stated in paragraph 2:

"By adopting these amendments to Civil Rule 82, the court intends no change in existing Alaska law regarding the award of attorney's fees for or against a public interest litigant, see, e.g., *Anchorage Daily News v. Anchorage School Dist.*, 803 P.2d 402, 404 (Alaska 1990); *City of Anchorage v. McCabe*, 568 P.2d 986, 993-94 (Alaska 1977); *Gilbert v. State*, 526 P.2d 1131, 1136 (Alaska 1974), or in the law that an award of full attorney's fees is manifestly unreasonable in the absence of bad faith or vexatious conduct by the non-prevailing party. See, e.g., *Malvo v. J.C. Penney Co.*, 512 P.2d 575, 588 (Alaska 1973); *Demoski v. New*, 737 P.2d 780, 788 (Alaska 1987)."

Laws 1993, c. 35--which enacted AS 45.12.108(d), effective January 1, 1994 (Secs. 125, 131)--amended Rule 82 "by requiring the court to award a specified level of attorney fees without consideration of who prevails in the entire action even if the entitled party is not ultimately the prevailing party in the action, and without reference to the amount of recovery, even if the rule would require that the amount of the award of attorney fees be based on a percentage of the amount of recovery." Laws 1993, c. 35, Sec. 130(b).

Laws 1993, c. 34--which enacted AS 45.14.305(e) and 45.14.404(b), effective January 1, 1994 (Secs. 12, 16)--changed Rule 82 "by changing the criteria for the award of attorney fees in certain circumstances." Laws 1993, c. 34, Sec. 15.

Laws 1993, c. 60, Sec. 2, which enacted AS 45.68.090 amended Rule 82 "by requiring the court to award full attorney fees where appropriate in certain actions under AS 45.68.090." Laws 1993, c. 60, Sec. 4(2).

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Chapter 1
The Project

There have been various proposals in the last decade to reform the civil justice system in the United States to make it fairer and more efficient. One which has repeatedly surfaced, most recently in the Republican House majority's 1995 "Contract with America," would require the loser in a civil lawsuit to pay all or a portion of the winner's attorney's fees. The usual rationale of such proposals is that a party who might be liable for the other side's attorney's fees would be less likely to abuse the system by bringing frivolous or marginal litigation.[1]

While such proposals have led to extensive discussion and press coverage, that discussion has never included any significant recognition that one state already requires the loser in a lawsuit to pay a portion of the winner's attorney's fees in almost every category of civil case. Indeed, attorney fee shifting in Alaska has been the law since the nineteenth century.

The Alaska Judicial Council requested and received a grant from the State Justice Institute (SJI) to review the operation of Alaska's fee shifting rule: Alaska Civil Rule

[1] Commentators have identified several other rationales for attorney fee shifting. One argument for fee shifting is that the winner in a lawsuit is not "made whole" or fully compensated unless the other side also pays the winner's attorney's fees. A second argument is that fee shifting makes it economically feasible for private citizens to bring lawsuits which benefit the public interest but which do not directly benefit their own financial interests. A third argument is that fee shifting gives people of limited means better access to the courts by letting the attorney collect the fee from the opposing party.

82 (the rule is set out at the end of the report, as Appendix F.) The goal of the project is to provide a detailed evaluation of fee shifting in Alaska to policy makers, both in Alaska and nationwide.

A. Civil Rule 82

Fitness, Inc. sues Joe Muscles in Alaska state court claiming that Joe breached an oral contract by failing to pay Fitness, Inc. $2,500 for some weight lifting equipment. Joe contests the suit, claiming that no contract existed because there was no meeting of the minds. After trial, the judge finds Joe liable and awards the same damages as would be awarded almost anywhere in the United States -- $2,500 for the equipment and an additional amount for costs and prejudgment interest. However, the judge also relies on Civil Rule 82 to award Fitness, Inc. an additional $500 in attorney's fees.[2]

What would happen if the judge finds that there was no enforceable contract (in other words the defendant prevails)? In that case, Joe Muscles' attorney would file with the court an affidavit summarizing the amount and type of services for which she had billed her client. Assume the attorney billed Joe $1,200 (ten hours at $120 per hour). The judge would review the request, and assuming he found the billing to be reasonable, would award the defendant $360 (30% of $1,200).[3]

Thus, Alaska Civil Rule 82 entitles whichever party prevails in a civil lawsuit to partial compensation of the winner's attorney fees from the loser. The rule applies to the great majority of civil cases. Domestic cases are the largest excluded category, along with cases in which attorney's fees are governed by a contract.

The rule directs judges to calculate the amount of attorney fees using several variables. A party recovering a money judgment receives a percentage of the judgment. For a case contested with a trial, the percentage is 20% for the first $25,000 and 10% for any additional amount. Percentages for non-contested cases and those contested without trial are less.

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[2] The $500 fee award equals 20% of the total damage award. *See* AK R.CIV. P. 82(b)(1).

[3] The $360 fee award is equal to 30% of the defendant's actual, reasonable attorney's fees which were necessarily incurred. *See* AK. R.CIV. P. 82(b)(2).

Attorney's fees for a party who prevails but does not recover a money judgment are calculated as a percentage of actual reasonable fees. The percentage is 30% for a case which goes to trial and 20% otherwise. In either situation, the court can vary the award based on factors listed in the rule. Other issues, discussed in Chapter 4, include determining precisely what fees are recoverable, who is the prevailing party, exceptions for public interest litigants, and appellate review.

Alaska also has a Civil Rule 68 offer of judgment provision similar to Federal Rule of Civil Procedure 68. Rule 68 lets either party make an offer of judgment to settle the lawsuit for a sum certain.[4] If the plaintiff rejects the defendant's offer and recovers less than the offer at trial, the defendant will be the prevailing party entitled to Rule 82 attorney's fees from the date of the offer, even though the plaintiff may have received a substantial judgment. In other words, the prevailing party will have to pay a percentage of the non-prevailing party's reasonable attorney fees incurred after the offer was made.

B. The Study

The purpose of this study is to empirically document the effects of two-way attorney fee shifting on civil litigation in Anchorage, Alaska. A number of scholars have written about the probable effects of adopting two-way fee shifting in American jurisdictions; however, few have studied the question empirically. Those in favor of fee-shifting argue that it would restrain frivolous or marginal litigation, and more fully compensate the prevailing party. Opponents warn that it would deter meritorious as well as frivolous claims and defenses, fail to distinguish between the real winners and losers in a lawsuit, and produce windfalls as well as draconian penalties.

This study addresses questions raised by opponents and advocates of fee shifting. How does the rule operate? How often are attorney's fees awarded in Alaska, to whom, and in what amounts? How does the rule affect judges' workloads? Do judges use it in any way as a case management tool? Do appeals of attorney fee awards consume an undue amount of appellate court resources?

[4] While the rule permits either party to make an offer of judgment, in practice it is the defendant who most often does so.

The study also addresses some broader questions. Does two-way fee shifting as it exists in Alaska encourage settlement of civil litigation? Does it help avoid protracted litigation? Does it deter the filing of "frivolous" or marginal lawsuits? Does the rule create inequities depending on the relative wealth of the parties? Does it have a "chilling effect" on access to the courts? Since fee shifting is of interest locally as well as nationally, this report tries to present the answers in a form that is useful both to practitioners in Alaska and to policy-makers in other jurisdictions who might be considering adopting fee shifting for the first time.

Because these issues are extremely complex, the study approaches them from a number of different angles. One perspective comes from court case files, both federal and state. Another view comes from interviews with trial and appellate judges. A third outlook arises from interviews with practicing civil attorneys. While each perspective is skewed in some way, taken together they give a good sense of how attorney fee shifting works in fact, and how it affects civil litigation practice in Anchorage. While the data from these different sources are not strictly comparable, we have tried to contrast them wherever possible to give the most complete picture. The study did not attempt to identify a control group of cases in which Rule 82 did not apply, because Rule 82 applies to most civil cases in the state and to federal diversity cases.[5]

C. The Report

This report is divided into three parts following this introduction. Part I sets the context for the study's data and findings, and consists of three chapters. Chapter 2 discusses fee shifting outside Alaska. It briefly discusses practices in England (the "English rule"), traces the history of fee shifting in the United States (the "American rule"), and discusses more recent developments, such as the growing number of statutory exceptions to the American rule and proposals to implement fee shifting. Chapter 3 describes how Alaska's fee shifting rules have evolved since adoption in 1884, including at least some speculation about why Alaska developed so differently from the rest of the country. Chapter 4 discusses the legal issues surrounding the application of Alaska's Rule 82, including data from Alaska state and federal court case files and interviews with Alaskan attorneys about how the legal issues play out in practice.

[5] The rule does not apply to divorce and a few other types of cases, which either cannot be compared because they differ in nature or are too few in number to make a statistically valid analysis.

Part II of the report presents the bulk of the data and the findings of the study. Chapter 5 discusses national and Alaska court statistics to compare general litigation trends in Alaska to trends in other states. In Chapter 6 we use groups of recently closed state and federal court cases in Anchorage to show how Rule 82 operates in practice. How often are attorney's fee awards made, and how much money typically is awarded? Chapter 7 explores how attorney fee shifting affects attorneys' and clients' strategies and approaches to cases. Chapter 8 explains how judges and experienced litigation attorneys view Rule 82: what purposes do they see it as serving, and would they recommend it to other jurisdictions?

Part III of the report presents conclusions and recommendations. The recommendations are divided into two sections, one aimed at a national audience and one aimed at local practitioners and policy-makers.

Part I

Understanding the Context for Fee Shifting in Alaska

Chapter 2
Fee Shifting Outside Alaska

This chapter sets the context for understanding the differences between Alaska's fee-shifting practices and those in other jurisdictions. Most civil litigation in the United States concludes very differently than civil litigation in the rest of the common law world and Western Europe. In the United States, each party bears its own costs in the suit unless a specific law provides otherwise, a practice known as the American Rule.[6] In contrast, in all other common law jurisdictions and most West European countries, attorney's fees are an item of costs, and "costs follow the event" (*i.e.*, the successful litigant is entitled to an award of costs).[7] This chapter traces the development of attorney fee shifting in England, the divergence of practice in America after the Revolutionary War, and present practices in both countries. Proposals from various sources to change fee-shifting practices conclude the chapter.

[6] The term "American Rule" is attributed to Goodhart, *Costs*, YALE L.J. 849 (1929). *See* Leubsdorf, *Toward a History of the American Rule on Attorney Fee Recovery*, 47 LAW & CONTEMP. PROBS. 9, 29 n.130 (1984).

[7] Pfennigstorf, *The European Experience With Attorney Fee Shifting*, 47 LAW & CONTEMP. PROBS. 37, 37 (1984).

A. Fee Shifting in England and Europe

In most European countries, a longstanding practice[8] resulted in a general rule that (a) the objective fact of defeat justifies imposition of costs on the losing party without requiring any evidence of fault or bad faith, and (b) reimbursable costs include the attorney's fees paid by the winner.[9] In both England and the European countries, the rationale underlying the rule is that victory is not complete if it leaves substantial expenses unpaid. Based on this rationale, the rule emerged that the losing party in a lawsuit must reimburse the winning party for its expenses.[10]

1. History of the "English Rule"

The practice of shifting the costs of litigation emerged early in English jurisprudence. Statutes authorizing awards of attorney's fees and costs to the prevailing party in some types of litigation have existed in England since the thirteenth century.[11] The principle that the losing litigant pays the winner's costs gradually became a part of the English common law. The English created an elaborate system using taxing masters to calculate attorney's fees and to award costs and fees to the prevailing party in litigation.[12] This decentralized system served mainly to protect the losing party from excessive demands for costs.[13]

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[8] In 450 B.C., a losing party lost the sum he had deposited in the temple treasury before the priests considered the merits of the case; priests returned the amount deposited by the prevailing party to that party. In 486 A.D., the East Roman emperor, Zenon, announced that the mere fact of losing was a sufficient ground to impose on the loser the obligation to pay the winner's costs, which by that date included attorney's fees. *Id.* at 42.

[9] *Id.* at 44. In England, whether the prevailing party's costs are fully indemnified depends in part on whether the case goes to trial or settles. If the case goes to trial, the losing party is liable for the necessary and proper costs that the prevailing solicitor charged to his or her own client. In practice, the losing party pays roughly two-thirds of these solicitor and client costs. H. GENN, HARD BARGAINING OUT OF COURT SETTLEMENT IN PERSONAL INJURY ACTIONS 84 (1987). If the case settles, the solicitor usually bargains for the opposing party to pay all the client's costs. *Id.*

[10] Pfennigstorf, *supra* note 7, at 83.

[11] A. TOMKINS & T. WILLGING, TAXATION OF ATTORNEYS' FEES: PRACTICES IN ENGLISH, ALASKAN, AND FEDERAL COURTS 5 n.14 (Federal Judicial Center 1986). In 1607, defendants became entitled to recover costs in all cases in which plaintiffs were so entitled. *Id.* at 7 n.20.

[12] *Id.* at 5. The English have been using masters to determine costs (including attorney's fees) for at least seven hundred years. *Id.* at n. 14.

[13] *Id.* at 6.

2. The Present "English Rule"

After centuries of decentralized cost taxation, the English substituted a centralized taxing master system in 1901 to move toward a uniform, predictable national body of principles and practices.[14] The present Supreme Court Taxing Office holds original or appellate jurisdiction over nearly all determinations of fees and costs.[15] Using special taxing masters or officers, the office decides which costs of legal services and ancillary expenses properly can be imposed on the opposing party or a governmental fund.[16]

Litigation expenses are taxed either on a "party and party" basis or on a "solicitor and client" basis. [17] "Party and party" costs are those that shift from the winning party to the losing party within the lawsuit, and these costs are the basis of the English rule that the loser pays the winner's fees. In contrast, "solicitor and client" costs address only those fees charged to a client by a solicitor. At the client's request, the taxing authority can review and modify those costs as well. Even in England, the prevailing party typically recovers only a portion of its costs; for example in 1984 the taxing masters reduced bills of costs by an average of 20% although some reduced them by as much as a third.[18]

B. Historical Development in America: the "American Rule"

During colonial times and until the American Revolution, the law of attorney fee recovery in America followed the English principle that the loser should pay the winner's costs. An important difference was that the colonial legislation regulating fees recoverable from a defeated adversary also regulated the maximum fee a lawyer could charge his or her client. After the Revolution, attorneys who opposed the government role in setting the maximum fee they could charge their clients won repeal of these

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[14] *Id.* at 7. Before the Supreme Court (of Judicature) Taxing Office was established in 1901, each division of the High Court of Justice developed its own system for using masters as judicial officers to tax costs. *Id.*

[15] *Id.*

[16] *Id.* at 5-6. The taxing master is legally trained and serves as a judicial officer. *Id.* at 6.

[17] Kritzer, *Fee Arrangements and Fee Shifting: Lessons from the Experience in Ontario*, 47 LAW & CONTEMP. PROBS. 125, 128 (1984) [hereinafter Kritzer, *Lessons*].

[18] TOMKINS AND WILLGING, *supra* note 11 at 8. In England, the loser typically pays the winner's legal costs even in settlements, regardless of whether a formal action was filed. Kritzer, *Searching for Winners in a Loser Pays System*, 78 A.B.A. J. 55, 55 (November 1992) [hereinafter Kritzer, *Searching for Winners*].

statutes, although provisions authorizing small recoveries from defeated adversaries remained. By the late nineteenth century, courts began interpreting these cost-recovery statutes to exclude attorney's fees as costs, and to deny recovery of attorney's fees as damages. Eventually, courts endorsed the principle that litigants could not recover substantial attorney's fees as costs, and the American Rule was born.

1. Colonial Practice

Fee recovery by colonial lawyers resembled the practice in England at the time. In both countries, the prevailing party recovered attorney's fees as part of the costs. In both, the right to recovery was grounded in statutes.[19]

The American system differed from the English in several ways. At the time in England, customs rather than statutes decided the amount of fees recoverable from an opponent and those chargeable to a client.[20] Customs regulated the charge for each item of an attorney's services.[21]

The colonial system was not as elaborate as the English, because the colonists could not afford the highly developed professional and procedural mechanisms to which the customs were linked.[22] Instead, the colonies statutorily regulated both the fees that a lawyer could charge the client, and the fees that the lawyer could recover from a defeated adversary.[23] Eventually, American attorneys began to seek more profit from their practices and to view governmental control of fees as oppressive.[24]

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[19] Leubsdorf, *supra* note 6, at 12 (citation omitted). Leubsdorf explains that the primary source regarding colonial legislation prior to the Revolutionary War is 1 A.-H. Chroust, *The Rise of the Legal Profession in America* 85-327 (1965). *Id.* at n.8.

[20] Leubsdorf, *supra* note 6, at 12; *see also* TOMKINS & WILLGING, *supra* note 11, at 7.

[21] Leubsdorf, *supra* note 6, at 12.

[22] *Id.* at 12-13.

[23] *Id.* at 11. As Leubsdorf explains, the effect of these laws was to limit the total amount of fees an attorney could receive, whether from his own client or from his defeated adversary. *Id.*

[24] *Id.* at 13.

2. After the Revolutionary War

The states repealed fee regulation statutes after the Revolutionary War, freeing American attorneys to contract for fees with their clients without governmental intervention.[25] Recovering fees at the conclusion of a civil lawsuit became less critical to attorneys.[26] By the 1820s and 1830s, courts acknowledged vast discrepancies between the small, statutorily determined costs recoverable from the defeated party and the fees charged to the client.[27] During this period, lawyers worked harder to establish their right to collect fees from their own clients than to increase the costs recoverable by statute from the opposing party.[28] The American Rule began to emerge as a rough compromise between the Bar and its critics:[29]

> Lawyers gained the right to collect large fees from their clients, while restrictions on cost recovery remained as a symbolic vestige of the old regulatory approach. Why were the lawyers able to demolish the regulatory barriers? In part, the change occurred because of factors unique to the legal profession: the growing political influence of lawyers, a possible decline in the intensity of antilawyer feeling, and the desire of businessmen to retain the best lawyers. But even without such factors, lawyer fee regulation could scarcely be expected to survive in a world built on the individual's freedom to conduct business without governmental restraint (and sometimes with governmental help). Having established themselves as private businessmen, lawyers reaped the profits.[30]

In the 1840s, the work of David Dudley Field and the Commissioners on Practice and Pleading moved toward the new ideas.[31] The Field Code kept the English principle that the costs followed the event, but limited it significantly:

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[25] *Id.*

[26] *Id.* at 14.

[27] *Id.*

[28] *Id.*

[29] *Id.* at 16-17.

[30] *Id.*

[31] *Id.* at 18, n.56-59.

> The losing party, ought however, as a general rule, to pay the expense of the litigation. He has caused a loss to his adversary unjustly, and should indemnify him for it. The debtor who refuses to pay, ought to make the creditor whole. . . . Then how shall the amount of indemnity be regulated? It cannot be adjusted with precision, from the nature of the case, but we can get an approximation to it. There are two modes: one by letting the court or the jury fix it, in each particular case, according to its circumstances; the other by giving certain allowances, graduated in part by the necessary labor performed, and in part by the amount in controversy. The latter strikes us as preferable, because it leaves nothing to arbitrary discretion. . . . We have not designated the sums to be inserted in the act, preferring that it should be done by the legislature.[32]

The accompanying draft Code contained blanks for legislatures to fill in the size of the fee award in dollars or percentage of the recovery.[33]

3. Late Nineteenth Century

As the various states adopted the Field Codes, they fixed the attorney's fees recoverable as costs in very small amounts.[34] While courts in the last half of the nineteenth century followed these statutory limits on cost recovery, some began to interpret the statutes to exclude attorney's fees from the category of costs.[35] Soon courts began to recognize the principle that substantial attorney's fees could not be recovered as costs.[36] The primary commentator who has traced the history of the American rule has failed to find any consistent theoretical justification for this principle as it grew prominent in the late nineteenth century.[37] According to Mr.

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[32] *Id.* at 19 (quoting from First Report of the Commissioners on Practice and Pleading, Code of Procedure 206-207 (1848)).

[33] Leubsdorf, *supra* note 6, at 20.

[34] *Id.* at 22. The fixed amounts did not exceed $20 unless there was an appeal. *Id.*

[35] *Id.* at 23 (citing *Hoffman v. Smith*, 61 Miss. 544 (1884), and *Swartzell v. Rogers*, 3 Kan. 375 (1866)).

[36] Leubsdorf, *supra* note 6, at 23.

[37] Mr. Leubsdorf wrote: "[O]ne of the most curious features of the American rule in the nineteenth century was its almost total absence of justification." *Id.* at 28. Nevertheless, Mr. Leubsdorf suggested that drawing a distinction between recovery of costs and recovery of attorney's fees fit into a "familiar pattern of late nineteenth century formalism." *Id.* at 23. He added that a policy of leaving losses

Leubsdorf, justifications for the rule had shifted from attempts to restrain the greed of lawyers (as in Colonial times) to the rule's tendency to encourage or discourage meritorious litigation.[38]

4. Twentieth Century

In the early twentieth century, scholars and legal writers offered various justifications for the American rule.[39] More recently, some have debated the theoretical effects of the "pay your own way" rule. Most of these scholars have applied formal economic analyses to predict the likely effects of attorney fee shifting.[40] Few studies have gathered empirical data to measure the rule's effects on litigation rates and strategies.[41]

Judges and legislatures created and invoked a growing number of exceptions to the American rule.[42] Courts concerned about disincentives to litigation invoked the "bad faith" doctrine.[43] Legislatures began to see realistic attorney's fee awards as aids to needy plaintiffs or sanctions against corporate defendants.[44] Leubsdorf suggests that these exceptions eventually led to the American rule's decline, and were "usually

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(*i.e.*, litigation expenses) to fall where they might fit with the *laissez-faire* economic philosophy popular at the time. *Id.* at 24.

[38] *Id.* at 28. The first commentators disagreed as to whether the American rule promoted or discouraged litigation. *Id.*

[39] Rowe, *The Legal Theory of Attorney Fee Shifting: A Critical Overview*, 4 DUKE L.J. 651, 653 (1982) [hereinafter Rowe, *Legal Theory*]. Rowe identifies six of the most commonly appearing rationales for fee shifting: basic fairness, making a litigant financially whole, deterring and punishing misconduct, the "private attorney general" theory, a desire to affect the parties' relative strengths, and economic incentive effects such as the rule's impact on the rate of pursuit of claims, on parties' settlement incentives and on the speed of disposition of cases. *Id. See also,* Zemans, *Fee Shifting and the Implementation of Public Policy*, 47 LAW & CONTEMP. PROBS. 187, 189 (1984).

[40] *See* Rowe, *Predicting the Effects of Attorney Fee Shifting* 47, LAW & CONTEMP. PROBS. 139, 139-40 (1984) [hereinafter Rowe, *Predicting the Effects*].

[41] *Id.* at 140.

[42] Leubsdorf, *supra* note 6, at 29; *see also* TOMKINS & WILLGING, *supra* note 11, at 49 (citations omitted).

[43] Leubsdorf, *supra* note 6, at 29.

[44] *Id.* Tomkins and Willging noted in their 1986 report that federal trial judges "are spending significant amounts of time handling attorney fee matters that, decades ago, did not confront the federal judiciary." TOMKINS & WILLGING, *supra* note 11, at 49. They added that "as fee shifting has become more common, the law that regulates the determination of attorney fee awards has undergone significant developments." *Id.* at 50.

grounded on the same concern with incentives and disincentives which we have already observed."[45]

C. Fee Shifting in the United States Today

A 1984 study of fee-shifting statutes throughout the United States and District of Columbia found 1,974 fee-shifting statutes.[46] The authors examined the nature of the statutes, and tried to assess their overall impact on the American rule. They concluded that although they could show a "strong, but selective and partial, legislative effort to deviate from the American rule,"[47] they could not show a strong actual impact on practices in the various states. The lack of identifiable effects may stem from the wide variety of reasons for enacting fee-shifting statutes, variations in application of the statutes, and complex interactions with other statutes and practices.

Statutory exceptions to the American Rule have been a legal fact of life throughout its existence. Legislatures reason that fee shifting (usually one-way) will encourage actions that benefit public policy -- either private enforcement actions, as in the area of civil rights litigation and environmental legislation, or social policies such as consumer protection and equal access to justice.[48] They also see fee shifting as a punitive measure in appropriate cases.[49]

1. Federal Statutory Fee Shifting

More than 200 federal statutes provide for shifting of attorney's fees.[50] Most federal statutory fee shifting is one-way, that is, if the one party prevails (typically the plaintiff), that party may ask the court for some or all of its attorney's fees. The same provision does not apply if the opposing party (typically the defendant) prevails. Some

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[45] Leubsdorf, *supra* note 6, at 29.

[46] Note, *State Attorney Fee Shifting Statutes: Are We Quietly Repealing the American Rule?* 47 LAW & CONTEMP. PROBS. 321, 323 (1984) [hereinafter Note, *State Attorney Fee Shifting Statutes*]. The authors surveyed 4,000 to 5,000 existing statutes that empowered "*courts* (emphasis in original) to require one party to pay the other party's attorney fees." *Id.*

[47] *Id.* at 346.

[48] Rowe, *Legal Theory*, *supra* note 39, at 662-63.

[49] *Id.* at 660.

[50] *See* DERNER & WOLF, COURT AWARDED ATTORNEY FEES, Table of Statutes, TS1-TS 36 (providing alphabetical list of statutes that provide for an award of attorney's fees).

of the most widespread effects have come from legislation affecting public interest litigation.[51] Representative examples include the Civil Rights Attorney's Fees Awards Act of 1976,[52] the Equal Access to Justice Act,[53] the Voting Rights Act of 1965,[54] the Fair Credit Reporting Act,[55] the Endangered Species Act[56] and the Freedom of Information Act.[57]

2. State Statutory Fee Shifting

Only a few of the approximately 2,000 state fee-shifting statutes fall into the category of two-way fee shifting, in which the nonprevailing party is expected to pay the prevailing party's fees regardless of whether the plaintiff or defendant prevails. [58] Most, like fee-shifting statutes in the federal courts, are one-way fee shifts favoring prevailing plaintiffs. One example of two-way fee shifting is a California provision that whenever a contract provides that the one-way costs of enforcing a contract, including an attorney's fee, is an element of damages, California law imposes an equivalent fee shift for the offeree who is required to enforce the contract in court.[59] In Washington state, the enforcement of contracts valued at less than $5,000 carries a two-way fee-shifting provision.[60] In Arizona, any contested enforcement of a contract, express or implied, carries a two-way fee-shifting provision.[61] Oregon passed new legislation in 1995 that updated existing provisions for fees to prevailing parties.[62]

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[51] *See* Larson, *Current Proposals in Congress to Limit and to Bar Court Awarded Attorneys' Fees in Public Interest Litigation,* 14 REV. L. & SOC. CHANGE 523, 524 (1986).

[52] 42 U.S.C. § 1988 (1988).

[53] 5 U.S.C § 504(a)(1) (1988).

[54] 42 U.S.C. § 1973(e) (1988).

[55] 15 U.S.C. § 1681n (1988).

[56] 15 U.S.C. § 1540(g)(4) (1988).

[57] 5 U.S.C. § 552(a)(4)(E) (1988).

[58] Note, *State Attorney Fee Shifting Statutes, supra* note 46, at 323.

[59] *See* CAL. CIVIL CODE § 1717(a) (West 1985 & Supp. 1995).

[60] *See* WASH. REV. CODE ANN. § 4.84.250 (1988).

[61] *See* ARIZ. REV. STAT. ANN. § 12-341.01 (1992).

[62] *See* Or. S.B. 385 (1995).

D. Proposals to Expand Fee Shifting

During the 1980s, the media and many attorneys and judges portrayed the American legal system as suffering from a "litigation explosion."[63] As insurance companies throughout the country raised their insurance rates, many observers blamed the increases on more litigation and higher damage awards.[64] Some scholars suggested that the perceptions of a litigation explosion were based on anecdotal or suspect sources,[65] but members of the public and policy makers nevertheless began calling for civil litigation reform.

The 1980s also saw an organized "tort reform" movement emerge at both local and national levels. In 1984 and 1985, the insurance industry suffered some of the worst loss years in its history. Responding to declining profits, the insurance companies abruptly raised the cost of premiums.[66] At the same time, the insurance industry began a campaign in which it placed most of the blame for escalating premiums and declining availability on the tort law system.[67] A 1986 Department of Justice report[68] bolstered the industry position with its conclusion that "developments in tort law are a major cause for the sharp premium increases."[69] In 1986, the Insurance Information Institute spent an estimated $6.5 million on advertising and public relations efforts to tie the insurance crisis to the need for tort reform.[70] In response to the Justice Department report and to lobbying by the insurance companies and other industry groups, forty-eight states passed some type of tort reform legislation between 1985 and 1988.[71]

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[63] Neubauer & Meinhold, *Too Quick to Sue? Public Perceptions of the Litigation Explosion,* 16 JUST. SYS. J. 1, 1-2 (1994). Neubauer and Meinhold's analysis of a 1991 telephone survey of 745 registered Louisiana voters revealed that perceptions of the litigation explosion were strongly related to the respondent's political and social status. *Id.* at 12.

[64] *Id.* at 2.

[65] *Id.*

[66] Sanders & Joyce, *"Off to the Races:" The 1980's Tort Crisis and the Law Reform Process,* 27 HOUSTON L. REV. 207-296, 213 (1990).

[67] *Id.* at 214.

[68] REPORT OF THE TORT POLICY WORKING GROUP ON THE CAUSES, EXTENT AND POLICY IMPLICATIONS OF THE CURRENT CRISIS IN INSURANCE AVAILABILITY AND AFFORDABILITY (U.S. Gov't Printing Office, Feb. 1986).

[69] *Id.* at 2.

[70] Sanders & Joyce, *supra* note 66, at 214.

[71] *Id.* at 218. These included Alaska, which among other changes amended AS § 09.60.010, the statute underlying Rule 82, to disallow attorney's fee awards in non-contested negligence cases. *See* 1986

1. American Bar Association Recommendations

The American Bar Association formed the Consortium on Legal Services and the Public in 1972,[72] charged with a mission to improve the delivery of legal services to consumers. In 1977, the Consortium recommended fee shifting to the Association's House of Delegates at its annual meeting, calling for a general shift to an indemnity rule on attorney's fee recovery in civil litigation matters.[73] The Board of Governors rejected the controversial recommendation in favor of an alternative proposal.[74] The House of Delegates voted to refer the matter back to the Consortium for further study. The Consortium returned in 1978, recommending that fee-shifting occur only in civil actions and administrative proceedings to which the U.S. government was a party.[75] Even in its limited form, the recommendation "allowed the [American Bar] Association to go on record as in favor of a lessening of the current restrictions on shifting

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Alaska Sess. Laws ch. 139 § 8.

[72] Johnson, *Report of the Consortium on Legal Services and the Public*, 102 A.B.A. REP. 1977, at 785 (1983). The Consortium on Legal Services and the Public included eight ABA committees: Special Committee on Prepaid Legal Services, Special Committee on Public Interest Practice, Special Committee to Survey Legal Needs, Standing Committee on Lawyer Referral Services, Standing Committee on Legal Aid and Indigent Defendants, Standing Committee on Legal Assistance for Military Personnel, and Standing Committee on Specialization. *Id.*

[73] Zemans, *supra* note 39, at 206. The Consortium recommended a resolution that provided:

> *Be It Resolved,* The American Bar Association supports the principle that in civil litigation, courts and administrative agencies should require losing parties to pay reasonable attorney fees as an item of costs to prevailing parties unless (1) the conduct of the losing party in opposition to the prevailing party's position was substantially justified or (2) for other reason an award would (a) be unjust or (b) tend to have a chilling effect on the utilization of legal remedies or defenses pursued in good faith or (3) the matter in controversy is the subject of specific legislative provision to the contrary.

Johnson, *supra* note 72, at 783.

[74] Johnson, *supra* note 72, at 383. The alternate proposal introduced by the Board of Governors was broader than the Consortium's recommendation. It provided:

> *Be It Resolved,* That the American Bar Association supports the principle that in civil litigation, courts and administrative agencies should require losing parties to pay reasonable attorney fees to prevailing parties, unless it appears to the court or agency that in the circumstances of the case some other order should be made, considering the conduct of the prevailing parties, their good faith and reasonableness in pursuing their claim and the attempts or failures to save costs of litigation by all parties; except that attorney fees should be included in costs payable to government only against a losing party who employed legal remedies or defenses in bad faith or principally for the purpose of gaining attorney fees.

House of Delegates Proceedings, 102 A.B.A. REP. 1977 at 518.

[75] *Report of House of Delegates Proceedings*, 103 A.B.A. REP. 251-252 (1978).

attorneys' fees in civil litigation, without trying to be all encompassing of every possible interest or special situation."[76]

2. Attorney Fee Shifting as an Element of Civil Justice Reform

In 1988, United States President George Bush created the Council on Competitiveness, chaired by then-Vice President Dan Quayle. The Council issued its "Agenda for Civil Justice Reform in America" in August 1991, with the basic premise that "[u]nrestrained litigation necessarily extracts a terrible toll on the U.S. . . . [causing the United States to be] increasingly disadvantaged in world markets unless modifications are made in the liability system."[77] The Council recommended "enhanced incentives for reduced litigation," including fee shifting.[78] Specifically, the Council encouraged Congress to:

> [a]dopt a 'loser pays' rule in cases involving state law brought under the federal courts' diversity jurisdiction. The loser would pay the winner's costs of vindicating its prevailing position, subject to two limitations: 1) fee shifting would be restricted to the amount of fees the loser incurred and 2) could be further limited by judicial discretion where appropriate.[79]

The Council believed that the loser pays rule would reduce litigation.[80] By requiring the losing party to pay the winner's fees, the loser pays approach would encourage litigants to evaluate carefully the merits of their cases before initiating a frivolous claim or adopting a spurious defense.[81] The Council also recommended the loser pays rule as an approach that is "grounded in fairness -- in the equitable principle that a party who suffers should be made whole."[82]

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[76] Johnson, *supra* note 72 , at 383.

[77] REPORT FROM THE PRESIDENT'S COUNCIL ON COMPETITIVENESS, AGENDA FOR CIVIL JUSTICE REFORM IN AMERICA 3 (August 1991).

[78] *Id.* at 8.

[79] *Id.* at 24.

[80] *Id.*

[81] *Id.*

[82] *Id.*

Shortly after the Council's report was published, Vice President Quayle spoke to the Annual Meeting of the American Bar Association in Atlanta, Georgia on August 13, 1991. He characterized the American civil justice system as sometimes being at "a self-inflicted competitive disadvantage,"[83] noting that American individuals and businesses each year "spend more than eighty billion dollars on direct litigation costs and higher insurance premiums."[84] Including the indirect costs, he estimated that the total could "add up to more than $300 billion."[85] The Council proposed fifty ways to counteract the negative economic and social effects it saw resulting from civil litigation in America. The vice president's comments ignited a storm of protest throughout the assembled lawyers and later, from legal commentators, who questioned both the critique of the justice system and the proposed reforms.[86]

President Bush issued an Executive Order within two months adopting the Council recommendations that the Executive Branch could carry out unilaterally.[87] The Order included a limited fee-shifting provision for civil litigation initiated by the United States: "Litigation counsel shall offer to enter into a two-way fee-shifting agreement with opposing parties to the dispute, whereby the losing party would pay the prevailing party's fees and costs, subject to reasonable terms and limitations."[88] To coordinate the executive efforts with legislative reforms, President Bush sent the Access to Justice Act of 1992 to Congress on February 4, 1992. The bill included a limited "loser pays" provision that failed to gain Congressional approval.

3. Attorney Fee Shifting as an Element of the Contract With America

Three years later, civil justice reform returned to public debate. The midterm elections in 1994 sharply realigned Washington, D.C. power centers. For the first time in more than forty years the Republican party controlled both houses of Congress. Two months before the November election, House of Representatives Republicans agreed on a ten-point plan that Rep. Newt Gingrich of Georgia titled the "Contract with

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[83] Prepared Remarks by Vice President Quayle, August 13, 1991.

[84] *Id.*

[85] *Id.* We note, however, that this figure has been disputed. *See* Galanter, *News from Nowhere: The Debate on Civil Justice*, 71 DENV. U.L. REV. 77, 83 (1993).

[86] *See, e.g.*, Tobias, *Executive Branch Civil Justice Reform*, 42 AM. U.L. REV. 1521-1566, 1526 (1993).

[87] Executive Order No. 12,778, 56 Fed. Reg. 55, 195 (1991).

[88] *Id.* at B78.

America." The Contract, published in *TV Guide*, galvanized Republican support at the polls and spurred the new majority to meet its ambitious program to introduce the ten points of the program within the first hundred days of the 104th Congress. The Contract provided for "The Common Sense Legal Reforms Act of 1995," that incorporated a "loser pays" rule for federal diversity cases.

Initially, the attorney fee-shifting rule proposed in House Bill 10 simply restated the prior Bush Administration proposal. Fee shifting would work as two-way, full fee shifting favoring the prevailing parties in diversity cases originally filed in federal court. The bill provided for judicial discretion, and capped the recovery for attorney's fees at the level of the losing party's counsel bill.[89]

The initial "loser pays" statute did not survive the House Judiciary Committee's hearings intact. Instead, an amended bill was substituted and reported on February 16, 1995. The new bill, the Attorney Accountability Act of 1995,[90] sharply limited the application of a 'loser pays' rule in federal diversity actions. As revised, the fee shifting could occur after an offer of settlement, but only if the offer was unaccepted and unbeaten at trial.[91] This device, similar to Federal Rule of Civil Procedure 68, was intended to encourage pre-trial settlement in two ways: (1) parties who make offers of settlement are rewarded with attorney's fees if the settlement offer was better than

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[89] The bill provided:

(a) Award of Attorney's Fee: Section 1332 of title 28, United States Code, is amended by adding at the end of the following:

(e)(1) The district court that exercises jurisdiction in a civil action commenced under this section shall award to the party that prevails with respect to a claim in such action an attorney's fee determined in accordance with paragraph (2).

(2) An attorney's fee awarded under paragraph (1) shall be a reasonable attorney's fee attributable to such claim, except that the fee awarded under such paragraph may not exceed --

(A) the actual cost incurred by the non-prevailing party for an attorney's fee payable to an attorney for services in connection with such claim; or

(B) if no such cost was incurred by the non-prevailing party due to a contingency fee agreement, a reasonable cost that would have been incurred by the non-prevailing party for an attorney's non-contingent fee payable to an attorney for services in connection with such claim.

(3) Notwithstanding paragraphs (1) and (2), the court in its discretion may refuse to award, or may reduce the amount awarded as, an attorney's fee under paragraph (1) to the extent that the court finds special circumstances that make an award of an attorney's fee determined in accordance with such subparagraph unjust. *See* text of bill as introduced January 4, 1995, Title I of a bill to reform the federal civil justice system.

[90] H.R. 988, 104th Cong., 1st Sess. (1995).

[91] Harwood, *House Votes Bill Requiring Losing Party to Pay Winners' Fees in Certain Suits*, WALL ST. J., at A3 (March 8, 1995).

the trial result; and (2) parties who reject offers of settlement must pay the other side's fees if the trial result does not surpass the settlement offer.

The revised legislation was reported to the House of Representatives on March 7, 1995 where it passed in a 232 - 193 vote.[92] The bill was placed on the calendar in the Senate on March 15, 1995 after second reading, and assigned to the Senate Judiciary Committee.[93] The Senate version of the loser-pays provision, introduced as part of products liability reform legislation, required defendants who "unreasonably" refused to use a non-binding alternative dispute resolution procedure and who then lost at trial to pay the opponent's post-offer costs.[94] Although the Senate adopted the products liability reform legislation, the loser-pays provision was removed before final passage.[95]

The emergence of "Civil Justice Reform" as one of the key components of the 1994 "Contract with America," and a 'loser pays' rule as an important aspect of civil justice reform, suggests that the American Rule has lost its luster. Indeed, the sheen was well tarnished before 1994 -- as shown by the growing number of statutory fee shifting provisions enacted in federal and state laws, primarily in the last few decades.[96]

E. Differences Between the United States and Other Countries Affecting Fee Shifting

It is important to understand that fee shifting in other countries occurs in a very different context from the United States. Differences between civil litigation practice in the United States and abroad influence the impact of fee shifting on clients and on the legal system.

1. Contingent Fee Contracts

Contingent fee contracts, which probably have a higher profile in the United States than in other common law countries or most of Western Europe, interact with attorney fee shifting in special ways. Courts first permitted contingent fee contracts in the

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[92] *Id.*

[93] 141 CONG. REC. S48 (Wednesday, March 15, 1995).

[94] Berkman, *Showdown in Senate on Tort Reform*, NAT'L L.J., at A26 (May 1, 1995).

[95] Berkman, *Back to the Start for Senate Tort Bill,* NAT'L L.J., at A16 (May 22, 1995).

[96] *See supra* notes 46 - 62 and accompanying text.

United States in the mid-1800s.[97] Used initially to fund tort litigation,[98] contingent fee contracts made the attorney's fee payment contingent on the recovery of money damages. If the court awarded money damages to a party, the client paid a percentage of the award as the attorney's fee.[99] One author noted that contingent fees have been encouraged as a means of "making legal services available to people for whom their cost makes an important difference."[100]

Under two-way fee-shifting, a losing party might avoid paying his or her own attorney by negotiating a contingent fee, but could still end up with a judgment against him or her for a portion of the prevailing party's attorney fees. This situation is not

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[97] Leubsdorf, *supra* note 6, at 16. From an historical perspective, Leubsdorf suggests that judges had no choice but to legitimate the contingent fee contract once the courts and legislatures acknowledged freedom of contract between lawyers and clients. *Id.*

[98] One author tied the development of the contingent fee in personal injury cases to the Industrial Revolution in the United States:

> In the latter part of the 19th century, . . . the number of personal injuries resulting from industrial accidents proliferated as workers' fragile bodies were placed in close proximity to the unyielding power machinery that drove the factories, steel mills, mines, and railroads of a burgeoning economy. These workers could not afford, in the absence of the contingent fee, to pay for the legal services necessary to pursue the time-consuming, often complex road to compensation through the then undeveloped law of negligence. The contingent fee solved this problem the 'American way' by applying the principles of free enterprise economic incentives to the allocation of legal services. Marino, *Future of Contingent Fees: "To Be or Not To Be,"* Reviewing the Law Reviews, 57 DEFENSE COUNSEL JOURNAL 245 (1990).

Another commentator tied fee-shifting and fee payment mechanisms to the country's health care system, noting that:

> Systems outside the law may ameliorate the adverse effects of a two-way shift. For example, the United States has extremely high health-care costs and an inadequate public welfare system, whereas many two-way shift nations have relatively low health care costs or substantial welfare benefits. In two-way shift countries, the effect of the two-way shift of limiting access to justice in personal injury suits is not as significant as in the United States, where lack of access to justice might result in lack of access to medical treatment. (Cites omitted)

Vargo, *The American Rule in Attorney Fee Allocation: The Injured Person's Access to Justice,* 42 AM. U.L. REV. 1567, 1599 - 1600 (1993).

[99] In Alaska, contingent fees typically range from 33% to 40% of the total recovery.

[100] Sands, *Attorneys' Fees as Recoverable Costs,* 63 A.B.A. J. 510, 512 (1977). The author adds "[I]t is well known that it does not have that effect for small claims. It is also rarely useful except in connection with money claims." *Id.*

common because few courts other than American courts permit contingency fees,[101] and American courts generally do not practice two-way fee-shifting. However, this situation can occur in Australia, where a solicitor may take a case on "spec."[102] If the indigent client (usually a personal injury plaintiff) does not prevail, he or she will not have the means to pay either the solicitor who took the case or the attorney's fees awarded to the opposing party.[103]

Little empirical evidence exists about the contingent fee contract's effect on the number of claims filed, the propensity to litigate, and the size of awards and settlements.[104] Some see contingency fees as a way of increasing access to the courts for parties who have few resources but valid claims. Others criticize, suggesting that it generates unnecessary litigation.[105]

Because the contingent fee attorney in effect funds the litigation, the attorney's interests and the client's interests may clash irreconcilably.[106] In one study, data

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[101] Pfennigstorf, *supra* note 7, at 59. Kritzer notes that all of the Canadian provinces except Ontario permit attorneys to use contingency arrangements. Kritzer, *Lessons, supra* note 17, at 130. Vargo says that some English solicitors made similar arrangements, called taking a case on "spec." Vargo, *supra* note 98, at 1607.

[102] Vargo, *supra* note 98, at 1615.

[103] *Id.* at 1616. Under these circumstances, the two-way shift is transformed for practical purposes into a one-way shift favoring plaintiffs. *Id.* This is the same transformation that occurs in Alaska. *See* Chapter 8, *infra.*

[104] P. DANZON, CONTINGENT FEES FOR PERSONAL INJURY LITIGATION 1 (U.S. Dep't. Health, Ed. & Welfare 1980).

[105] *Id.* at 2. Another criticism of contingent fee arrangements is that allowing lawyers to have a financial stake in the outcome of personal injury cases sets up an ethical conflict of interest between the lawyer and the client.

[106] Donohue, *The Effects of Fee Shifting on the Settlement Rate: Theoretical Observations on Costs, Conflicts and Contingency Fees*, 54 LAW & CONTEMP. PROBS. 195, 211 (1991). The author asks hypothetically what would happen if the plaintiff hired an attorney on a one-third contingency fee in a system in which if the plaintiff lost the case, the plaintiff would be liable for some or all of the defendant's attorney's fees. This is exactly the situation in many Alaskan cases. The author uses economic analyses to conclude that the plaintiff's likelihood of going to trial under a fee-shifting system rather than settling the case increases as the plaintiff's optimism about winning the case increases. The plaintiff becomes more, rather than less likely to go to trial, suggesting that fee shifting in this type of case does not achieve the goal of reducing litigation. *Id.* at 215. He concludes that the theoretical models cannot yet provide a strong enough foundation for deciding which approach to prefer as a policy. *Id.* at 222. The study of Florida medical malpractice law (in effect from 1980 to 1985) also concluded that "optimistic litigants anticipate shifting their fees to their opponent," which increased the chance that they would go to trial, but found that more plaintiffs dropped their claims, and cases that reached the settlement/litigate decision settled more often. The net effect in Florida seemed to be a possible reduction in litigation. Snyder & Hughes, *The English Rule for Allocating Legal Costs: Evidence Confronts Theory,*

showed that for some types of cases, clients with attorneys on contingency fee arrangements received smaller settlements than those without any attorney.[107] Other authors contend that hourly fee arrangements also create economic conflicts between the attorney's interests and those of the clients.[108] A study of Florida's fee-shifting law for medical malpractice cases between 1980 and 1985 noted that contingency fee arrangements affected the case outcomes.[109]

In the absence of contingent fee arrangements in other countries, equivalent mechanisms often have developed that serve the same purposes. In Germany, for example, the lawyer has no obligation to actually collect a fee from the client, if the litigation is unsuccessful and the client has no means to pay the lawyer's fees.[110] In Ontario, Canada, "a set of practices among many lawyers . . . creates a system of fees that functions much like the American percentage fee system."[111] In Australia, solicitors may take cases on "'spec,'" with the solicitor sometimes co-signing a bank loan for the costs of the case.[112] Traditionally in England, solicitors could take cases on "spec," but apparently at more risk professionally than in Australia because a judge could deny the successful litigant the fee recovery if the judge learned of the arrangement.[113]

The English prohibition against contingent fees fell by the wayside in July of 1995, as regulations went into effect authorizing contingent fees in personal injury, insolvency and human rights cases.[114] Critics of the regulations warned that permitting solicitors a financial stake in the outcome of personal injury litigation would set up an

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6 J. L., ECON. & ORG. 345, 377- 378 (1990).

[107] Thomason, *Are Attorneys Paid What They're Worth? Contingent Fees and the Settlement Process*, 20 J. OF LEGAL STUD. 187, 222 (1991).

[108] Clermont & Currivan, *Improving on the Contingent Fee*, 63 CORNELL L. REV. 529, 536 (1978).

[109] Snyder & Hughes, *supra* note 106, at 347. The authors noted that the legislature passed the law in an effort to "restrain the growth in medical malpractice litigation," and repealed it five years later "[f]ollowing a series of expensive cases lost by physicians and hospitals." *Id.* at 356.

[110] Pfennigstorf, *supra* note 7, at 60.

[111] Kritzer, *Lessons*, *supra* note 17, at 130.

[112] Vargo, *supra* note 98, at 1615.

[113] *Id.* at 1607.

[114] M. Napier, *Now More Can Afford to Go to Law; 'No win, no fee' Legislation*, LAW TIMES OF LONDON, Features section (July 11, 1995).

ethical conflict of interest between solicitor and client.[115] Supporters characterized the change as increasing access to justice, especially for those who were too "rich" for legal aid and too "poor" to fund cases themselves.[116] In response to concerns about safeguarding clients from adverse fee awards, the English Law Society negotiated a form of insurance to cover a client's own solicitor's disbursements and the other side's costs in the event of a loss.[117]

2. More Settled Law in England

Some commentators note that fee-shifting in England operates in a different legal climate than in the United States. Most noticeably, they observe, "[T]he English legal profession . . . historically has been reluctant to seek out or develop new areas of practice or causes of action."[118] In contrast, "Law in America is more volatile and less precedent-bound than in England. It is a rare case of which one can say with assurance that it cannot prevail."[119] One author says the "serious contract litigation is the most unpredictable kind of lawsuit, because of the great complexity and flexibility of American contract law."[120] Another author notes that "In England, approximately ninety-nine percent of all claims for damages are settled before trial."[121]

The differences may be particularly noticeable in personal injury cases. First, there is no oral discovery in the English process, although the solicitors are required to exchange lists of relevant documents.[122] Written interrogatories may be issued, but

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[115] *Id.*

[116] *Id.*

[117] *Id.* The insurance, called "Accident Line Protect," costs Pounds 85 and offers up to Pounds 100,000 of protection. Press Association, *Legal Bills Scheme Launched: Personal Injuries*, THE FINANCIAL TIMES (London edition, Monday, August 14, 1995).

[118] Kritzer, *Searching for Winners, supra* note 18, at 57.

[119] Schwarzer, *Fee-shifting Offers of Judgment -- An Approach to Reducing the Cost of Litigation*, 76 JUDICATURE 147, 149 (1992).

[120] Kleinfeld, *On Shifting Attorneys' Fees in Alaska: A Rebuttal*, 24 JUDGES' JOURNAL 39, 41 (1985) [hereinafter Kleinfeld, *Rebuttal*]. He adds that "The parties sometimes are motivated by the desire to have a neutral third party tell them what is fair." *Id.*

[121] Vargo, *supra* note 98, at 1612. In the United States, the percentage of civil cases in general jurisdiction trial courts settled before trial is lower, probably about 93%. *See* NATIONAL CENTER FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS, 1993, at 14 (1995).

[122] M. ZANDER, CASES AND MATERIALS ON THE ENGLISH LEGAL SYSTEM 61-76 (3rd ed. 1980).

only to the opposing party.[123] There is no pretrial examination of any witness. [124] Judges, not juries, try personal injury actions.[125] Barristers engaged by the injured party's solicitor do not routinely see or speak to the plaintiff.[126] In addition, a code of conduct precludes barristers from seeing witnesses.[127]

3. Legal Aid in Other Countries

The effects of two-way fee shifting in many countries occur in the context of legal aid to many individuals from the government. One author notes that "Even a minimal investigation into the working of the rule in the English legal system . . . would reveal that many litigants are shielded from either the costs or the benefits, or both, that the cost-shifting principle theoretically creates."[128] Government assistance with legal costs helps many litigants in England:

> Legal aid is available in personal injury actions. Such aid is available to over fifty percent of the English population, and even a person with a family earning as much as $45,000 a year can qualify. . . . Under the present program in the United States, legal aid is denied altogether to a personal injury victim, no matter how poor.[129]

The government pays all costs. If the plaintiff prevails, the defendant must repay the government legal aid, but if the defendant prevails, neither the plaintiff nor the

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[123] *Id.*

[124] Vargo, *supra* note 98, at 1602 -1603 (cites omitted). The author relies heavily on the work of HAZEL GENN, *supra* note 9.

[125] Vargo, *supra* note 98, at 1602-1603.

[126] *Id.*

[127] *Id.*

[128] Kritzer, *Searching for Winners, supra* note 18, at 55. The author cites a 1986 English study that showed that "only about 40 percent of English plaintiffs are subject to the downside risk of the English rule." *Id.* He adds that litigants avoid the risks through use of legal aid, trade union assistance, and legal insurance. *Id.* at 55-56.

[129] Vargo, *supra* note 98, at 1607 (cites omitted). Attorneys take many American personal injury cases on a contingent fee basis, regardless of the client's financial situation, presumably alleviating the need for legal aid in these cases. One American commentator familiar with the English system says that "an estimated 28 percent of personal injury plaintiffs receive legal aid." Kritzer, *Searching for Winners, supra* note 18, at 56.

legal aid pay any of the defendant's costs.[130] Plaintiffs also may hire an attorney through a trade union. "If the injured party loses, the trade union will pay all costs that the defendant is entitle to recover. . . . The injured party is freed of any costs, win or lose."[131] Substantial advantages accrue to plaintiffs with either form of outside representation:

> [D]efendants regard the injured parties and their solicitors as formidable opponents. Insurance companies are well aware that injured parties represented by trade unions are operating on a more equal basis than privately funded plaintiffs. In such instances, insurance companies cannot rely on the fear of prohibitive costs as a means of forcing plaintiffs to settle (cites omitted).[132]

In other European countries, legal insurance programs cover as many as 40% of the households.[133] Empirical research in several countries has suggested that for the most part, people with legal insurance do not litigate substantially more often than those without.[134] In the context of two-way fee-shifting, the effect of legal aid is to enable parties to litigate matters that in the United States, they either could not afford, or would pursue under a contingent fee arrangement.[135]

Thus, Alaska's fee-shifting scheme is unique because it imposes the English "loser pays" rule on an American civil litigation system. In Alaska, the use of contingent fee contracts, the volatility of substantive law, and the availability of legal aid resemble the American civil litigation system, while the use of two-way fee-shifting resembles

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[130] Vargo, *supra* note 98, at 1608.

[131] *Id.* (cites omitted).

[132] *Id.* at 1611.

[133] Pfennigstorf, *supra* note 7, at 78-79.

[134] *Id.* at 80-81. Pfennigstorf found some notable exceptions documented, including traffic tickets in German courts (*id.* at 80), and a scheme in which some German lawyers have taken advantage of legislation that intended to benefit consumers by paying legal fees in some cases. The lawyers form organizations that "employ dozens of researchers combing through newspapers and magazines in search of advertisements containing some offensive matter that can be construed as misleading or otherwise in violation of the fair trade practices law. The offending advertiser is then put on notice, requested to cease and desist, and asked to pay to the complainant the applicable statutory attorney fees -- which are the only objective of the operation and, in an office staffed with skilled employees handling a large volume of publications, generate substantial profits for the owners." *Id.* at 81-82.

[135] *See* Pfennigstorf, *supra* note 7, at 60, 64-65 for a general discussion of legal aid in European countries.

the English system. Chapter 3 explains how Alaska continued to follow the English attorney-fee rule, even as other states evolved toward the American rule.

Chapter 3
History of Fee Shifting in Alaska

This chapter traces the evolution of Alaska's fee-shifting rule since it became law in 1884.[136] Fee shifting in Alaska can be traced back to the Field Codes of the mid-1800s, and came to Alaska through the application of Oregon law during territorial days. There is no clear answer to why Alaska retained a much more English approach to fee shifting than did the rest of the United States. It appears that Alaska followed its separate course more through historical accident than through any conscious decision to reject the "American rule."

A. Territorial Days

On March 30, 1867, Russia signed a treaty selling its claims to the territory known as Alaska to the United States. Congress made no provision for any sort of civil government in Alaska for the next seventeen years.[137] Pre-existing Alaska Native tribal

[136] Some of the information contained in this chapter comes from research done by Ceceile Kay Richter in 1992 for the Alaska Court System's Court Rules Attorney.

[137] Brown, *The Sources of the Alaska and Oregon Codes Part II: The Codes and Alaska, 1867-1901*, 2 UCLA-AK L.REV. 87, 88 (1973) [hereinafter *Brown*, Part II].

governments continued in their customary practices, with some beginning to develop tribal councils at about this time.[138]

In the absence of a civil government for Alaska, Congress passed laws governing customs, forbidding the sale of liquor to Indians, and governing seal hunting in the Pribilof Islands.[139] The Treasury Department, Navy, and Army kept order, and an 1872 law gave mining camps the authority to abide by the customs of the miners.[140] Still, during the first seventeen years of American rule, settlers and miners were frustrated by the lack of civil government in Alaska.[141]

1. Civil Government Comes to Alaska: 1884-1900

In 1884, Congress designated Alaska as a civil and judicial district.[142] Congress also provided that "the general laws of the State of Oregon now in force are hereby declared to be the law in said district."[143] Thus Oregon's statutes, including its provisions regarding attorney's fees, became the law in Alaska.[144]

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[138] CONNORS, CARNS, AND DI PIETRO, RESOLVING DISPUTES LOCALLY: A STATEWIDE REPORT AND DIRECTORY 10, (Alaska Judicial Council 1993). The council structure evolved independently among Tlingits and Haidas in Southeast Alaska, Yupiks in western Alaska, and Inupiat in the northwest areas of the state. Missionaries, teachers, military and other early immigrants to the state encouraged the council form of government for various reasons. *Id.* at 10-11.

[139] Brown, Part II, *supra* note 137, at 88.

[140] *Id.* at 89. A 1901 document titled ALASKA BAR ASSOCIATION AND SKETCH OF JUDICIARY, by an early Alaskan judge named Arthur Delaney, said that "The Territory was turned over to the War Department and garrisons were established at Sitka, Wrangel and Tongass. Ten years of military rule succeeded . . . . In June, 1877, the military was withdrawn and Territory fell into the hands of the Treasury Department. Anarchy reigned for the next succeeding two years." The author describes Indian difficulties, British intervention, the miners code ("a democracy pure and simple"), and the Carter Code.

[141] Brown, Part II, *supra* note 137, at 89-90.

[142] *Id.* at 90. The legislation was known as the "Alaska Government Act of 1884," Ch. 53, 23 Stat. 24 (May 17, 1884). The Act also created other governmental positions, including a Governor to be appointed by the President, and a District Judge to hold court at Sitka. *Id.*

[143] *Id.* According to Brown, Congress' choice of Oregon law was "fairly arbitrary." *Id.* at 91. Apparently, the Congressional drafters had considered either Washington or Oregon laws for Alaska, but chose Oregon's as the more developed of the two. *Id.*

[144] Years later, at statehood hearings, Alaska territorial governor Ernest Gruening recalled that transplanting Oregon substantive laws to the Alaska territory had created many problems:

> Congress . . . applied the code of the State of Oregon to Alaska, and it was soon discovered that Oregon had counties, county officials, and as Alaska had no counties and no power to create them, whenever references were made to them they did not apply to Alaska. And in the Oregon code was a provision that in order to be a member of a jury

An 1862 Oregon statute in effect in 1884 let attorneys and their clients negotiate their own fee arrangements, and allowed a prevailing party to recover certain costs of the action, including attorney's fees, from the defeated party.[145] Other sections of the Oregon laws provided that a prevailing plaintiff should receive costs as a matter of course in certain civil actions, and that a party entitled to costs should also be allowed to recover for all necessary disbursements in proving its case, including witness fees, court fees, deposition expenses and preparation for documents used as evidence for

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> one had to be a taxpayer; and as Congress levied no taxes on Alaska, we could not have any legal juries. And that went on and on and on and on, and the only thing that changed the situation at all was the discovery of gold in the Klondike in 1887.

HEARINGS BEFORE THE SUBCOMMITTEE ON TERRITORIES AND INSULAR POSSESSIONS OF THE COMMITTEE ON INTERIOR AND INSULAR AFFAIRS, HOUSE OF REPRESENTATIVES, 83RD CONGRESS, 1ST SESS 205 (April 14-17, 1953).

[145] *See* THE CODE OF CIVIL PROCEDURE AND OTHER GENERAL STATUTES OF OREGON Ch. VI, Title V, Sec. 538 (1863) (Code Commissioners: M. P. Deady, A. C. Gibbs, J. K. Kelly); DEADY & LANE, GENERAL LAWS OF OREGON 1843-1872 Ch. VI, Title V, Sec. 538 (1874) (compiled and annotated by M. P. Deady and L. Lane). Specifically, section 538 of the Oregon law provided:

> The measure and mode of compensation of attorneys shall be left to the agreement, expressed or implied, of the parties; but there may be allowed to the prevailing party in this judgment or decree certain sums by way of indemnity for his attorney fees in maintaining the action or suit, or defense thereto, which allowances are termed costs.

Another section of Oregon's 1863 law specified the amount of costs allowed to either party: to the prevailing party in the supreme court, $15; to the prevailing party in the circuit court without trial, $5 and with trial, $10; and to the prevailing party in the county court, half the amount allowed in the circuit court. *Id.* at Sec. 542.

The story of how Oregon came to use the Field Codes goes back to Oregon's territorial days. The Field codes came from New York, where the legislature commissioned private attorneys (including David Dudley Field) to re-codify and systematically re-write the law. The Field Commission revisions, completed in the mid-1800s, affected the development of law throughout the United States. Leubsdorf, *supra* note 7, at 18. On the issue of prevailing party's attorney's fees, the Field Commissioners believed that the losing party should pay the expense of litigation, but they did not specify in their code what sums the losers should have to pay. *Id.* at 19-20. Instead, they left blanks in the code for the legislature to fill in the size of the fee award in dollars or percentage of the recovery. *Id.* at 20.

In 1848, Congress organized the Oregon territory under the Oregon Organic Act. The territorial legislature soon borrowed Iowa statutes (the Iowa "blue books"). Because different judges used different versions of the Iowa blue book statutes, the Kelly Commission wrote a code adopted in 1854 that included a small portion of the Iowa code, but mostly New York statutes from the Field Commission revisions. This history suggests that the fee-shifting provisions in the Oregon code came from the Field Codes. After Oregon statehood in 1859, the state commissioned an attorney, M. P. (later Judge) Deady, to revise the statutes. After 1866, Deady codes provided most of the framework for Oregon law. Brown, *The Sources of the Alaska and Oregon Codes, Part I: New York and Oregon*, 2 UCLA-ALASKA LAW REVIEW 15, 16 (1973) [hereinafter Brown, Part I]; Brown, Part II, *supra* note 137, at 87.

trial.[146] Other sections of the Oregon statutes set out procedures for applying for costs and disbursements from the clerk, subject to a right for an appeal to be heard by the judge.[147]

2. 1900 to Statehood (1959)

Oregon statutes continued to govern court-awarded attorney's fees in Alaska's territorial courts until 1900, when Congress passed a Code of Civil Procedure for the District of Alaska.[148] Fee shifting continued under Congress' Act, which included a provision similar to Oregon's prevailing party fee-shifting authorization.[149] Fee-shifting provisions were carried through subsequent compilations of Alaska law, with the possible exception of a ten-year period between 1937 and 1947 when it may have been omitted.[150]

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[146] *See* GENERAL LAWS OF OREGON 1843-1872 Ch. VI, Title V, Sec. 539, 543. In the late 1800s, judges began to disallow attorney's fees as one of the permissible costs. Leubsdorf, *supra* note 7, at 23.

[147] *See* GENERAL LAWS OF OREGON 1842-1872 Ch. VI, Title V, Sec. 539, 543, 546, 547, 548. Since territorial days, Oregon has kept laws on its books giving a small fee to the prevailing party as part of costs and disbursements. Court Rule 68 governed payment of the fees. However, in 1995 the Oregon Legislature revised its statutes, increasing the statutory prevailing party fees and permitting two-way attorney fee shifting in some types of cases. The legislature used Alaska's Rule 82 as its source for some parts of the law. *Telephone interviews with Max Williams and David Heynderickx, counsel to the Oregon Senate Judiciary Committee and Legislative Counsel, and Professor Maury Holland, University of Oregon School of Law.* The new legislation set a schedule of prevailing party fees not tied directly to attorney fees. Parties can automatically recover $250 without trial or $500 with a trial in the circuit court, and lesser amounts in the lower courts. The circuit court may award up to $5,000 more after considering various factors, including "(g) any award of attorney fees made to the prevailing party as part of the judgment." OR. REV. STAT. § 20.190(3) (1995). Legislators modified about 115 existing statutes that mandatorily shifted fees for prevailing plaintiffs by permitting discretionary fee-shifting to the prevailing party. They also provided for shifting attorney's fees after arbitration if the appealing party does not better its position in the following court proceedings.

[148] *See* Act of June 6, 1900, ch 786, 31 Stat. 321 ("an act making further provision for a civil government for Alaska, and for other purposes").

[149] *See id.* at Sec. 509:

> The measure and mode of compensation of attorneys shall be left to the agreement, expressed or implied, of the parties; but there may be allowed to the prevailing party in the judgment certain sums by way of indemnity for his attorney fees in maintaining the action or defense thereto, which allowances are termed costs.

The Congressional act differed from the Oregon statutes in that it did not set fees in specific amounts for specific courts.

[150] *See* Comment, *Award of Attorney's Fees in Alaska*, 4 UCLA-AK L.REV. 129, 144 (1974) (authored by Gregory Hughes). Hughes says that Congress actually omitted the provision for including attorney's fees as costs in a 1937 revision, and then re-enacted it in 1947. In 1912, Congress directed Senate and House committees to undertake the first codification, compilation and annotation of Alaska

In 1949, Congress amended the Alaska Government Act to apply the Federal Rules of Civil Procedure to the U.S. District Court for the Territory of Alaska.[151] Although the Federal Rules of Civil Procedure did not contain provisions for attorney fee-shifting, the teritorial fee-shifting statute had not been repealed. Because Congress had not repealed the earlier territorial statute, and nothing in the federal rules prohibited court-awarded attorney's fees to the prevailing party, fee shifting continued to be the practice in Alaska to the best of our knowledge.

A review of the court's rules for the Territory gives another picture of prevailing party fees. The court rules in effect in 1922 made no mention of fee shifting or prevailing parties. By March 7, 1947, however, the rules provided that "...The prevailing party in the judgment shall be allowed the sum of twenty dollars, by way of indemnity for his attorney's fees in maintaining the action or defense thereto...."[152]

By April 30, 1953, the local federal rules had been amended to give a schedule for lien, non-lien and divorce cases to "be adhered to in fixing such fees for the prevailing party as a part of the costs of action allowed by law."[153] The rules in effect on January 28, 1956 kept the same schedules but added a subsection (a)(3): "In all other cases where the above schedule shall not be applicable, the court shall fix such fee in favor of the prevailing party as shall appear just and reasonable."[154]

The Ninth Circuit Court of Appeals reviewed at least two attorney fee cases from the Alaska court during this period: *Forno v. Coyle*[155] and *Columbia Lumber v. Agostino.*[156] These cases decided issues related to the judge's discretion to award particular amounts. In both cases, the Ninth Circuit upheld the Alaska judge's decisions.[157]

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law. *See* Territorial Organic Act, Ch. 387, 37 Stat. 512 (1912). Subsequent compilations were undertaken in 1933 and 1949.

[151] *See* Act of July 18, 1949, 63 Stat. 343.

[152] *See* Former LOCAL FED. R.CIV. P. 46 (1947) (all former federal local rules cited from collection of Judge Russel Holland, Chief Judge, U. S. District Court, District of Alaska).

[153] Former LOCAL FED. R.CIV. P. 45 (1953).

[154] Former LOCAL FED. R.CIV. P. 25 (1956).

[155] 75 F.2d 692 (9th Cir. 1935).

[156] 184 F.2d 731 (9th Cir. 1950).

[157] Comment, *supra* note 150, at 144.

B. Statehood and After

1. Statehood through 1991

President Eisenhower proclaimed Alaska a state on January 3, 1959. Territorial laws continued in effect until the new legislature could pass its own statutes. The new state's constitution gave the Alaska Supreme Court power to promulgate administrative rules and rules of civil and criminal procedure for the state courts.[158] The three justices appointed to the Alaska Supreme Court promulgated rules of civil and criminal procedure for the state court system[159] that took effect on February 24, 1960, when the court system began to function.[160]

The new state's Rules of Civil Procedure included Rule 82, awarding partial attorney's fees to the prevailing party as costs, unless the court in its discretion otherwise directed. Unlike most of the other civil rules adopted, Rule 82 had no federal counterpart. To guide the trial court in making fee awards, the rule set forth schedules of attorneys' fees to be followed in civil cases "for any party recovering any money judgment therein."[161] These schedules set different amounts for liens and other claims, and varied the awards for "contested," "partly contested," or "noncontested" cases.[162]

The second session of the 1962 legislature approved a bulk formal revision of the state laws, including a complete revision of the Code of Civil Procedure.[163] By repealing the old code of civil procedure, the legislature also repealed all the existing statutory provisions pertaining to the allowance of attorney's fees and costs. The new Code of

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[158] *See* AK. CONST. art. IV, § 15.

[159] *See* Ak. Sup. Ct. Order No. 5 (October 9, 1959). The state court rules of civil procedure derive from the Federal Rules of Civil Procedure. Brown, Part II, *supra* note 137, at 109. Those which do not are taken from the codes of procedure in the earlier Oregon law. *Id.*

[160] *See* Ak Sup. Ct. Order No. 17 (February 15, 1960). The court system originally consisted of a general jurisdiction trial court (the superior court) and a supreme court. Later, the Legislature added a limited jurisdiction trial court (the district court), magistrate courts, and an intermediate appellate court (the Court of Appeals).

[161] The rule also permitted the court to fix fees in a reasonable amount for cases in which no monetary recovery was awarded. Where no monetary recovery was had, the attorney's fees for the prevailing party could be fixed by the court, in its discretion, in a reasonable amount. The rule closely resembled the 1956 version of the territorial court's rule.

[162] *See* former AK. R.CIV. P. 82(a)(1) (on file at Alaska Judicial Council library).

[163] *See* 1962 Alaska Sess. Laws ch. 101, approved April 12, 1962. This law promulgated a revised Alaska Code of Civil Procedure and repealed the old one, both acts effective January 1, 1963.

Civil Procedure codified the prevailing party's right to attorney's fees at A.S. § 09.60.010:

> **Costs Allowed Prevailing Party.** Except as otherwise provided by statute, the Supreme Court of Alaska shall determine by rule or order what costs, if any, including attorneys' fees, shall be allowed the prevailing party in any case.[164]

The statutes underlying Rule 82 have remained relatively unchanged since statehood. In 1971, the legislature spelled out provisions for fee shifting in small claims cases.[165] In 1986, a tort reform provision amended the basic statute to eliminate fee shifting in non-contested civil tort actions.[166]

More action on fee shifting occurred in the supreme court. New court rules in 1963 deleted the distinction between lien and non-lien cases.[167] The court also added a subsection that let judges vary from the schedule when the money judgment was not an accurate criterion for deciding the fee to be allowed to the prevailing side.[168] The fee for those cases was to be commensurate with the amount and value of legal services rendered.[169]

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[164] 1962 Alaska Sess. Laws ch. 101 § 5.14.

[165] HB 349, introduced by Representative Kerttula was codified at A.S. § 09.60.015. It provided fees to the prevailing party's attorney in cases of $1,000 value or less.

[166] 1986 Alaska Sess. Laws ch. 139 § 4 amended ALASKA STAT. § 09.60.010. The statute currently provides in relevant part:

> The supreme court shall determine by rule or order the costs, if any, that may be allowed a prevailing party in a civil action. Unless specifically authorized by statute or by agreement between the parties, attorney fees may not be awarded to a party in a civil action for personal injury, death, or property damage related to or arising out of fault. . .unless the civil action is contested without trial, or fully contested as determined by the court.

Section 8 of the same act amended Rule 82 "by prohibiting the award of attorney fees in certain civil actions based on fault, unless allowed by statute or by agreement of the parties or unless the civil action is contested without trial or fully contested."

[167] *See* Sup. Ct. Order No. 49 (December 21, 1962). These changes became effective on January 1, 1963, and were published as ALASKA RULES OF COURT PROCEDURE AND ADMINISTRATION 1963.

[168] *See* former AK. R.CIV. P. 82(a)(2) (1962).

[169] *Id.*

From statehood until the early 1970s, the supreme court decided various challenges to Rule 82. The court also considered a series of recommendations from local Bar associations. A 1962 letter from the Juneau Bar Association called for "a substantial increase in the amount allowed to the successful party."[170] Other local Bar associations proposed changes in 1963, 1967, and 1970, all oriented toward increasing the awards for non-monetary judgments and creating more uniformity in awards. In 1972, the supreme court's Civil Rules Committee directed a subcommittee to consider Rule 82. Concerns about the uncertainties created by what the Bar apparently saw as too much judicial discretion led to a 1973 resolution passed at the Alaska Bar Association Conference calling on the court to repeal Rule 82.

A 1974 law review article that summarized the history of Rule 82 as a follow-up to the 1973 Bar resolution said "The direct effect of Rule 82 is to give the trial judge complete freedom to award any amount as an attorney's fee -- or he can choose to deny an award altogether. . . . This vast discretion . . . is probably the principal problem with Rule 82, and one reason why it may be repealed in the near future."[171] The author characterized the numerous appeals about Rule 82 primarily as allegations that the trial judge abused his discretion, and suggested that the court had "little success in establishing standards for the exercise of the court's discretion, possibly because every case must be considered individually."[172]

Apparently, the passage of time dampened the Bar's enthusiasm for repealing the rule. On February 4, 1976, a letter from Keith Brown, President of the Alaska Bar Association, to Chief Justice Boochever cited a 1975 survey of the Bar's members as grounds for concluding that "no concensus (sic) [existed] among the Bar's membership" about Rule 82.[173] Of the attorneys responding to that survey, 121 (47%) favored repeal,

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[170] Letter from N. C. Banfield, President of the Juneau Bar Association, to Chief Justice Nesbett dated March 26, 1962. Mr. Banfield said, "After the present schedule was adopted by the judges of the United States District Court for the Territory of Alaska, I personally discussed the low percentages provided in the schedule with one of the judges. He said that the schedule was purposely set very low to discourage litigation. We have found it encourages litigation by encouraging a man who has no defense to refuse to pay until after judgment." *Id.* Letter in Court Rules Attorney's files.

[171] Comment, *supra* note 150, at 147.

[172] *Id.* The author suggested changing Rule 82 so that it applied only to successful plaintiffs in a series of circumstances in which other states already practiced one-way fee shifting (e.g., small claims, public interest litigation). He supported attorney's fees awards as a sanction in bad faith cases, and in Rule 68 offers of judgment situations. He also recommended that the court or legislature limit judges' discretion, and base the award on actual hours worked multiplied by a competitive rate.

[173] Letter in Court Rules Attorney's files.

and 136 (53%) did not. After that date, relatively few concerns about Rule 82 appear in the court's files, until 1992.[174]

2. 1993 Substantive Changes

In March, 1992 the Alaska Supreme Court asked the chief justice to appoint a subcommittee of the Civil Rules Committee to review Civil Rule 82. The members of the court were "concerned that the costs of litigation have increased to such an extent that the prospect of an award of attorney's fees under Civil Rule 82 may deter a broad spectrum of litigants from voluntary use of the courts."[175]

The court's special subcommittee studied three issues: access to the courts, lack of uniformity in fee awards when the prevailing party does not receive a monetary judgment, and absence of a requirement that trial judges articulate the reasons for an award when the schedule does not apply.[176] At the subcommittee's first meeting, a majority of members voted not to recommend any changes to the existing rule. After the supreme court's request for reconsideration and a survey of members of the Alaska Bar,[177] the subcommittee recommended revising Rule 82. The subcommittee suggested that the court use a fixed percentage of reasonable fees incurred to calculate fee awards in non-monetary judgment cases.[178] It also recommended that the rule list factors that

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[174] The court revised the monetary recovery schedule in 1981 (*see* Sup. Ct. Order No. 497 (12/16/81)) and 1986 (*see* Sup. Ct. Order No. 712 (May 25, 1986, effective September 15, 1986)). In 1988, the court added a provision about attorney's fees in default cases over $50,000 (*see* Sup. Ct. Order No. 921 (August 18, 1988, effective January 15, 1989)), and in 1990 and 1991, made other minor changes (*see* Sup. Ct. Order No. 1006 (August 31, 1989) and Sup. Ct. Order No. 1066 (March 29, 1991, effective July 15, 1991) (adding subsection 82(a)(5)).

[175] Minutes of Civil Rules Committee, March 29, 1992. The court earlier had confronted this issue in *Bozarth v. Atlantic Richfield Oil Co.*, 833 P.2d 2 (Alaska 1992). The plaintiff in that case had lost a wrongful discharge suit against his former employer and been assessed $152,000 in attorney's fees under Rule 82. *Id.* at 2-3. Bozarth appealed the fee award to the supreme court. While the majority declined to grant Bozarth relief, they characterized the magnitude of the award as "nonetheless disturbing." *Id.* at 4 n.3. The justices wondered whether large fee awards could deter access to the courts, and called on the Civil Rules Committee to review the issue. *Id.*

[176] Kordziel, *Rule 82 Revisited: Attorney Fee Shifting in Alaska* 10 AK. L. REV. 429, 441-42 (1993).

[177] The survey found that 80% of the 543 attorneys responding favored keeping Rule 82; only 16% believed that the court should repeal it. *Id.* at 467. Our survey of attorneys for this evaluation of Rule 82 found 73% favored keeping the rule and 23% favored repeal, indicating that relatively little change in opinion has occurred in the three-year period. The opinion of the Bar does seem to have shifted toward a more positive view of Rule 82 over the two decades between the 1975 Bar survey and the present.

[178] *Id.* at 446.

the trial judge should consider in deviating from the schedule or the fixed percentage.[179]

Acting on the special subcommittee's report, the supreme court in 1993 repealed and reenacted Civil Rule 82.[180] The supreme court adopted most of the subcommittee's recommendations, but also added a factor to address the *Bozarth* access issue.[181] The current rule permits the trial judge to vary a fee award calculated under the schedules after considering "the extent to which a given fee award may be so onerous to the non-prevailing party that it would deter similarly situated litigants from the voluntary use of the courts."[182] While the rule does not specifically address a losing party's ability to pay, one observer believed that judges might consider financial impact in analyzing some cases.[183]

The new rule contained other changes. For the first time, it specified a fixed percentage of actual attorney's fees for the trial judge to award in cases with no monetary judgment.[184] Under the old version of the rule, the judge would first determine the total reasonable fee, and then would choose a percentage by which to multiply the total reasonable fee.[185] The percentage multiplier could vary from 20%-80%, depending on such case-specific factors as the nature of the case and the results achieved.[186]

Under the new rule, the trial court multiplies the prevailing party's actual, necessarily incurred fees by 20% if the case was resolved without trial and 30% if it was resolved with trial.[187] The Civil Rules subcommittee suggested these fixed

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[179] *Id.* "The subcommittee specifically rejected adding a factor to address the *Bozarth* access issue, fearing that an ability-to-pay factor might generate unnecessary litigation and undermine the rule's uniformity and fairness." *Id.*

[180] *See* Sup. Ct. Order No. 1118 (Jan. 7, 1993 and effective July 15, 1993).

[181] Kordziel, *supra* note 176, at 446.

[182] *See* AK. R. CIV. P. 82(b)(3)(I).

[183] Kordziel, *supra* note 176, at 451.

[184] *See* ALASKA CIV. R. 82(b) (2).

[185] TOMKINS & WILLGING, *supra* note 11, at 43.

[186] *Id.* at n.152. Commenting on the discretion afforded by this provision, one author observed that "Awards between 20 percent and 80 percent of actual defense fees are, as a practical matter, not reversible." Kleinfeld, *Alaska: Where the Loser Pays the Winner's Fees*, 24 THE JUDGES' J. 4, 6 (1985).

[187] *See* AK R. CIV. P. 82(b)(2).

percentages to roughly equalize the recovery available between the plaintiff and defendant in a certain type of case.[188] The result still will vary in many cases, leaving inequities between plaintiff and defendant reimbursements that bother many attorneys.[189]

3. Application in Federal Cases

a. In Federal District Court - In 1853, Congress passed a fee-shifting statute that permitted the prevailing party to collect a docket fee ranging from five to twenty dollars.[190] This law remains on the books, but without much effect on practice.[191] The U. S. Supreme Court discussed it in some detail in *Alyeska Pipeline Co. v. Wilderness Society et al.*[192] Versions of the Alaska Federal District Court Rules dating from 1964

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[188] Minutes, Subcommittee to Review Civil Rule 82, July 7, 1992. ("Approximately half of the subcommittee recommended 30 percent and half recommended 35 percent. Thirty to 35 percent is roughly comparable to the percentage of actual fees that a prevailing party recovers in a larger case under the schedule in Rule 82(a)(1). There was one vote for 25 percent.")

[189] If the case resulted in money judgment of $100,000 after trial, the plaintiff would recover approximately $5,000 + $7,500 = $12,500 (20% of the first $25,000, and 10% of the next $75,000) on a Rule 82 award from the schedule. If the plaintiff's attorney had taken the case on a standard one-third contingent fee contract, the plaintiff would owe the attorney $33,300 in fees, of which the non-prevailing party would presumably pay about one-third. If, in the same case (assuming one could project the probable value at $100,000), the defendant prevailed, the court would award the defendant 30% of the actual fees. If the defendant had spent $100,000 in defending the case, the court (following the schedule) would award $33,300, or nearly three times the award to the plaintiff.

It is not clear why the court has maintained the distinction between plaintiff and defendant as prevailing parties in calculating awards. One author says "One attorney estimated that in the vast majority of small cases, thirty percent of the actual defense fees will far exceed the amount of attorney fees the prevailing plaintiff can recoup under the schedule. . . . [T]he amendment may fail to redress adequately the inherent asymmetry between the schedule and fixed-rate methods of fee taxation for plaintiffs and defendants respectively." Kordziel, *supra* note 176, at 450 (cites omitted).

[190] Several authors note that Congress enacted a fee shifting statute in 1853 that permitted the prevailing party in a federal case to collect a small docket fee. Vargo, *supra* note 98, at 1578, and Comment, *supra* note 150, at 137. As a practical matter, when most people think of federal fee-shifting, they think of the federal laws that shift fees to successful plaintiffs in various types of actions noted below.

[191] Comment, *supra* note 150, at 137 (cites omitted). The author notes that Congress modified and re-enacted the law in 1948, including in its provisions docket fees of $20 to the prevailing party in civil, criminal and admiralty cases, "to be taxed as costs." *Id.* at 138 n.46.

[192] 421 U. S. 240, 251-258 (1975). The Court noted that the 1948 revisions to the law omitted a statement that "'no other compensation shall be taxed and allowed," and changed the wording from "shall be taxed" to "may be taxed." *Id.* at 255 n.29. The Court said that neither revision affected its "conclusion that the 1948 Code did not change the longstanding rule limiting awards of attorneys' fees to the statutorily provided amounts." *Id.* In his dissent, Justice Marshall argued that the Court had

and 1973 refer to the docket fees authorized by the statute, but later versions of the rules do not specifically mention them.[193]

A 1981 law review article, written to guide Alaska practitioners through the federal court procedures, set aside several pages for a discussion of attorney's fees and costs.[194] The author noted that "Attorney's fees may be available under federal law, and in diversity cases state law must be consulted."[195] While stating that the American rule generally governs in federal court unless a federal statutory provision or a recognized exception applies,[196] the author noted that when the federal court "sits in diversity" Rule 82 and Alaska law interpreting the rule must be applied.[197]

A question not addressed by the article was how to calculate attorney's fees in cases other than diversity cases that call for application of state law. Should fees be calculated under the federal court's General Local Rule on attorney's fees, or under state Rule 82? The 1993 version of the federal rule, Rule 21.1, implied that state Rule 82 law and standards applied to all attorney's fee awards unless statutory provisions or other considerations took precedence.[198] The most recent version of the

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consistently read the statute narrowly (*id.* at 278) and added "Since that language is no longer a part of the fee statute, it seems even less reasonable to read the fee statute as an uncompromising Bar to equitable fee awards. *Id.* at 281.

[193] *See* GENERAL AND CRIMINAL RULES FOR THE DISTRICT OF ALASKA Rule 15(B)(7) (June 1, 1964); GENERAL, ADMIRALTY, BANKRUPTCY AND CRIMINAL RULES FOR THE DISTRICT OF ALASKA Rule 21(B)(7) (October 1, 1973); GENERAL, ADMIRALTY, CRIMINAL, MAGISTRATE, AND BANKRUPTCY RULES FOR THE DISTRICT OF ALASKA Rule 21 (September 12, 1985) (no specific mention of attorney's fees as allowable costs). However, Tomkins and Willging list "Local rules related to attorney fee taxation" and include "Gen. 21.1 Attorney Fees" for Alaska. TOMKINS AND WILLGING, *supra* note 11, at 115. The General Rules for the District of Alaska as of May 4, 1993 separated out attorney's fees in Rule 21.1. The rule provided that "The motion [for fees] shall be accompanied by a statement of authority for the award of such fees, which set forth the amount claimed. Insofar as practicable, State Rule 82 shall constitute guidance as to reasonable amounts of attorney fees under this rule." *Id.* The most recent version of the rule, effective July 17, 1995, is Local Rule 54.3. *See* note 199, *infra.*

[194] Trudell, *Federal Practice in Alaska: Local Rules and Related Matters*, 11 UCLA-AK. L. REV. 1, 21-26 (1981).

[195] *Id.* at 21.

[196] *Id.* at 23. The exceptions include those "based upon a district court's equitable powers to award attorney's fees 'when overriding considerations of justice . . . compel such a result,'" (cites omitted), those allowed "to a successful party when the unsuccessful party has acted in bad faith," (cites omitted), and common benefit or "common fund" cases. *Id.*

[197] *Id.* at 24.

[198] *See* D. AK L. R. 21.1. The former rule provided: "Insofar as practicable, State Rule 82 shall constitute guidance as to reasonable amounts of attorney fees under this rule."

rule, Local Rule 54.3 omitted this language, limiting its references to Rule 82 to diversity cases.[199] Only about 38% of the rule 82 awards occurred in this type of case.[200]

Data gathered for the current study indicated that the federal court applied Rule 82 most often in diversity cases.[201] Interviews with the federal judges also suggested that Rule 82 became a factor in diversity cases more frequently than in other types of cases. Alaska's federal judges[202] all commented that they used Rule 82 infrequently, in part because diversity cases in the federal courts rarely went to trial. They also said that they did not rely on Rule 82 much in settling cases.

As in state court, attorneys in federal court tended to ask for fees from the schedule, and the federal judges tended to rely on it. The judges said that they reviewed hourly rates, actual hours, the parties' arguments, case law, and the need for the legal services.[203] In general, they did not believe that an absence of Rule 82 would change

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[199] The General Local Rules supplement the Federal Rules of Civil Procedure. Trudell, *supra* note 194, at 7 (cite omitted). Local Rule 54.3 reads: "Motions for attorney's fees shall be filed within 14 days after entry of judgment, unless an applicable statute provides another time limit. In a diversity case the court shall apply Alaska R. Civ. P. 92 existing at the time of judgment. The motion shall set forth the authority for the award, whether Alaska R. Civ. P. In a diversity case, a federal statute, or other grounds entitling the moving party to an award. The affidavit in support shall provide a total number of hours worked and the amount charged to the clients, if any, and shall attach as exhibits bills sent in other detailed itemization as may be appropriate."

[200] Of civil cases closed in 1993, a judge awarded attorney's fees under the local rule in eight cases.

[201] Thirteen of the twenty-one federal cases in which Rule 82 applied (62%) were diversity cases; eight were other types.

[202] Each of the current federal judges has extensive background in Alaska state courts and application of Rule 82. Judge Singleton practiced law for a number of years, then spent about twenty years on the Alaska state court bench, ten years as a trial judge, and ten on the Court of Appeals. Judges Sedwick and Holland had lengthy private civil practice backgrounds before appointment to the federal bench.

[203] A 1986 report discussed federal judges' analysis of fee requests. The report noted that while some believed that they should not spend relatively scarce judicial resources determining attorney's fees, others "emphasized the role of the courts in preventing legal services from becoming too expensive for potential litigants," and the need to avoid overcompensation because fee awards in one case "establish a common law of fees that is then used to establish attorneys' fees in subsequent cases." TOMKINS & WILLGING, *supra* note 11, at 65.

federal court practice significantly.[204] They saw "strict case management" as more effective than Rule 82 in reducing protracted litigation.

b. Federal Statutes in State Court - Just as the federal court must interpret and apply state law in some instances, Alaska's state courts also interpret and apply federal law. Where a federal statute calls for an attorney fee award, federal rather than Alaska law applies, even in state court.[205] The Supreme Court of Alaska based this rule on the often-differing purposes advanced by Rule 82 and federal attorney's fee statutes.[206] The purpose of the Civil Rights Attorney's Fee Award Act is to encourage meritorious claims that plaintiffs might not otherwise bring, while "the purpose of Rule 82 is to partially compensate a prevailing party for the expenses incurred in winning his case."[207] Similarly, the policy underlying the federal Truth-in-Lending Act encouraged vindication of borrower/consumer rights and broad compliance with the Act by private rather than governmental action.[208] Emphasizing its reliance on federal law and interpretation for federal attorney's fees awards in state courts, the Alaska Supreme Court said that fee awards in Truth-in-Lending cases and civil rights cases should rely on the twelve factors set out in *Johnson v. Georgia Highway Express, Inc.*[209]

c. Admiralty Cases - Plaintiffs can bring federal maritime tort claims either in state or federal court.[210] If a party takes the case to federal court, attorney's fees

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[204] One judge noted that they had seen little interest in attorney's fees provisions during the recent revision of the local rules. He thought that attorneys would complain to the Alaska Supreme Court about Rule 82 rather than to the Alaska District Court about the local rule provisions because the local federal rule is so solidly based on the existing Rule 82.

[205] *Ferdinand v. City of Fairbanks*, 599 P.2d 122, 125 (Alaska 1979). "While the award of attorney's fees under both the Alaska Rule [82] and the federal statute remains within the trial court's discretion, that discretion is narrowly limited when attorney's fees are awarded pursuant to the federal act, and will be reviewed on appeal in light of federal rather than Alaska law." *Id.* The court relied on the federal act's legislative history to support its position: "It is intended that the amount of fees awarded under S. 2278 be governed by the same standards which prevail in other types of equally complex Federal litigation . . . [C]ounsel for prevailing parties should be paid, as is traditional with attorneys compensated by a fee-paying client, 'for all time reasonably expended on a matter'" (cites omitted). *Id.* at n. 9.

[206] *Tobeluk v. Lind*, 589 P.2d 873, 876 (Alaska 1979).

[207] *Id.* at 876. *See also Ferdinand*, 599 P.2d at 125; *Hayer v. Nat'l. Bank of Alaska*, 663 P.2 547, 550 (Alaska 1983).

[208] *Hayer*, 663 P.2d at 550. *See also* TOMKINS & WILLGING, *supra* note 11, at 40.

[209] 488 F.2d 714, 717-19 (5th Cir. 1974).

[210] *See* 28 U.S.C. § 1333 (1948). State court jurisdiction over admiralty cases arises under the saving to suitors clause of section 1333.

normally are not recoverable as costs.[211] When an admiralty claim is brought in state court, however, the state court applies federal substantive law[212] and state procedural law. The Alaska Supreme Court has held that the prevailing party in a state court action based on admiralty jurisdiction is entitled to a Rule 82 attorney's fee award, since a fee award is "remedial in nature."[213] On the other hand, some federal courts, including the Alaska District Court, faced with the same question arising in diversity cases[214] have concluded that state attorney's fees statutes are inconsistent with maritime law and should not apply.[215]

[211] *Kalmbach v. Ins. Co. of Pa.*, 422 F. Supp. 44, 45-46 (D. Alaska 1976) (citing *Alyeska Pipeline*, 421 U.S. 240). In *Kalmbach*, decided before the district court adopted local Rule 21.1,the plaintiffs had alleged federal jurisdiction based on both diversity and admiralty. *Kalmbach*, 422 F. Supp. at 45. Judge von der Heydt refused to allow Rule 82 fees because "the fact that this case is also grounded upon diversity jurisdiction does not change this rule [that attorney's fees normally are not recoverable in admiralty cases]." *Id.* at 46.

[212] *Brown v. State*, 816 P.2d 1368, 1370 (Alaska 1991).

[213] *Williams v. Eckert*, 643 P.2d 991, 997 (Alaska 1982). The court reasoned that Congress had not prohibited such an award, and the award would not frustrate or displace the essential features of substantive maritime law. *Id.* The court rejected the argument that having attorney fee awards available in some state courts would disrupt uniform national application of admiralty law. *Id.*

[214] State law governs cases brought under the federal court's diversity jurisdiction, under the *Erie* doctrine. *See Erie Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817 (1938).

[215] *See Sosebee v. Rath*, 893 F.2d 54, 57 (3rd Cir. 1990); *Mitchell v. Alaska Packers*, 1982 AMC 2796, 2796 (D. Alaska 1981); *Kalmbach*, 422 F.Supp. at 46.

Chapter 4
Fee Shifting in Alaska Today

Fee shifting occurs in Alaska in a variety of contexts. Apart from Rule 82, various statutes shift fees, usually one-way. In other situations, the courts or legislature have decided not to shift fees at all. This chapter discusses fee shifting both outside Rule 82 and within its framework, the legal underpinnings, procedures, consequences of some of the more important case law and statutory changes, and the public policy issues. It also discusses case law on deciding prevailing party for purposes of an attorney's fee award, public interest litigation, and appellate review of fee awards.

A. Fee Shifting Outside Rule 82: Cases to Which the Rule Does Not Apply

Rule 82 governs awards of attorney's fees to the prevailing party in most civil cases, including small claims[216] and district court[217] matters. The rule does not apply to most

[216] Fee awards in small claims actions where the amount pleaded is $1,000 or less are governed by ALASKA STAT. § 09.60.015 (1994).

[217] The district court is Alaska's limited-jurisdiction trial court (claims for damages up to $50,000). *See* ALASKA STAT. § 22.15.030 (1994).

domestic relations cases, to cases in which a statute or other court rule, or private contract, governs the fee award, or to appeals.

1. Some Domestic Relations Cases

Rule 82 does not govern fee shifting in a decree of divorce,[218] because the prevailing party standard for determining fee awards does not apply to divorces.[219] Rule 82 does apply to post-decree litigation over money and property issues. It governs fee awards in some adoption and custody cases, but does not apply to child in need of aid cases.

a. Divorce Cases - During territorial days, the court did award attorney's fees to the prevailing party in divorce cases. The Territorial Rules set fees of $325 to the prevailing party in a contested divorce and $225 in an uncontested divorce.[220] By the time that the award of attorney's fees in a divorce case became an appellate issue in 1975, the legislature and court had established different criteria for awarding fees, based on the reality that usually no party prevails in a divorce case. The supreme court instructed the trial courts to decide fee awards based on the parties' relative economic situations and earning power,[221] to ensure that both spouses had roughly even resources with which to litigate.[222]

The supreme court permits trial judges to increase an attorney's fee award if a divorcing party acted in bad faith or engaged in vexatious conduct.[223] A party's

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[218] *Hillier v. Hillier*, 828 P.2d 1205, 1205 (Alaska 1992); *Mann v. Mann*, 778 P.2d 590, 592 (Alaska 1989); *Streb v. Streb*, 774 P.2d 798, 803 (Alaska 1989); *L.L.M. v. P.M.*, 754 P.2d 262, 263 (Alaska 1988); *H.P.A. v. S.C.A.*, 704 P.2d 205, 212 (Alaska 1985); *Johnson v. Johnson*, 564 P.2d 71, 77-77 (Alaska 1977); *Burrell v. Burrell*, 537 P.2d 1, 6 (Alaska 1975). This exception applies also to child custody and support cases between unmarried parents. *Bergstrom v. Lindback*, 779 P.2d 1235, 1238 (Alaska 1989).

[219] A statute, ALASKA STAT. § 25.24.140, permits the court to order one spouse to pay an amount of fees and cost necessary to enable the other spouse to prosecute or defend the action in divorce cases. The standard for the fee award is the "relative economic situations and earning powers" of the parties. *Cooke v. Cooke*, 625 P.2d at 293.

[220] Territorial Court Rule 45 (April 30, 1953). The same fees appeared in the January 28, 1956 version of the Territorial Court Rules.

[221] *Jones v. Jones*, 835 P.2d 1173, 1179-80 (Alaska 1992); *Burrell*, 537 P.2d at 7. Further facts which the trial court may consider include the parties' relative expenditure of fees, time and effort. *Johnson*, 564 P.2d at 76-77.

[222] *Lone Wolf v. Lone Wolf*, 741 P.2d 1187, 1192 (Alaska 1987).

[223] *Hartland v. Hartland*, 777 P.2d 636, 644 (Alaska 1989); *Horton v. Hansen*, 722 P.2d 211, 218 (Alaska 1986) (husband's "vexatious" behavior supported award of attorney's fees in favor of wife.).

misconduct, however, does not entitle the court to disregard the parties' relative economic situations and earning powers.[224] Rather, the court must first decide the appropriate fee award under the general rule, and then increase the award to account for a party's misconduct.[225] The court also must make explicit findings of bad faith or vexatious conduct and clearly explain its reasons for deviating from the general rule.[226]

In applying the "vexatious conduct" rule for fees, the court has emphasized that conduct vexatious enough to justify an increased award must be distinguished from conduct that is a normal by-product of the adversarial system itself.[227] Vexatious conduct justifying full fees must prevent the parties from litigating as equals.[228] Thus, the court upheld a full fee award in a contested marriage and partnership dissolution where the husband "willfully, intentionally and in callous disregard for [wife's] rights, fabricated; lied; destroyed, purposely or recklessly lost, or withheld evidence; and repeatedly attempted to mislead the court in an effort to defeat [wife's] legitimate claim."[229]

b. Post-Decree Motions - The rule does not apply to post-decree motions to amend or enforce child custody or visitation orders, but does apply to post-judgment litigation involving money and property issues.[230] In post-decree motions to amend or enforce child custody or visitation orders, the trial court applies the statutory standard of "willfully and without just excuse,"[231] to fee awards, rather than Rule 82 or the divorce action judgment statute.[232] This standard ensures that the possibility of a fee award will not deter a party who reasonably and in good faith believed that the child's best

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[224] *Kowalski v. Kowalski*, 806 P.2d 1368, 1373 (Alaska 1991).

[225] *Id.*

[226] *Id.* Where the court finds that one spouse's misconduct has unnecessarily increased the other spouse's costs, the court must identify the nature and amount of these increased costs. *Richmond v. Richmond*, 779 P.2d 1211, 1217 (Alaska 1989).

[227] *Kowalski*, 806 P.2d at 1373.

[228] *Id.*

[229] *Horton*, 722 P.2d at 214. *See also Hartland*, 777 P.2d at 644; *Gabaig v. Gabaig*, 717 P.2d 835, 840 (Alaska 1986).

[230] *Patch v. Patch*, 760 P.2d 526, 530-31(Alaska 1988); *L.L.M*, 754 P.2d at 264-65.

[231] *L.L.M.*, 754 P.2d at 264-65 (referring to ALASKA STAT. § 25.24.300 (1991), which authorizes a reasonable fee award to prevailing parties in actions for enforcement of court-ordered visitation rights).

[232] *L.L.M.*, 754 P.2d at 264-65; *see also* ALASKA STAT. § 25.24.140(a)(1) (1994).

interests justified the action.[233] The court will reverse and remand a fee award under this standard if the trial court did not make a finding that the other party acted in bad faith.[234] A finding of bad faith can support an award of full rather than partial fees.[235]

If the post-judgment litigation involves money or property issues, the court sets the attorney's fee award for partial fees under Rule 82.[236] The prevailing party standard also governs fee awards in post-divorce judgment modifications and enforcement motions,[237] because the court views these as civil litigation. Modification or collection of past due child support falls into the category of proceedings to which Rule 82 applies.[238]

c. Adoption Cases and Child in Need of Aid - Rule 82 applies to some adoption cases. In a 1974 case of contested adoption, the supreme court failed to find any "sufficiently demonstrable interest or justification" to warrant departing from Rule 82 as a matter of policy.[239] In a later case in which a natural parent sought to withdraw her consent to adoption, the court found the equities of the situation made a substantial award of fees manifestly unreasonable.[240] Because of the importance of the right being asserted, the court did not believe that the appellant should carry the burden of the prevailing

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[233] *L.L.M.*, 754 P.2d at 264-65.

[234] *House v. House*, 779 P.2d 1204, 1209 (Alaska 1989).

[235] *L.L.M.*, 754 P.2d at 265. Interpreting the statutory offer of "reasonable fees" to mean full fees keeps it consistent with the general rule that vexatious or bad faith conduct justifies a full fee award. *Id.*

[236] *O'Link v. O'Link*, 632 P.2d 225, 231 n.15 (Alaska 1981).

[237] *Lowe v. Lowe*, 817 P.2d 453, 460 (Alaska 1991). Under this standard, the parties' relative economic positions are irrelevant. *Id.*

[238] *Patch*, 760 P.2d at 531.

[239] *Adoption of V.M.C.*, 528 P.2d 788, 796 (Alaska 1974). The non-prevailing party argued that applying Rule 82 would create a "chilling effect upon the legitimate assertion of rights by both parties in contested adoption proceedings." *Id.* at 795. The court noted that the case did not justify departure from "established precedent," but said in a footnote that it was considering a revision of the general policy of Rule 82, and did not "foreclose the possibility of future changes along the lines suggested by the appellants." *Id.* at n.17. The appellants and their attorney lived in Fairbanks, and some members of the Fairbanks Bar actively sought the repeal of Rule 82 in the early 1970s. The court may have been speaking to the members of the Bar who were concerned about the rule. Comment, *supra* note 150, at 167 n.222.

[240] *S.O. v. W.S.*, 643 P.2d 997, 1007 (Alaska 1982).

party's attorney's fees.[241] The court also declined to apply the rule to child in need of aid proceedings absent express statutory authority or absent a specific court rule.[242]

2. Another Statute Governs Award

In some instances, a state or federal statute controls the award rather than Rule 82.[243] The supreme court has interpreted the state statutes that expressly call for an award of reasonable attorney's fees as requiring full reasonable fees.[244] The court's decisions implicitly acknowledge the legislature's right to apply different standards to the award of attorney's fees than those espoused by the courts[245] (the court rule's purpose is to compensate prevailing parties only partially, rather than fully, for attorney's fees, unless the losing party acted in bad faith or engaged in vexatious conduct).[246] For example, in a lien case the plaintiff argued that the legislature intended to authorize recovery of full attorney's fees to make small judgments recoverable for contractors, laborers and suppliers, who otherwise could not afford to go to court. The supreme court agreed, and extended that reasoning to include

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[241] *Id.* at 1007.

[242] *Cooper v. State*, 638 P.2d 174, 178 (Alaska 1981). The court noted, "There is no statute authorizing such awards. . . nor have we promulgated any rule or order authorizing such an award." *Id.* The court considered several alternative grounds suggested by the appellant for awarding her attorney's fees in the child of need of aid case, including bad faith on the state's part, and public interest. The court found that awarding attorney's fees would "significantly chill the state's willingness to commence protective proceedings for children." *Id.*

[243] *See, e.g.*, ALASKA STAT. § 9.45.170 (1994) (costs in foreclosure of liens); ALASKA STAT. § 9.38.095 (1994) (attorney's fees for violations of exemptions act); ALASKA STAT. § 9.60.070 (1994) (civil actions by victims of violent crimes); ALASKA STAT. § 23.30.260 (1990) (attorney's fees in workers' compensation cases must be approved by board or court); ALASKA STAT. § 23.20.400, .465 and .470 (1990) (limitations of attorney's fees in Unemployment Compensation Act cases); ALASKA STAT. § 32.11.520 (1993) (derivative actions by limited partners in a limited partnership); ALASKA STAT. § 34.03.300 (1990) (violations of the Uniform Residential Landlord-Tenant Act); ALASKA STAT. § 46.03.763 (1991) (attorney's fees for state in civil actions for pollution control).

[244] *Bobich v. Stewart*, 843 P.2d 1232, 1237 (Alaska 1992) (interpreting the Alaska Wage & Hour Act, ALASKA STAT. § 23.10.110(c), to require a full award of reasonable attorney's fees).

[245] The court has interpreted several statutes that use attorney's fees awards to enforce public policy. *See* Alaska Wage & Hour Act, ALASKA STAT. § 23.10.110 (1990) (encouraging employees to press wage-and-hour claims); and ALASKA STAT. § 34.35.110 (1990) (purpose is to "facilitate enforcement by mechanics' lienors of their rights by giving them an assurance of costs and attorney's fees if they prevail in their foreclosure actions." *Rosson v. Boyd*, 727 P.2d 765, 767 (Alaska 1986)).

[246] *Demoski v. New*, 737 P.2d 780,788 (Alaska 1987).

appellate proceedings with the comment that "it makes no sense to limit authorization of attorney's fees to trial level proceedings."[247]

The court prohibited attorney's fee awards in at least one case in which a statute guaranteed access to the courts. In *Crisp v. Kenai Peninsula Borough Sch. District*,[248] the supreme court did not permit the trial court to assess Rule 82 attorney's fees against a public school teacher who had a statutorily guaranteed right to contest his dismissal in the courts, but who did not prevail in the suit.[249] The court was unwilling to extend the application of Rule 82 to this case because teachers have an "expectation of continued employment that is in the nature of a property interest," and awarding any attorney's fees would penalize the exercise of the teacher's right.[250]

3. Fee Awards in Appeals

Appellate Rule 508(e) provides for an award of attorney's fees in civil appeals to the Alaska Supreme Court.[251] The court decides the amount, and generally does not rely on any percentage of actual fees or the size of the judgment in the underlying case.[252] One author commented that he thought the differences between the rules for attorney's fees to prevailing parties in trial court cases and appellate cases supported an inference that the supreme court did not really believe in the rationales propounded for Rule 82.[253]

Rule 82 does not cover appeals from administrative agency decisions brought under Appellate Rule 45 to the superior court. The supreme court noted in a 1979 case that

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[247] *Rosson*, 727 P.2d at 767.

[248] 587 P.2d 1168, 1169 (Alaska 1978).

[249] Had the appeal been frivolous, or taken merely for the purpose of delay, the court would have allowed an award. *Id.* at n.6.

[250] *Id.* at 1170 n.7.

[251] *See* AK. R.APP. P. 508(e).

[252] *See* AK. R.APP. P. 508(e). In 1995, the court sets many awards at $1,000. The court can award actual fees if it decides that a party made a frivolous appeal or cross-appeal, or that a party brought the action simply for purposes of delay. *Id.*

[253] Kleinfeld, *supra* note 120, at 53. One supreme court justice interviewed for this study pointed out that the court applies different reasoning to attorney's fees awards at the appellate level in a variety of cases, including public interest appeals, worker's compensation appeals and eminent domain appeals.

Appellate Rule 29(d) covered these cases.[254] Also, appellate rule 508(e) permits attorney's fee awards when the superior court decides an administrative appeal.[255]

4. Contract Governs Fee Award

The plain meaning of contract terms calling for the prevailing party to recover "reasonable" attorney fees overrides any other limitation set by Rule 82.[256] Unless the parties show that the contract merely intended to restate rights already possessed under Rule 82, the trial court may award actual, reasonable fees instead of partial fees.[257]

Insurance policies are a special kind of contract that can govern the company's obligation to pay court costs (including attorney's fees) incurred in connection with a claim. Insurance policies and Rule 82 are discussed in Chapter 7.

5. Parties Stipulate that Rule Will Not Apply

Parties may stipulate that each side will bear its own costs and fees. This often occurs in the context of settlements. Since the 1993 amendments, the rule has expressly permitted parties to avoid a fee award by stipulation.[258]

6. Other Court Rule Applies

Alaska Civil Rule 72(d), rather than Rule 82, usually governs fee awards in eminent domain actions. Some parts of Rule 72(k) specifically set the circumstances for fee awards.[259] A condemnee eligible for attorney's fees receives full compensation under Civil Rule 72, not partial compensation under Rule 82.[260] If a condemnee asserts counterclaims that are basically common law actions (such as negligence), the

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[254] *Kodiak Western Alaska v. Harris Flying Service*, 592 P.2d 1200, 1204 (Alaska 1979).

[255] *Diedrich v. City of Ketchikan*, 805 P.2d 362, 371 (Alaska 1991).

[256] *Gudenau v. Bierria*, 868 P.2d 907, 912-13 (Alaska 1994); *Ursin Seafoods v. Keener Packing Co.*, 741 P.2d 1175, 1181 (Alaska 1987).

[257] *Ursin*, 741 P.2d at 1181.

[258] *See* AK. R.CIV. P. 82(a).

[259] *Stewart & Grindle v. State*, 524 P.2d 1242, 1251 (Alaska 1974).

[260] *Greater Anchorage Area Borough v. Ten Acres*, 563 P.2d 269, 275 (Alaska 1977).

condemnor can be awarded costs and attorney's fees under Rule 82 if it prevails on those issues.[261]

B. Purposes of the Rule

The supreme court has identified Rule 82's primary goal as partially reimbursing a prevailing party for attorney's fees. In several other situations the court permits trial courts to use the rule for other purposes. Courts can use the rule to discourage bad faith, frivolous claims or vexatious conduct, or to encourage parties to file lawsuits that benefit the public interest. The court also has expanded Rule 82's purposes to include case-management goals of reducing unnecessary litigation and encouraging prompt case resolution, usually in combination with Alaska's offer-of-judgment rule (Civil Rule 68).

1. Partial Compensation

The main purpose of Rule 82 is to partially compensate a prevailing party for the productive work done by his or her attorney.[262] The court first stated this purpose for the rule in 1964.[263] The court added, "The rule was not designed to be used capriciously or arbitrarily, or as a vehicle for accomplishing any purpose other than providing compensation where it is justified."[264] The court viewed the risk that a plaintiff would become liable for "the full amount of attorney's fees the other side sees fit to incur,"[265] as creating a situation in which "the size of a party's bank account will have a major impact on his access to the courts."[266] The court most recently acknowledged the tension between the purpose of partial compensation to the prevailing party and access

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[261] *Stewart v. State Dep't of Transportation*, 693 P.2d 827, 831 (Alaska 1984). The trial judge cited *City of Anchorage v. Scavenious*, 539 P.2d 1169 (1975) to support his award of attorney's fees under Rule 82.

[262] *Stepanov v. Gavrilovich*, 594 P.2d 30, 37 (Alaska 1979); *Malvo v. J.C. Penney*, 512 P.2d 575, 587-88 (Alaska 1973); *State v. Abbott*, 498 P.2d 712,731 (Alaska 1972); *Preferred General Agency v. Raffetto*, 391 P.2d 951, 954 (Alaska 1964).

[263] *See Preferred General Agency*, 391 P.2d at 954; *see also Moses v. McGarvey*, 614 P.2d 1363, 1368-71(Alaska 1980).

[264] *Preferred General Agency*, 391 P.2d at 954.

[265] *Malvo*, 512 P.2d 575, 587.

[266] *Id.*

to the courts in a 1992 case, *Bozarth v. Atlantic Richfield Oil Co.*[267] After *Bozarth*, the court revised Rule 82 in part to address the problem of large awards creating a chilling effect on access to the courts.[268]

2. Discourage Frivolous Suits and Bad Conduct

The supreme court soon permitted trial courts to use the rule for other purposes, approving the possibility of full fee awards in some circumstances.[269] The losing party's bad faith or vexatious conduct could warrant a full fee award.[270] Frivolous claims also might justify full fee awards.[271] It is not entirely clear from the court's opinions in these areas (frivolousness and vexatiousness) whether the full fee awards are justified as a punishment for the bad conduct/frivolous filing, or whether they are intended merely to fully compensate the non-offending party for litigation costs incurred defending

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[267] 833 P.2d 2 (Alaska 1992).

[268] The trial judge can vary the award using a variety of factors, including "The extent to which a given fee award may be so onerous to the non-prevailing party that it would deter similarly situated litigants from the voluntary use of the courts." AK. R.CIV. P. 82 (B)(3)(I). We have not heard of any instances in which attorneys have tried to decrease a fee award arguing that this factor should apply.

[269] *See, e.g., DeWitt v. Liberty Leasing Co.*, 499 P.2d 599, 602 n.13 (Alaska 1972), in which the court mentioned the possibility of denial of fees "in an extreme case of a vexatious *prevailing* (emphasis added) party unreasonably prolonging the litigation and substantially increasing the costs."

[270] *Horton*, 722 P.2d at 218 (affirming full fee award on trial court's findings that defendant's distortion of the facts was "abnormal," and that his misconduct ". . .[caused plaintiff] to incur costly attorney's fees in a wasteful effort to reconstruct the business records . . ."). *See also Van Dort v. Culliton*, 797 P.2d 642, 645-46 (Alaska 1990) (trial court may award 75% of actual fees if it properly finds on remand that losing party's conduct was vexatious); *Demoski v. New*, 737 P.2d 780, 788 (Alaska 1987) (overturning a full fee award in the absence of a finding of bad faith or vexatious conduct by the losing party); *State v. University of Alaska*, 624 P.2d 807, 817-18 (Alaska 1981) (overturning trial court's award of 90% of what university requested because "there is no evidence that the state's claim was frivolous, vexatious or devoid of good faith" *Id.* at 818); *Davis v. Hallett*, 587 P.2d 1170, 1171-72 (Alaska 1978) (overturning trial court's full fee award because "the court below made no finding of bad faith by [the losing party], the [winning parties] have not alleged such bad faith, and none clearly appears in the record on appeal." *Id.* at 1172).

[271] *Steenmeyer Corp. v. Mortenson-Neal*, 731 P.2d 1221, 1226-27 (Alaska 1987) (upholding trial court award of 75% of actual fees because losing party's defense "bordered on the frivolous"). *See also, Estate of Stewart Eric Brandon, Jr.*, Slip Op. No. 4240 at 30 (Alaska 8/18/95) (court noted that failure of attorney to litigate a very strong claim might have deprived estate's young heiress of a potential award of full attorney's fees under Rule 82, because any defense to that claim could have been "frivolous"); *Crawford v. Vienna*, 744 P.2d 1175, 1178 (Alaska 1987) (reversing the superior court's denial of Rule 82 attorney's fees and instructing court to consider a full fee award under appellate rule 503(e) on remand because suit was frivolous); *State v. University of Alaska*, 624 P.2d at 817-18 (overturning trial court's award of 90% of what university requested because "there is no evidence that the state's claim was frivolous, vexatious or devoid of good faith" *Id.* at 818).

against the bad behavior or frivolous claim.[272] Under either rationale, the court in these decisions has implicitly recognized full compensation as an additional purpose for Rule 82. At the same time, the court has emphasized that Rule 82 was not intended to penalize a losing party for litigating a good faith claim.[273]

3. Encourage Bringing of Claims in the Public Interest

The court, through case law, permits full compensation for attorney's fees in public interest cases.[274] The goal of this common-law exception is to encourage plaintiffs to raise issues of public interest.[275] The exception achieves this goal by prohibiting fee awards against unsuccessful good-faith public interest litigants and rewarding successful public interest litigants with full fee awards.

4. Encourage Settlement and Avoid Protracted Litigation

The court has cited these purposes for attorney fee awards governed by Civil Rule 68 (the offer of judgment rule).[276] In a 1969 case, *Miklautsch v. Dominick*,[277] the court first explained the purpose of fee awards in the context of Rule 68. In *Miklautsch*, the trial court had awarded attorney's fees to the appellee, who had rejected a $2,500 offer of judgment, and then received a directed verdict on liability but no damages at trial.[278] The supreme court overturned the fee award, holding that the appellee's failure to better the unaccepted Rule 68 offer precluded her from being the prevailing party under Rule 68, even though she had prevailed on liability.[279] The court said, "The purpose of Civil Rule 68 is to encourage the settlement of civil litigation, as well as to avoid protracted litigation. In our view, adoption of Civil Rule. . .82's 'prevailing party'

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[272] In *Tobeluk v. Lind*, 589 P.2d 873 (Alaska 1979), the court commented that it "intend[s] fee awards [under Rule 82] to be compensatory rather than punitive." *Id.* at 876. In *Williams v. Eckert*, 643 P.2d 991 (Alaska 1982) the court permitted a Rule 82 award in an admiralty case because the purpose of Rule 82 was "remedial." *Id.* at 997.

[273] *Malvo*, 512 P.2d at 588; *Gilbert v. State*, 526 P.2d 1131, 1136 (Alaska 1974).

[274] The public interest exception is discussed in more detail *infra* at p. 73 and accompanying notes.

[275] *Anchorage v. McCabe*, 568 P.2d 986, 990 (Alaska 1977).

[276] Rule 68 is explained *infra* at pp. 68-69.

[277] 452 P.2d 438 (Alaska 1969).

[278] *Id.* at 438-39.

[279] *Id.* at 440.

criterion in the resolution of Rule 68 issues defeats the very purposes which led to the promulgation of the rule."[280] In a subsequent Rule 68 case, *Continental Insurance Co. v. U.S. Fidelity & Guaranty*,[281] the court again insisted that trial judges tailor fee awards in Rule 68 cases to encourage settlement. In that case, the supreme court declined to require trial court judges to award *pre-offer* attorney's fees in all instances, because to do so would "encourage litigation and discourage settlement, thereby defeating the intent underlying Civil Rule 68."[282]

C. How Rule 82 Works

This section describes the mechanics of Rule 82. It combines a discussion of the legal requirements with data taken from judge and attorney interviews and state and federal case files.

1. Rule 82 Motion Practice

Rule 82 requires that a party move for an award of fees no later than ten days after the date shown on the certificate of distribution on the judgment.[283] The opposing party has ten days to file an opposition to the motion.[284] We asked attorneys to describe Rule 82 motion practice. Many attorneys described it as routine; others believed it was excessively contentious. Most attorneys described the motions themselves as "pro forma" or "cookbook," saying they were content to request the amounts set forth in the schedule. One noted, "I have the standard motion and the standard opposition." Descriptions of motion practice as routine were consistent with the results of a 1986 study that found that the losing party rarely opposed the fee request.[285]

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[280] *Id.* at 441.

[281] 552 P.2d 1122 (Alaska 1976).

[282] *Id.* at 1126.

[283] *See* AK. R.CIV. P. 82(c). Failure to timely move for attorney's fees is construed as a waiver of the party's right to recover. *Id.*

[284] *McGill v. Wahl*, 839 P.2d 393, 349 (Alaska 1992).

[285] *See* TOMKINS & WILLGING, *supra* note 11, at 41. This monograph discusses Alaska procedures in some detail, based on interviews with Alaska superior court judges, literature review and other sources. The authors note that "Fee shifting is such an accepted part of Alaskan legal culture that there is typically no opposition to schedule-based fee awards." *Id.*

Others, however, reported that they routinely tried to "beat the schedule" or "get a bump if you can." An attorney who handled plaintiffs' employment and wrongful termination cases said he regularly asked for more than the schedule permitted in order to make up for the small recoveries available to plaintiffs who can mitigate their damages in wrongful termination cases.

Those who ask for enhanced fees tended to agree with Justice Rabinowitz's dissent[286] that conscientious attorneys would seek variances. While few thought that explicitly enumerating the exceptions encouraged excessive litigation, one attorney believed that the court should eliminate the enhancement/variance process because it was "a large drain on attorney time." He added, "the mudslinging that goes on post trial is really pretty bad. One of the most unpleasant areas of practicing law is post-trial. Very unpleasant." Another described the process as "vicious."

The trial court judges also were asked about changes in motion practice since the 1993 amendments. Almost all the judges felt that it had "remained about the same." None thought it had increased. One thought it had decreased. This judge explained that "with respect to nonmonetary judgments, attorneys now know what they are entitled to, and they don't spend much time arguing that they should get 80% [of their actual fees]."

Examination of Rule 82 motion practice in the federal and state courts supported the perception that fee shifting was fairly routine and occurred with relatively little written motion work. Although about 10% of state cases contained Rule 82 awards, only 6% had written motions asking for attorney's fees. Only about 3% of the state cases contained a Rule 82 request in a specific amount.[287] Of the cases with motions for

[286] *See* AK. R.CIV. P. 82, Note, Rabinowitz, Justice dissenting from the court's adoption of the 1993 amendments to Rule 82: "My judicial hunch is that these amendments..., in particular the new provisions reflected in (b)(3)(A) through (K), will unnecessarily and dramatically increase litigation over attorney's fees awards both in our trial courts as well as in this court.... Any attorney worth his or her salt will, pursuant to the expansive provisions of (b)(3)(A) through (K), request variations from the attorney's fees awards called for under either the monetary recovery schedule provisions of (b)(1), or the provisions of (b)(2) which apply where no money judgment is recovered by the prevailing party."

[287] Cross-tabulations showed that where a specific amount was requested, judges usually awarded an amount close to the amount requested. For example, 70% of the time that the prevailing party requested an award between $1,000 and $5,000, the award fell in that range. Similarly, 70% of the time that the prevailing party requested more than $5,000 the award exceeded $5,000.

attorney's fees, the great majority (82%) had only one.[288] All federal cases containing a Rule 82 award had at least one written motion requesting attorney's fees. Finding more written motions in federal cases was expected, since the amount of written work generally is greater in federal than state court.[289]

2. Calculating Fee Awards

An issue for jurisdictions considering fee shifting is how to calculate fees. Alaska's Rule 82 uses, for the prevailing party, a percentage of the judgment for cases involving a money judgment and a percentage of actual, reasonable fees for cases not involving a money judgment. The supreme court decides the schedules in the rule. The supreme court rules' attorney's files show that over the years since statehood, the court has considered a variety of changes to the rule suggested by Bar associations and attorneys around the state. For the most part, these recommendations have not targeted the schedule directly, but have focussed on what attorneys saw as too much judicial discretion. The court seldom has revised the rule.[290]

a. Monetary Judgment - When a prevailing party recovers a money judgment, the judge usually calculates the award based on the schedule in (b)(1). The judge computes schedule-based fee awards on the net, not gross recovery.[291] The amount of the "money judgment" includes any prejudgment interest award.[292] The court can include punitive

[288] Approximately 15% contained two attorney's fee motions. Three cases had three motions, and one case had six motions.

[289] *See* Kritzer, Grossman, McNichol, Trubek & Sarat, *Courts and Litigation Investment: Why Do Lawyers Spend More Time on Federal Cases?*, 9 THE JUSTICE SYSTEM JOURNAL 7, 8 (1984). The authors found that hourly fee attorneys spent considerably more time on cases they took to federal court than on cases in state court. The differences did not hold true for lawyers working on a contingent fee. The authors note that "[F]or these lawyers, their time is their money (rather than their clients' money) and it may well be that because of the economic incentives associated with their work they (successfully) resist the temptation to differentiate between the two types of courts in deciding how much effort to put into their cases." *Id.* at 17.

[290] See Chapter 3, *supra*, for discussion.

[291] *Fairbanks Builders v. Sandstrom Plumbing & Heating*, 555 P.2d 964, 967 (Alaska 1976). TOMKINS & WILLGING, *supra* note 11 at 42, comment that judges told them that computing a schedule-based fee award rarely took more than ten minutes, and that more than 80% of their cases used the schedule.

[292] *Era Helicopters v. Digicon Alaska*, 518 P.2d 1057, 1063 (Alaska 1974).

damages in the "amount recovered" for purposes of calculating Rule 82 attorney's fees. If it does not, the judge must state reasons on the record.[293]

The supreme court presumes that attorney's fee awards made using the schedule are correct,[294] and does not require an explanation for these awards.[295] A prevailing party who asks for fees based on the schedule need not submit documents to support the request.[296] The 1986 study found that the trial court handled most schedule-based fee awards as routine motions.[297]

Interviews with judges for the current study also suggested that they found Rule 82 motions routine and applied the rule with little effort. For cases in which the prevailing party won a monetary judgment, almost all the judges looked to the schedule and applied the appropriate multiplier without any further analysis. One judge reported that he also "glances at the list" of reasons to vary from the schedule in subparagraph b(3) before making the award. Another judge made an exception in collections cases where the attorney tried the case instead of moving for summary judgment. If the judge determined that the attorney had put in "very little work" he awarded a percentage of actual fees instead of a percentage of the monetary judgment.

If the trial court departs from the schedule in a contested case with a monetary judgment, it must state reasons for the departure.[298] In default judgments, the clerk of court may determine attorney's fee awards,[299] but for amounts over $50,000, the prevailing party must specify actual fees.[300]

b. Non-Monetary Judgment - Sometimes a prevailing party does not recover a money judgment. Occasionally, plaintiffs sought only injunctive relief. More often, if a

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[293] *Sturm, Ruger & Co. v. Day*, 627 P.2d 204, 205 (Alaska 1981). The court reasoned that denying attorney's fees as to punitive damages would be unreasonable in tort cases, such as defamation, where actual damages are nominal but punitives are substantial. *Id.* at 205 n.1.

[294] *Babinec v. Yabuki*, 799 P.2d 1325, 1337 (Alaska 1990).

[295] *Alaska Airlines v. Sweat*, 584 P.2d 544, 551 (Alaska 1978).

[296] *Babinec*, 799 P.2d at 1337; *Korean Airlines v. State*, 779 P.2d 333, 340 (Alaska 1989).

[297] TOMKINS & WILLGING, *supra* note 11, at 41.

[298] *Patrick*, 413 P.2d at 178-79.

[299] ALASKA CIV. R. 82(d).

[300] ALASKA CIV.R. 82(c).

defendant prevails, the court disposes of the case through dismissal or a finding for the defendant without awarding the defendant a money judgment. In these cases, the supreme court has decided that the trial court should compute the prevailing party's attorney's fee award as a percentage of the fees the prevailing party actually incurred.[301]

Under the old version of the rule,[302] the judge first decided the total reasonable fee, and then chose a reasonable percentage by which to multiply the total reasonable fee.[303] Judges chose multipliers ranging from 20% to 80%, depending on the judge, and on the nature of the case and the results achieved.[304] The court's 1993 amendments to Rule 82 marked the first time that the court had specified what percent of actual fees to award to a prevailing party with a non-monetary judgment. Currently, the judge must decide which of the prevailing party's fees were "necessarily incurred," excluding duplicative and unnecessary work before applying the specified percentage.[305] The amount of damages sought by the unsuccessful plaintiff does not limit a prevailing defendant's fee recovery.[306]

Judges interviewed for the current study generally reported spending more time and engaging in more analysis on non-monetary judgment fee awards than when a monetary judgment was involved. For example, eleven said that they analyzed the need for the legal services reported. Even the seven who said they generally did not analyze the need for the services reported said they did analyze them "if the other side protests" or "if they appear on their face to be excessive."

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[301] *See* AK. R.CIV. P. 82 (b)(2). That section provides: " In cases in which the prevailing party recovers no money judgment, the court shall award the prevailing party in a case which goes to trial 30 percent of the prevailing party's actual attorney's fees which were necessarily incurred, and shall award the prevailing party in a case resolved without trial 20 percent of its actual attorney's fees which were necessarily incurred. The actual fees shall include fees for legal work customarily performed by an attorney but which was delegated to and performed by an investigator, paralegal or law clerk."

[302] *See* former AK. R.CIV. P. 82(a)(2).

[303] TOMKINS & WILLGING, *supra* note 11, at 43.

[304] *Id.* at n.152. This wide range of discretion probably led to the Alaska Bar resolution in 1973, calling for abolition of Rule 82.

[305] *State v. Fairbanks Borough School Dist.*, 621 P.2d at 1335.

[306] *Stevens v. Richardson*, 755 P.2d 389, 396 (Alaska 1988). The court reasoned that "[e]ven a claim for a small amount of damages may be expensive to defend." *Id.*

The supreme court requires counsel for the prevailing party to submit accurate records of the hours expended, and briefly describe the services.[307] Attorneys usually rely on affidavits that summarize billing rates, number of hours spent, and which professional worked on which matters.[308] Some attorneys also submit copies of the bills they sent to their clients.[309] Ten of the judges interviewed for this study said they required or preferred that the prevailing party submit copies of actual billings. Judges who did not require actual billings still scrutinized the affidavits submitted with the fee requests. They looked for "duplication of services," "padding," "hourly breakdowns," and "paralegals doing purely clerical tasks." Judges noted in interviews that they typically review these affidavits and make the fee decisions without the help of a court clerk or other assistant.[310]

Despite the increased scrutiny that most judges applied to awards in nonmonetary cases, few complained that the work took up too much time or was unduly burdensome. Said one, "the motions seldom are long, because the parties are tired by then." One who did believe that Rule 82 took "a substantial amount of time" said that getting rid of it would "speed up the process."

As with fee awards based on money judgments, the trial court can exercise broad discretion, including not awarding attorney's fees to a prevailing party, but the court must state the reason for its decision.[311] The supreme court allows,[312] but does not require, the judge to apportion fees based on degree of success or success on specific

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[307] *Hayes v. Xerox Corp.*, 718 P.2d 929, 939 (Alaska 1986) (citing *Moses*, 614 P.2d at 1374 n.32).

[308] *See Hayes,* 718 P.2d at 939.

[309] TOMKINS & WILLGING, *supra* note 11, at 41.

[310] Judges interviewed for the 1986 study said the same thing. *See* TOMKINS & WILLGING, *supra* note 11, at 41. Judges' decisions about reasonable fees in non-monetary judgments have generated perhaps more controversy about the rule than any other specific aspect of it. In a 1982 case, *Alvey v. Pioneer Oilfield Services, Inc.*, 648 P.2d 599, 601 (Alaska 1982), the defendant who prevailed on summary judgment cross-appealed to the supreme court. The court said in a footnote that "Pioneer claims that the superior court's award 'was apparently set at a very low rate to encourage this appeal' and to obtain thereby 'better defined guidelines' for the determination of costs and fees." *Id.* at n.1.

[311] *Stordahl v. Government Employees Insurance Co.*, 564 P.2d 63, 68 (Alaska 1977).

[312] *Hickel v. Southeast Conference*, 868 P.2d 919, 926 (Alaska 1994); *Ak. State Bank v. General Insurance Co.*, 579 P.2d 1362, 1369 (Alaska 1978).

issues, reasoning that Rule 82 "already takes into account the degree of success at the initial stage of determining prevailing party status."[313]

3. Departures from Schedules

Before the 1993 amendments, the supreme court allowed the trial court to vary the fee award at a party's request, but did not require the judge to limit the award to the amount requested.[314] If the court decided to vary, the judge calculated the award authorized by the schedule and then stated the reasons for deviating from that amount.[315] The supreme court required this procedure to assure a rational basis for departure and a sound record for review on appeal.[316]

The supreme court changed the rule, effective July, 1993, to require judges to consider eleven factors in deciding whether to depart from the schedule.[317] The subcommittee appointed to study the rule recommended the factors to increase uniformity by "codifying" some of the reasons that attorneys most often argued would justify a variance. The supreme court has published only one case interpreting the

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[313] *Hickel*, 868 P.2d at 924-25; *see also Gold Bondholders Protective Council v. Atchison, Topeka & Santa Fe Railway*, 658 P.2d 776, 779 (Alaska 1983).

[314] *State v. Fairbanks North Star Borough School Dist.*, 621 P.2d at 1351.

[315] *Kowalski*, 806 P.2d at 1373 n.7. In *Kowalski*, the supreme court overturned the trial court's award of full attorney's fees because the trial court had not first determined what fee award would be appropriate under the general rule, and only then increased the award to account for the husband's misconduct. *Id.* at 1372-73. The supreme court instructed the trial court to use this two-step process on remand, and added in a footnote that "increased attorney's fee awards under Alaska Civil Rule 82 are subject to the same requirements. The court must first calculate what award is authorized under the schedule. . . and then state its reasons for deviating from that award." *Id.* at n.7.

[316] *Fairbanks Builders*, 555 P.2d at 966.

[317] *See* Supreme Court Order No. 1118, effective July 15, 1993. The factors are: complexity of the litigation, length of trial, reasonableness of the attorneys' hourly rates and the number of hours expended, reasonableness of the number of attorneys used, attorneys' efforts to minimize fees, reasonableness of the claims and defenses on each side, vexatious or bad faith conduct, relationship between the amount of work performed and the significance of the matters at stake, extent to which a given fee award may be so onerous to the non-prevailing party that it would deter similarly situated litigants from the voluntary use of the courts, extent to which the fees incurred by the prevailing party suggest that they had been influenced by considerations apart from the case at bar, and other equitable factors. AK. R. CIV. P. 82(b)(3). The court has said that the "change worked by the new version of the Rule is merely to provide a set of guidelines to aid the court in making its decisions, and to require that variations from the baseline award. . .be explained in writing." *Bishop v. MOA and ATU*, Slip Op. No. 4233 at 17 (July 28, 1995).

1993 amendments to date,[318] so it is not clear how the factors will affect existing case law.[319] Judges interviewed for the current study described the variance decision as a "party-propelled issue." They generally did not consider departing from the schedule unless a party requested it.

The rule does not specify how much the judge should vary the award from the schedule if a reason for variance is found. Judges did not find this to be a problem. Most judges interviewed for the present study said they simply went "down the list" of reasons to grant a variance, and decided how much to vary based on their own knowledge of the case, "a gut feeling," or their prior private practice experience. The judges agreed that by the time a party filed a Rule 82 motion, they usually had a good sense of the factors and were close enough to the case to make the decision simple.

The data and interviews suggested that variances were not common. A few judges said that they had "never" diverged from the schedule in the past year, and others reported anywhere from six to twelve variances in the past year. In almost all of the cases from our state court sample (about 92% of the time), judges calculated fee awards according to the schedules set out in the rule.[320] In only one of the federal cases did a judge vary from the schedule.[321] The attorney interview data differed somewhat from the case file data on the frequency with which fee awards varied from the scheduled amounts. The attorneys told us that judges awarded fees according to the schedule only 64% of the time.[322]

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[318] *Bishop v. MOA*, Slip Op. #4233 at p. 17 (July 28, 1995).

[319] In a note to its order amending the rule, the court expressly denied that it intended by adopting the amendments to change the law regarding public interest litigants or the rule that full fees are manifestly unreasonable in the absence of bad faith or vexatious conduct. Note to Supreme Court Order No. 1118. The note did not mention frivolous conduct as a reason to uphold full fee awards, despite the court's line of decisions permitting full fees in cases of frivolous conduct. *See* cases cited *supra* at note 271. Still, the amendments do raise the question of whether the court will allow variations for reasons other than those explicitly mentioned in section b(3).

[320] See Chapters 5-8 for more detailed discussions of the data and analysis. The weighted state court case sample included most civil cases closed in 1993 in Anchorage (domestic relations and debt cases were excluded). The court awarded Rule 82 fees in only 10% of the cases.

[321] Fee awards were made in twenty of the federal cases.

[322] This may represent an important difference in how judges and attorneys see the rule in practice. Throughout the life of the rule, one of the Bar's primary complaints has been that attorneys see judges as having too much discretion. Many of the changes made by the supreme court have limited judicial discretion. Despite this, attorneys still believed that judges varied from the schedule more frequently than they actually did. They also perceived different proportions of reasons for awards than actually occurred.

In the past, the supreme court has emphasized the need for trial courts to state findings that support departures from the schedule.[323] In *Bowman v. Blair*,[324] the court held that when a trial court varied the attorney's fee award from the standards prescribed in the rule, the judge must explain the variance.[325]

Data collected for the current study suggested that judges explained their decisions to grant variances, and that they only granted variances based on the eleven factors set out in the rule. Judges interviewed for the present study said that within the past year they had granted variances based on "other equitable factors," "reasonableness of defenses and claims" made by both sides, and "vexatious or bad faith conduct"[326] (all cited by eleven judges). The next most common grounds for departure were "relationship between the amount of work and the significance of the matters at stake" (cited by ten judges),[327] "complexity of the case" (cited by nine judges), "reasonableness of the hourly rate and the number of hours expended" (cited by eight judges) and "attorneys' efforts to minimize fees" (cited by seven judges). Five judges had varied an award based on "reasonableness of number of attorneys," four had cited "outside considerations," and three had cited "length of trial."

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[323] Under old case law, judges had to state reasons for variation on the record. *Hayes*, 718 P.2d at 939; *Stordahl*, 564 P.2d at 68; *Patrick v. Sedwick*, 413 P.2d at 179. The court accepted an oral explanation, on the record *(Larry v. Dupree*, 580 P.2d 326, 327 (Alaska 1978)), which had to be sufficient. *See Cunan v. Hastreiter*, 579 P.2d 524, 530-31 (Alaska 1978) (judge's statement that "under the circumstances, justice will best be served if each party bears [its] own costs and attorney's fees" was not sufficient). One case decided under the new version of the rule suggested that the court will continue to look for reasons for variation in the record. *See Bishop*, Slip Op. No. 4233 at 17 (court said that the change worked by the new rule requires "that variations from the baseline award. . .be explained in writing").

[324] 889 P.2d 1069 (Alaska 1995).

[325] It also held that when a prevailing party asks to have the fee award enhanced, the non-prevailing party must have a chance to oppose the enhancement. *Id.* at 1075. In *Bowman*, the personal representative of an intestate decedent's estate filed an action to decide claims to property held by the decedent's girlfriend. After a lengthy hearing, the probate master found in favor of the girlfriend and awarded her 50% of the attorney's fees she actually incurred. In making the 50% award under Rule 82(b)(3), the probate master cited extensive hearing time and the volume of documents produced. The Alaska Supreme Court remanded the attorney's fee award because the appellant had not had a chance to respond. *Id.* The court noted that it previously had upheld awards in excess of 50% based on factors such as those cited by the probate master. *Id.* at 1075, n.10.

[326] Three of the judges noted that attorneys requested variances based on bad faith or vexatious conduct much more often than judges granted variances. Said one, "it's raised a lot but seldom prevails."

[327] However, one state district court judge commented, "I don't use this factor because it's hardly ever worth it to fight all the way" through trial.

In all the federal and state cases in which the judge gave a reason for the variance, that reason was one of the eleven factors listed in the rule. In the state court sample, the most common reasons judges gave on the record for departure were the reasonableness of claims and defenses asserted (cited about 27% of the time) and litigants' vexatious conduct (cited about 27% of the time).[328] Other common reasons judges gave were "other equitable factors," "complexity of the litigation," and "reasonableness of attorney's hourly rates" (each cited about 13% of the time). Length of trial was cited in one case. In the one federal court case in which the judge varied from the schedule, he did not give a reason in the file.

In the thirty-three interview cases in which attorneys reported a departure from the schedule, they most often said the variance was granted based on "other equitable factors" (cited 31% of the time), the reasonableness of claims and defenses asserted (cited about 12% of the time), litigants' vexatious conduct (cited about 15% of the time), and complexity of the litigation (cited about 15% of the time). Length of trial was cited in one case.

Variances from the schedule seemed to be related somewhat to whether the attorney represented plaintiff or defendant. Attorneys who represented defendants told us about cases in which they received awards not calculated from the schedules slightly more often than did plaintiffs.

One practice that the 1993 amendments may not affect is the supreme court's refusal to allow the trial judge to depart from the schedule based on informal settlement offers. In *Myers v. Snow White Cleaners*,[329] the trial court used past settlement negotiations to justify reducing the amount of attorney's fees it awarded to the plaintiff, who prevailed.[330] The supreme court reversed the fee award on appeal, saying that Civil Rule 68 exclusively "controls whether a trial court can penalize a party for its refusal to settle prior to trial when the jury verdict awards an amount of money virtually identical to the pre-trial offer."[331]

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[328] The sample contained fifteen cases in which the judge varied from the amount set forth in the schedule.

[329] 770 P.2d 750 (Alaska 1989).

[330] *Id.* at 751.

[331] *Id.* at 752. The offer of judgment in this case was defective under Rule 68. *Id.* In a similar case, the supreme court reversed the trial court's fee award because the trial court relied on, among other things, the defendant's "ridiculously low" settlement offers to justify a fee award that exceeded the

D. What Fees Can Parties Recover?

Some exceptions exist to the general rule that the prevailing party is entitled to an attorney fee award. This section discusses the common law rules that have developed in areas of *pro se* litigants, in-house counsel, and alternative dispute resolution forums.

1. No Fees Incurred

The court can award attorney's fees even if a client was not obliged to pay for the legal services rendered.[332] This holding suggests that the court is not concerned about the party's obligation to pay counsel, as long as counsel actively represented the party in the litigation at bar.[333] Different rules sometimes apply, however, for litigants seeking compensation for working on their own cases.

a. Attorney Litigant - Attorney-litigants may recover their fees under certain circumstances.[334] If the attorney-litigant recovers a money judgment, the court can award fees pursuant to the schedule.[335] An attorney-litigant who helps retained counsel defend an action may recover fees only for time spent actively engaged in litigation, not time spent as a client.[336]

b. Non-Attorney Pro Se Litigant - A non-attorney pro se litigant is not entitled to Rule 82 fees.[337] The court cited a number of policy reasons for denying fees to *pro se*

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scheduled amount. *Van Dort v. Culliton,* 797 P.2d at 645.

[332] *Gregory v. Sauser*, 574 P.2d 445, 445 (Alaska 1978) (prevailing party entitled to fee award despite fact that Alaska Legal Services Corp. represented him free of charge).

[333] *See id.*; *see also Greater Anch. Borough*, 573 P.2d at 863.

[334] The court distinguishes attorney litigants appearing *pro se* from non-attorneys by quoting the trial judge who found that "An attorney has expended considerable time and effort in obtaining the skills necessary to practice law. Whether those skills are directed to the representation of others or oneself, the attorney skills and time have a clear marketable value. None of the policy reasons given by the court in *Bernhardt* . . . are applicable to attorneys who represent themselves." *Pratt & Whitney Canada v. Sheehan*, 852 P.2d 1173, 1181 (Alaska 1993).

[335] *Burrell v. Hangar*, 650 P.2d 386, 387 (Alaska 1982).

[336] *Pratt*, 852 P.2d at 1181; *Burrell*, 650 P.2d at 387.

[337] *Gates v. Tenakee Springs*, 822 P.2d 455, 463 (Alaska 1991); *Alaska Federal S & L v. Bernhardt*, 794 P.2d 579, 581-82 (Alaska 1990).

litigants, including the difficulty of valuing the non-attorney's time and the problem of over-compensating *pro se* litigants for "excessive hours [spent] thrashing about on uncomplicated matters."[338] Second, the court noted that awarding attorney's fees might encourage frivolous filing by lay *pro se* litigants, "creating a 'cottage industry' for non-lawyers."[339] Finally, the court reasoned that because the rule expressly specifies attorney's fees it cannot easily be construed to allow awards to non-attorneys.[340]

From a public policy standpoint, the court's decision arguably does not comport with the rule's stated purposes. If the purpose of the rule is to partially compensate the prevailing *party* rather than the prevailing attorney, it should not matter that the expenses were incurred by the party directly rather than through an attorney. When the litigant loses, the party pays, not the attorney.[341] It would be fairer and more consistent to award prevailing *pro se* defendants an amount for attorney's fees equivalent to what the court would have awarded a typical attorney handling the same case, and to award prevailing *pro se* plaintiffs the scheduled percentage of the judgment.

c. In-House Counsel - The cost of in-house counsel is an attorney's fee within the meaning of Rule 82 only to the extent that in-house counsel actively participated in the litigation.[342] The court reasoned that in-house counsel's salaries were a cost of doing

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[338] *Alaska Federal*, 794 P.2d at 581 (citation omitted). One objection to the "thrashing about" argument is that lawyers also may spend excessive hours. In fact, the supreme court addresses this problem by reducing excessive fee awards on appeal. *See, e.g., Davidsen v. Kirkland*, 362 P.2d 1068 (Alaska 1961), the court's first published decision on Rule 82, in which it took into account the length and difficulty of the trial and reduced the fee award accordingly, from $1,700 to $800. *Id.* at 1070. Also, the difficulty of valuing the *pro se* litigant's time does not become an issue unless no money is recovered.

[339] *Alaska Federal*, 794 P.2d at 581 (citation omitted). Theoretically, of course, *pro se* litigants would know that if they lost, they would become liable for the prevailing party's partial fees, and would be less inclined to gamble on their litigation skills.

[340] *Id.* The only policy reason cited by the court favoring award of attorney's fees to *pro se* litigants was that they suffer an economic detriment in litigation. The court said that it found the reasons against the award "more persuasive than those put forth by the few courts which have allowed fees to lay *pro se* litigants." *Id.* At 581-82.

[341] At least two commentators have suggested that the attorney should pay. *See* Donohue, *supra* note 106, at 212-14); Kritzer, *Searching for Winners, supra* note 18, at 57. Kritzer believes that the proposal would increase overall litigation rates by encouraging plaintiff lawyers to take on smaller, routine cases. *Id.*

[342] *Greater Anch. Area Borough v. Sisters of Charity*, 573 P.2d 862, 863 (Alaska 1978); *Continental Ins. Co. v. U.S. Fid. & Guar. Co.*, 552 P.2d 1122, 1128 (Alaska 1976).

business that the company would pay regardless of any particular suit.[343] If in-house counsel, rather than retained counsel, actively engaged in the litigation, the court could award Rule 82 attorney's fees.[344]

d. Paralegal Fees - Before the 1993 rule changes, attorneys could recover costs for paralegal services under Civil Rule 79.[345] Rule 82 now permits attorneys to charge for legal work customarily performed by an attorney but which is delegated to and performed by an investigator, paralegal or law clerk.[346]

2. Award Limited to "Costs of the Action"

Rule 82 applies only to "costs of the action," not to attorney's fees incurred in a prior arbitration.[347] If a party made reasonable though unsuccessful efforts to resolve the dispute without going to courts, then Rule 82 may apply to attorney's fees prior to litigation.[348] The judge has discretion to consider a party's pre-litigation attorney's fees in calculating an award.[349]

3. Rule 82 Interactions with Rules 54, 68 and 79

Civil Rule 54 is the general rule on judgments and costs.[350] The supreme court has cited Rule 54 as the foundation for awarding costs, including attorney's fees, to the prevailing party.[351] Rule 79 governs the details of costs that the court awards to a

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[343] *Continental Ins.*, 552 P.2d at 1128.

[344] *Greater Anch. Area Borough*, 573 P.2d at 863.

[345] *See* AK. R.CIV. P. 79; *Ak Federal S & L*, 794 at 582; *CTA Architects v. Active Erectors & Installers*, 781 P.2d 1363, 1367 (Alaska 1989).

[346] *See* AK. R. CIV. P. 82(b)(2).

[347] *Alaska State Housing v. Riley Pleas*, 586 P.2d 1244, 1249 (Alaska 1978).

[348] *Bowman*, 889 P.2d at 1075.

[349] *Id.*

[350] Rule 54 provides in relevant part: "(d) **Costs.** Except when express provision therefor is made either in a statute of the state or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs. The procedure for the taxing of costs by the clerk and review of the clerk's action by the court shall be governed by Rule 79."

[351] *McDonough v. Lee*, 420 P.2d 459 (Alaska 1966). The court cited Rule 54(d) as one of the bases for Rule 82.

prevailing party, other than attorney's fees.[352] The rule permits "the party entitled to costs"[353] to receive deposition costs, expenses of posting bonds, serving notices, filing fees and transcript costs, and costs of computerized legal research, as well as "any other expenses necessarily incurred in order to enable a party to secure some right accorded to the party in the action or proceeding."[354]

Alaska Civil Rule 68[355] and Alaska Statute § 09.30.065[356] control offers of judgment. An unaccepted offer of judgment made pursuant to Rule 68 in effect changes the time and conditions under which a party can become the prevailing party for purposes of attorney's fee awards and associated rules and statutes.[357] Alaska's Rule 68 permits either party to make a settlement offer up to ten days before trial. If the offer is accepted, the trial court then awards Rule 82 attorney's fees to the prevailing party, unless the offer specified otherwise.[358] If the offer is not accepted and the trial result

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[352] Rule 79 requires the party entitled to costs to serve on each of the other parties a cost bill, together with a notice of the date and time of the cost bill hearing. *See* AK R.CIV. P. 79(a). The cost bill must "distinctly set forth each item claimed in order that the nature of the charge can be readily understood." *Id.*

[353] Including, *e. g.*, the prevailing party, as set out in Rule 54(d).

[354] AK. R.CIV. P. 79 (b). The rule notes that costs do not include fees for investigators, paralegals or law clerks. *Id.*

[355] Rule 68 provides in relevant part: "At any time more than 10 days before the trial begins, either the party making a claim or the party defending against a claim may serve upon the adverse party an offer to allow judgment to be entered in complete satisfaction of the claim for the money or property or to the effect specified in the offer, with costs then accrued. . . . (b) If the judgment finally rendered by the court is not more favorable to the offeree than the [unaccepted] offer, the prejudgment interest accrued up to the date judgment is entered shall be adjusted as follows: (1) if the offeree is the party making the claim, the interest rate shall be reduced by the amount specified in AS 09.30.065 and the offeree must pay the costs and attorney's fees incurred after the making of the offer (as would be calculated under Civil Rules 79 and 82 if the offeror were the prevailing party). The offeree may not be awarded costs or attorney's fees incurred after the making of the offer. (2) if the offeree is the party defending against the claim, the interest rate will be increased by the amount specified in AS 09.30.065."

[356] The statute provides in relevant part: "**Offers of Judgment**. At any time more than 10 days before the trial begins, the party making a claim or the party defending against a claim may serve upon the adverse party an offer to allow judgment to be entered in complete satisfaction of the claim for the money or property or to the effect specified in the offer, with costs then accrued. . . .If the judgment finally entered on the claim as to which an offer has been made under this section is not more favorable to the offeree than the offer, the interest awarded under AS 09.30.070 and accrued up to the date judgment is entered shall be adjusted as follows: (1) if the offeree is the party making the claim, the interest rate shall be reduced by five percent a year; (2) if the offeree is the party defending against the claim, the interest rate shall be increased by five percent a year."

[357] I.e., Rule 79 costs, and pre-judgment interest under ALASKA STAT. § 45.45.010 and ALASKA STAT. § 09.30.070.

[358] *Van Dort,* 797 P.2d at 645.

is not more favorable than the offer of judgment, several consequences follow. Most importantly, if the defendant made the offer and the plaintiff did not accept, then the plaintiff becomes liable for the defendant's attorney's fees (Rule 82) and costs (Rule 79) accrued after the date of the offer. If the defendant refused an offer made by the plaintiff, the defendant becomes liable for a higher rate of pre-judgment interest after the date of the offer.[359] Pending legislation would amend Rule 68 to give the prevailing party full, rather than partial attorney's fees.[360]

In our interviews with attorneys and judges, Rules 68 and 79 emerged as important influences on their thinking about attorney's fees. While judges and attorneys typically said that the most important factors in litigation strategy were damages, liability, strength of case and strength of party, they lumped Rule 82 attorney's fees together with Rule 79 costs and pre-judgment interest[361] as a trio of costs that became a balancing factor for parties to consider in case strategy.[362] One or the other, or the combination, could tip the scales in favor of filing a claim, or deciding whether to settle or try a case.[363] Only rarely did one of the factors make the difference for the whole case. Rule 68 focussed consideration of the trio of factors on a specific point in the case, the offer of judgment.

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[359] *See* ALASKA STAT. § 09.30.065(2).

[360] CS for House Bill No. 158, introduced Mar. 22, 1995 by representatives Porter, Toohey, Mulder, Rokeberg and Ogan. The bill also would eliminate the changes in interest rates and make other tort reform changes to a variety of statutes and rules.

[361] Attorneys noted that depending on the facts of the case, either Rule 82 attorney's fees or pre-judgment interest may become large enough to outweigh the combination of factors, or even the underlying damages as the deciding item in case strategy ("the tail wagging the dog"). More often than not, attorneys mentioned this phenomenon in the context of cases in which the parties knew that a large judgment was likely but years elapsed between the date of injury and the final judgment.

[362] One attorney estimated that liability, damages and strength of case made 80% of the decision in a case, and Rules 82 and 79 and pre-judgment interest made the other 20%. Kleinfeld, *supra* note 18, at 5, characterized Rule 82 as the most important of the three, saying that "The power of Rule 68 offers of judgment in Alaska derives from Civil Rule 82." However, he noted that in a calculation of which party prevailed, the judge "must compute prejudgment interest to the date of the offer of judgment, using the amount of the verdict as the principal amount. If the sum of the verdict plus interest is less than the offer of judgment, then the defendant is entitled to a Rule 82 award from the date of the offer to the date of the judgment." *Id.* at 6.

[363] Whiting, *The Alaska Rules Are a Success*, 24 THE JUDGES' JOURNAL 9 (Spring 1985), discussed the interplay of these rules and statutes from a personal injury defense point of view. He commented that, "The purpose of Rule 68 is to provide protection to the defendant against Alaska Rules 82 and 79, which allow for awards of costs and attorneys' fees to the prevailing party." Although he saw Rule 82 as something that defense attorneys and their clients needed protection from, he also believed that Rule 82 "forces sobering reality on both parties when evaluating settlement," and gives "a sued party some incentive to defend against meritless claims." *Id.* at 10.

Rule 82 fees can make the difference in deciding which party prevailed in the context of an unaccepted Rule 68 offer. The trial judge cannot use the amount of post-offer attorney's fees as grounds for determining which party prevailed.[364] Attorneys described a few cases in which one or the other party advocated for attorney's fees in an amount that, when added to the judgment, would make the difference between beating or not beating an unaccepted Rule 68 offer, thus changing the direction of the fee shift.[365]

E. Prevailing Party

One criticism of a "loser pays" rule is that cases do not always have clear winners and losers.[366] Thus, the supreme court has developed an extensive body of case law addressing this issue of which party prevailed. This section discusses the case law and the judge interview data to understand how questions about "real" winners affect Rule 82 in practice.

The determination of which party prevailed and is entitled to Rule 82 attorney's fees rests squarely within the discretion of the trial judge.[367] For Rule 82 purposes, the prevailing party is generally the one who successfully prosecuted or defended against the action. The court also has identified the prevailing party as the one who was successful on the main issue of the action,[368] or in whose favor the decision or verdict is rendered and the judgment entered.[369]

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[364] *Mitchell v. Smith*, 742 P.2d 220, 226 (Alaska 1987). "To the extent [the trial court] concluded that Smith prevailed because much of his attorney's fees were incurred after the offer of judgment was made, the trial court considered an impermissible factor." *Id.*

[365] See Chapter 7, *infra*, for a more detailed discussion.

[366] Kleinfeld, *supra,* note 120, at 41. Mr. Kleinfeld says that "Attorneys' fee awards imply that the loser should have recognized that the winner was right, and not fought the claim. The implication is often unfair in contract (and tort) claims where considerable justice can be found on both sides." *See also* Rowe, *supra* note 39, at 655.

[367] *Hillman v. Nationwide Mutual Ins.*, 855 P.2d 1321, 1326 (Alaska 1993); *Apex Control v. Ak. Mechanical*, 776 P.2d 310, 314 (Alaska 1989); *DeWitt*, 499 P.2d at 601.

[368] *Cooper v. Carlson*, 511 P.2d 1305 (Alaska 1973).

[369] *Day v. Moore*, 771 P.2d 436, 437 (Alaska 1989); *Adoption of V.M.C.*, 528 P.2d at 795 n.14 (citations omitted).

In the typical case with a money judgment, the court will define the party who recovered the judgment as the prevailing party. This rule does not always hold true.[370] In some cases, the supreme court has decided that the trial court erred if it relied solely on the fact that one party received an affirmative recovery in awarding attorney's fees.[371] The court may decide that a party who defeated a claim of great potential liability prevailed even though the other side received an affirmative recovery.[372] The judge can find that no party prevailed,[373] or that even if one party prevailed, the equities of the situation do not warrant a Rule 82 award.[374] Where each side prevails in substantial areas of the litigation, the court can conclude that each side should bear its own costs and attorney fees.[375]

F. Multiple Parties

Cases where multiple parties are variously aligned on numerous counterclaims and cross-claims present special challenges for interpreting Rule 82 attorney's fee awards. In 1979, the Alaska Supreme Court upheld the application of joint and several liability for attorney's fees and taxable costs in *Stepanov v. Gavrilovich.*[376] In addition, the court suggested that a right of contribution may exist among non-prevailing parties for

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[370] *Owen Jones & Sons v. C.R. Lewis Co.*, 497 P.2d 312, 313-14 (Alaska 1972). *Oaksmith v. Brusich*, 774 P.2d 191, 202 (Alaska 1989). In interviews for the current study, we asked trial court judges how often they had decided the prevailing party in a case. Estimates of how often this happened ranged from "none in the last year" to "two or three times in the last year" to "ten percent of my cases." Trial court judges did not characterize prevailing party issues as arising too frequently or consuming undue judicial resources.

[371] *Hayer v. National Bank of Alaska*, 619 P.2d 474, 477 (Alaska 1980).

[372] *Day*, 771 P.2d at 437; *Hutchins v. Schwartz*, 724 P.2d 1194, 1204 (Alaska 1986); *Alaska Placer Co. v. Lee*, 553 P.2d 54, 63 (Alaska 1976); *Cooper*, 511 P.2d at 1309. In interviews for this study, three trial court judges said they had decided a prevailing party issue in cases in which a plaintiff sought a large reward but recovered a small amount. Seven trial judges said they had decided a prevailing party issue in cases involving multiple claims or theories of recovery, and eight said it came up in cases involving counterclaims. Three judges mentioned cases involving injunctive, declarative or equitable relief. Other scenarios in which the prevailing party was unclear included third party claims, cases in which liability existed but not damages, and family cases involving actions for post-decree enforcement.

[373] *Tobeluk*, 589 P.2d at 877.

[374] *Adoption of V.M.C.*, 528 P.2d at 795 n.14 (citations omitted). *See also* Rowe, *supra* note 39, at 656, commenting that "In cases so close and difficult or important that both sides have ample justification to litigate, it can seem unfair and harsh to saddle one with the fees of both" (citation omitted).

[375] *Oaksmith v. Brusich*, 774 P.2d 191, 202 (Alaska 1989).

[376] 594 P.2d 30, 36 (Alaska 1979).

fee awards and costs.[377] When different parties are awarded attorney's fees based on counterclaims and cross-claims, each request for fees by the prevailing party must be considered objectively and on its own merits.[378] In such cases, the trial court is not required to compare the attorney's fees awarded to each of the prevailing parties so as to provide for a particular net award of fees.[379]

After *Stepanov* was decided, however, Alaska's laws concerning allocation of fault among joint tortfeasors changed from a per capita allocation.[380] Under current Alaska statute, fault among joint tortfeasors is allocated proportionally.[381] The supreme court has not yet explained what effects, if any, this change had in the context of apportioning Rule 82 fee awards among joint tortfeasors.

Despite the relatively large number of published decisions on prevailing party, analysis of the case files did not suggest that the issue arose often. In cases with a judgment, we found that the party who prevailed on the judgment was nearly always the party who prevailed on the attorney's fee motion. In the state court cases, the identity of the party receiving the judgment and the party who received the fee award differed in only two cases. In federal court, where cases may be more complex, we found the parties differed in four of the twenty-two cases (18%) with fee awards.

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[377] *Id.*

[378] *Myers,* 770 P.2d at 753.

[379] *Id. See also KAPS Transport Inc. v. Henry,* 572 P.2d 72 (Alaska 1977).

[380] On November 8, 1988, Alaskan voters approved the "Tort Reform Ballot Initiative" (Initiative Proposal No. 2, § 2 (1987)) which amended ALASKA STAT. § 09.17.080(d) to change allocation of fault among tortfeasors from a per capita to a proportion of fault basis. The ballot initiative also did away with contribution among tortfeasors by repealing ALASKA STAT. § 09.16.010. *See Benner v. Wichman,* 874 P.2d 949, 954-56 (Alaska 1994).

[381] *See* ALASKA STAT. § 09.17.080 (1994).

G. Public Interest Litigation

1. Different Standards for Public Interest Cases

Fee shifting in public interest cases occurs in many jurisdictions through statute.[382] One commentator suggests that in the broadest sense, all enforcement of statutes is in the public interest,[383] and that the American rule, by requiring each party to bear its own costs, creates the need for other means of enforcing legislation.[384] An opponent of legislatively created enforcement mechanisms that rely on fee shifting argues that public interest exceptions to the American rule create unnecessary litigation, burden the courts, and require courts to "make important policy choices."[385]

Courts in American rule jurisdictions also have interpreted statutory provisions for fee awards to public interest litigants as evincing legislative intent to create an exception to the American rule that fees are not awarded except in cases of bad faith or vexatious conduct. The Supreme Court arrived at this conclusion in the context of the Civil Rights Act of 1964.[386] In Alaska, the supreme court created a public interest

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[382] Note, *State Attorney Fee Shifting Statutes*, *supra* note 46, at 343. The authors surveyed fee-shifting statutes in all fifty states and the District of Columbia. They found that "80.5% of all public interest attorney fee shifting statutes have been enacted since 1960. . . [and] the percentage of public interest statutes as compared to the other statutes is growing." *Id.*

[383] Zemans, *supra* note 39, at 197. Zemans says that "it could be argued equally persuasively that the American rule is indefensible on enforcement grounds for all statutory law. . . . [W]henever a legislative body passes a law, it does so for public policy purposes. . . .[and] there is always a public argument to be made for encouraging its enforcement." *Id.* She adds that many features of the American legal system are legislative responses to citizen demands for ability to enforce laws, including small claims court, the contingent fee, class actions, and the creation of regulatory agencies. *Id.* at 200.

[384] *Id.* at 201.

[385] Fein, *Citizen Suit Attorney Fee Shifting Awards: A Critical Examination of Government-"Subsidized" Litigation*, 47 LAW & CONTEMP. PROBS. 211, 214 (1984). Fein says that "no rule is more deeply embedded in our jurisprudence than the principle that each party is responsible for its own attorney fees" (cite omitted). *Id.* at 213.

[386] *See Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 88 S.Ct. 964 (1968). In *Newman*, the Supreme Court held that Title II's provision of "a reasonable attorney's fee" to the prevailing party should not be limited to circumstances in which the losing party's "defenses had been advanced for purposes of delay and not in good faith." The Court directed the trial court on remand to include "reasonable counsel fees as part of the costs to be assessed" against the losing party. The Supreme Court's rationale was to further Congress' intent to encourage individuals injured by racial discrimination to seek judicial relief under Title II. Similarly, in *Aleyeska Pipeline Co. v. Wilderness Society*, 421 U.S. 240 (1975), the Supreme Court majority opinion stated that by enacting fee shifting statutes, "Congress has opted to rely heavily on private enforcement to implement public policy and to allow counsel fees so as to encourage private litigation." *Id.* at 263.

case exception to the normal operation of Rule 82 in the absence of legislative intent to encourage public interest lawsuits.[387] The Alaska Supreme Court also has created its own definition of public interest litigants, which it applies on a case-by-case basis.[388]

Alaska's supreme court first explicitly acknowledged a public interest exception to Rule 82 in 1974 in *Gilbert v. State.*[389] In that case, the court announced the rule that attorney's fees will not be awarded against "a losing party who has in good faith raised a question of genuine public interest before the courts."[390] In *Gilbert,* the plaintiff lost his case challenging the state's requirements of residency for election to legislative office. On appeal, he argued that Rule 82 would deter citizens from litigating questions

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[387] *See Hickel,* 868 P.2d at 923. The court stated that "While Alaska Civil Rule 82 has been construed as providing only for partial fees, this court has used its authority to create an exception for public interest litigants." *Id.*

[388] Alaska's legislature also has created public interest fee-shifting provisions that resemble those in many other state and federal statutes.

[389] 526 P.2d 1131 (Alaska 1974).

[390] *Id.* at 1136. The court said, "We have previously intimated that denial of attorneys' fees might be appropriate in a proper case where the public interest is involved." *Id.* Tracing the cases back, in *Jefferson v. City of Anchorage,* 513 P.2d 1099 (Alaska 1973), the appellants complained of having to pay $2,000 in attorney's fees because "this is a case in which a question of public interest was litigated." *Id.* at 1102. The court said the public interest was not "served by forcing a municipality to defend against specious attacks on the propriety of its actions. . . . Suffice it to say that this court has previously sustained an award of attorney's fee (sic) to a municipality in a case presenting a public question. Dale v. Greater Anchorage Area Borough, 439 P.2d 790, 793 (Alaska 1968)." *Id.* at 1102 -1103. In *Dale,* the appellant had asked for a declaration that an election was illegal. The court found the election legal, and an award of $700 against the appellant appropriate, without any discussion of public interest or the fact that the prevailing party was a governmental body. *Dale,* 439 P.2d at 793.

The other case mentioned in *Gilbert* as a predecessor was *Mobil Oil Corporation v. Local Boundary Commission,* 518 P.2d 92 (Alaska 1974). In that case, the appellant specifically asked the court to "declare the award [of Rule 82 attorney's fees] in this case to be an abuse of discretion as a matter of law because the public interest is involved." *Id.* at 104. Mobil's argument relied on "the premise that fear of incurring this expense will deter a citizen from litigating questions of general interest to the community." *Id.* at 104. The court disagreed, saying that "the sums at stake in this controversy are large enough to prompt a suit without consideration of the public interest, [and] the superior court could have concluded that the property owners were acting in their private interests and not in behalf of the public." *Id.*

In all of these cases, the court upheld an award of partial attorney's fees under Rule 82 from a private party appellant to a prevailing party which was a governmental body. In *Jefferson,* the court found that the losing appellant had not helped the public interest, and in *Mobil* the court found that the losing appellant had enough private interest at stake that it could have brought the suit without considering the public interest. These differences distinguish the predecessor cases from *Gilbert,* in which the court found that the losing appellant had brought a suit of public interest in good faith. In none of the cases or discussion does the court refer to any statutory basis or other grounds for defining or finding public interest.

of general public concern for fear of having to pay the other party's attorney's fees.[391] The court agreed, reiterating its holding in *Malvo*[392] that the purpose of Rule 82 is not to penalize a party for litigating a good faith claim.[393]

In the 1977 case of *Anchorage v. McCabe*,[394] the court established the second prong of the public interest exception: that prevailing public interest plaintiffs are entitled to full reasonable attorney's fees. In *McCabe*, homeowner plaintiffs prevailed in a suit against the Municipality of Anchorage and received full fees under Rule 82.[395] Before reaching the full fee issue, the supreme court first rejected the Municipality of Anchorage's contention that under *Gilbert* no fees should be awarded in public interest cases.[396] The court made it clear that the *Gilbert* policy of "encouraging public interest litigants" supported an award of attorney's fees to the prevailing plaintiffs in "this and all other public interest cases."[397] It also restated the policy behind shielding public interest plaintiffs from adverse fee awards.[398]

The court in *McCabe* refused to overturn the trial court's award of full fees.[399] The court reasoned that a full fee award was necessary to ensure that the public interest

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[391] *Gilbert*, 526 P.2d at 1136.

[392] 512 P.2d 575, 587.

[393] *Gilbert*, 526 P.2d at 1136. In one later case, the court carried the public interest exception even further, to award fees to a *non*prevailing public interest plaintiff. *See Thomas v. Croft*, 614 P.2d 795 (Alaska 1980). The court reiterated its policy that "Plaintiffs who in good faith seek to vindicate the strong public policy . . . should not be penalized by an assessment of attorney's fees unless the suit is frivolous." *Id.* at 798. The court's decision did not rely on Rule 82, but rather on "the inherent equitable power of the court to award attorney's fees when the interests of justice so require." *Id.* at 799. It noted that although the state prevailed, it had been responsible for the conduct of the election in question, and the award of Croft's partial attorney's fees against the state reflected "an exceptional case in which the court rules as to costs and fees did not adequately protect the interests of justice." *Id.*

[394] 568 P.2d 986 (Alaska 1977).

[395] *Id.* at 993.

[396] *Id.* at 991.

[397] *Id.*

[398] The policy is "to encourage plaintiffs to raise issues of public interest by removing the awesome financial burden of such a suit." *Id.* at 990.

[399] *Id.* at 994. Subsequent full-fee award public interest cases include: *Hickel*, 868 P.2d at 923; *Hunsicker v. Thompson*, 717 P.2d 358, 359 (Alaska 1986); and *Anchorage Daily News v. School District*, 803 P.2d 402, 404 (Alaska 1990) (Having qualified as a public interest litigant, the Daily News is entitled to the full amount of its attorney's fees, to the extent that they are otherwise reasonable). But see also TOMKINS & WILLGING, *supra* note 11, at 36 n.135, in which the authors cite Alaska cases where the court upheld awards of only partial attorney's fees to prevailing plaintiffs in public interest cases.

plaintiff, acting as "a private attorney general," not be "penalized by Rule 82 by failing to receive full compensation for the costs of litigating issues of public importance."[400] In a later case, the court added that full fee awards encourage meritorious claims which might otherwise not be brought."[401]

While the trial court retains the discretion to award less than all fees requested, the court may not reduce the award in order to discourage public interest litigation or penalize a plaintiff acting as a private attorney general.[402] The court held in 1980 that it was "appropriate to award full attorney's fees on appeal to a successful public interest litigant."[403]

2. Criteria for Public Interest Status

A litigant must satisfy four criteria to qualify for the public interest attorney fee exception.[404] First, the case must be designed to effectuate strong public policies; second, numerous people are expected to benefit if the plaintiff succeeds; third, only a private party would be expected to bring the suit; and fourth, was there sufficient economic incentive for the purported public interest litigant to file the suit (*i.e.*, would the purported public interest litigant have sufficient economic incentive to file suit

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[400] *McCabe*, 568 P.2d at 994.

[401] *Hickel*, 868 P.2d at 924 (citations omitted).

[402] *Hunsicker*, 717 P.2d at 359. The court may reduce the award as unreasonable if, for example, it finds the hourly rate to be excessive or the total hours unreasonable. *Id.* The trial judge had found that the defendant, the Matanuska-Susitna Borough, had litigated in good faith; the supreme court said that Mat-Su's good faith could not be considered. *Id.* at 360.

[403] *Thomas v. Bailey*, 611 P.2d 536, 539 (Alaska 1980). In *Hickel*, 868 P.2d, the court said "the rule was not intended to give such litigants carte blanche to litigate post-trial with the knowledge that they can recover fees regardless of whether they prevail." *Id.* at 926. It noted that its decision modified *Thomas* by holding that "a public interest litigant's general prevailing party status does not mean the litigant should recover fees incurred in bringing or defending petitions for review in which that party does not prevail." *Id.* at 932.

[404] The court articulated the first three points in *Anchorage v. McCabe*, 568 P.2d 986 (Alaska 1977), citing a Ninth Circuit case *La Raza Unida v. Volpe*, 57 F.R. D. 94 (N.D. Cal. 1972): " '(1) the effectuation of strong public policies; (2) the fact that numerous people received benefits from plaintiffs' litigation success; (3) the fact that only a private party could have been expected to bring this action.'" (cites omitted). The court added the fourth point in 1982, in *Kenai Lumber Co., Inc. v. LeResche*, 646 P.2d 215, 223 (Alaska 1982), when the court said "the fourth criterion may be expressed as whether the litigant claiming public interest status would have had sufficient economic incentive to bring the lawsuit even if it involved only narrow issues lacking general importance. Such a litigant is less apt than a party lacking this incentive to be deterred from bringing a good faith claim by the prospect of an adverse award of attorney's fees." *Id. See also, Murphy v. City of Wrangell*, 763 P.2d 229, 233 (Alaska 1988).

even if the action involved only narrow issues lacking general importance?).[405] With regard to the fourth prong of the test, the court is unwilling to award public interest status to litigants who are acting in their private interests and not on behalf of the public.[406] However, a plaintiff's "comparatively minor" economic interest in a matter will not preclude public interest status where the other three criteria have been met.[407]

H. Appellate Review of Fee Awards

The Alaska Supreme Court deals with attorney's fees in two contexts: it reviews all aspects of fee awards at the trial court level, and it awards attorney's fees to successful appellate litigants. The court has published scores of opinions on Rule 82, giving trial judges a comprehensive body of case law from which to draw while at the same time adopting a fairly relaxed standard of review.

1. Appellate Review of Trial Court Awards

The Alaska Supreme Court reviews attorney's fee awards for abuse of the trial court's discretion.[408] The court expects that the trial court will decide a reasonable fee award,[409] and state its basis for the award.[410] Only when a trial court's exercise of discretion results in an award that is "manifestly unreasonable" will the supreme court reverse for abuse of discretion.[411] Although the trial court has broad discretion, it cannot deny a proper motion for attorney's fees from improper motive, or for arbitrary

[405] *Anch. Daily News*, 803 P.2d at 404.

[406] *See Mobil Oil v. Local Boundary Comm'n*, 518 P.2d 92, 104 (Alaska 1974).

[407] *See Anch. Daily News*, 803 P.2d at 404.

[408] *Preferred General Agency v. Raffetto*, 391 P.2d at 954. The court said "We limit our review in matters of this kind to the question of whether the court exceeded the bounds of the broad discretion vested in it." *Id. See also Palfy v. Rice*, 473 P.2d 606, 613 (Alaska 1970).

[409] TOMKINS & WILLGING, *supra* note 11, at 36 discuss appellate review standards, and note that the court "has directed trial judges to consider the same types of factors that have been developed to guide an attorney in setting a fee with a client" (cites omitted).

[410] *Id.* at 38 n.142.

[411] *See, e.g., Alaska Placer*, 553 P.2d at 63; *Western Airlines v. Lathrop*, 535 P.2d 1209, 1217 (Alaska 1975); *Adoption of V.M.C.*, 528 P.2d at 795.

or capricious reasons.[412] The trial court has the discretion to decide whether the prevailing party's fee request includes too much attorney time or too many attorneys.[413]

2. Prevailing Party Fee Reimbursement in Appealed Cases

The court uses a different rule to reimburse prevailing parties at the appellate level.[414] Most of the cases interpreting the rule involve its use in appeals to the superior court from administrative agency decisions.[415] A 1985 article on fee shifting notes that the Supreme Court follows different procedures for fee awards in supreme court proceedings than in trial court actions.[416] The author says that the court "routinely awards $250 to $750. The prevailing party is ordinarily not allowed to submit evidence of his actual fees . . . .[which] on appeals in substantial civil cases are typically in the $5,000 to $15,000 range."[417] Our interviews suggested that awards in 1995 were typically around $1,000, but still were made to the prevailing party on different grounds than Rule 82.

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[412] *Haskins v. Shelden*, 558 P.2d 487, 495-96 (Alaska 1976).

[413] *Integrated v. Fairbanks*, 799 P.2d 295, 304 (Alaska 1990). *See also, Hunsicker*, 717 P.2d at 359. The court allowed the trial judge to deduct a portion of the prevailing public interest plaintiff's attorney's fees for time spent in naming and then dismissing some defendants.

[414] *See* App. Rule 508 (e) **Attorney's Fees**. Attorney's fees may be allowed in an amount to be determined by the court. . . . If the court determines that an appeal or cross-appeal is frivolous or that it has been brought simply for purposes of delay, actual attorney's fees may be awarded to the appellee or cross-appellee. Section (g)(1) exempts claimants in Workers' Compensation appeals from paying fees "unless the court finds that the claimant's position was frivolous, unreasonable, or taken in bad faith," and (g)(2) awards full reasonable attorney's fees to successful claimants.

[415] *E. g., State, Dept. of Highways v. Salzwedel*, 596 P.2d 17 (Alaska 1979); *Thomas v. Bailey*, 611 P.2d 536, 539 (Alaska 1980).

[416] Kleinfeld, *supra* note 120, at 53.

[417] *Id.* In a response, Alaska plaintiff's attorney James A. Parrish, said that "Applying Rule 82 at the appellate level would be difficult. When an appellant wins a retrial, the ultimate outcome of the litigation is rarely known." Parrish, *Plaintiff's View*, 24 THE JUDGES' JOURNAL 8, 54 (Spring, 1985). He gives several other reasons, including difficulty in deciding the prevailing party in "purely technical victories," the court's wish to not "discourage the raising of bona fide legal claims on appeal," its desire that attorneys bring appeals only when "the clients are serious enough about the issue to bear the cost," and finally he notes that "the absence of significant fee awards tend to keep the court's focus on legal issues, thereby maintaining a 'detached' image and attitude essential to an appellate body." He goes on to say that he would like to see larger and more consistent awards, but says, "I accept our court's trivial and unexplained awards knowing they have not diverted the court from important matters." *Id.*

Part II

Data Analysis and Findings

Chapter 5
Litigation Trends

One question addressed by this study is how Alaska's civil litigation compares to litigation in states which do not shift attorney's fees. Does any evidence suggest that Alaskans go to court more or less often than people from states that do not shift fees? This chapter examines case filings, types of cases, and trials in Alaska courts and nationwide to see whether the state differs significantly on these measures from other states.

A. Civil Case Filings

Does attorney fee shifting affect civil case filings? One rough way to examine this issue is to compare civil case filing rates in Alaska to rates in states which do not shift fees. If fee shifting had strongly pronounced effects, one would expect a lower rate of civil case filings, on the hypothesis that fee shifting discouraged some potential plaintiffs from filing cases.[418] Alaska's per capita civil filing rate does not seem to differ substantially from rates across the nation. For example, Alaska's 5,793 civil filings per

[418] Our interviews strongly suggested that Rule 82's ability to discourage plaintiffs depended upon both the merits of the case and the plaintiff's financial status. See Chapter 7, *infra*.

100,000 population in 1992 was slightly below the national median of 6,610 for that year.[419] Alaska's rate in 1993 also was slightly below the national median.[420]

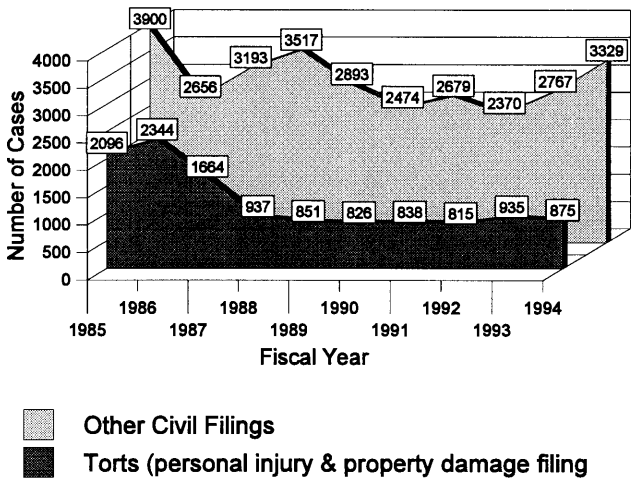
Tort filings are a subset of civil filings that may be more closely related to fee shifting.[421] Torts include high profile matters like legal and medical malpractice, products liability and wrongful death cases, that are at the center of debates about fee shifting and civil justice reform. Some observers caution that the prospect of an adverse fee award could chill access to the courts, at least for some plaintiffs in tort cases.[422]

We compared tort filing trends in Alaska to filings in states that do not shift fees. In 1993, the National Center for State Courts reported that the only substantial period of growth in tort filings nationwide had occurred between 1985 and 1986, and that tort filings actually had declined by about 2% since 1990.[423] In Alaska, tort filings increased modestly between 1985 and 1986, decreased drastically between 1986 and 1989,[424] and decreased

Figure 1

Tort Filings Compared to Other Civil Filings, Alaska

Adapted from National Center for State Courts & Ak. Ct. System Reports



[419] NATIONAL CENTER FOR STATE COURTS, STATE COURT CASELOAD STATISTICS: ANNUAL REPORT 1992, at 11, Fig. 1.13 (National Center for State Courts 1994) (hereinafter "NCSC STATISTICS, 1992").

[420] NATIONAL CENTER FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS, 1993, at 12 (National Center for State Courts 1995) (hereinafter "NCSC STATISTICS, 1993"). Alaska's rate was 4,046 and the national median was 4,704. *Id.*

[421] Chapter 2, *supra* contains a discussion of how fee-shifting proposals often have been associated with tort reform efforts.

[422] *See* Rowe, *Predicting the Effects*, *supra* note 40, at 143.

[423] NCSC STATISTICS, 1992, *supra* note 419, at 17. Data come from twenty-two states that have reported comparable data from the 1985 to 1992 period. *Id.* at 16.

[424] As Figure 1 shows, tort filings in Alaska statewide decreased by 29% between 1986 and 1987, and by 44% between 1987 and 1988. These drastic drops probably are related to changes in population caused by a severe economic downturn in Alaska from 1985-88 ("the bust"). During the period of most severe retrenchment in 1986-87, the rate of population change dropped to -1.8%. By 1989, however, net out-migration slowed enough to allow the natural increase of births over deaths to produce the first increase in population since 1985. ALASKA DEP'T OF LABOR, ALASKA POPULATION OVERVIEW 1988 &

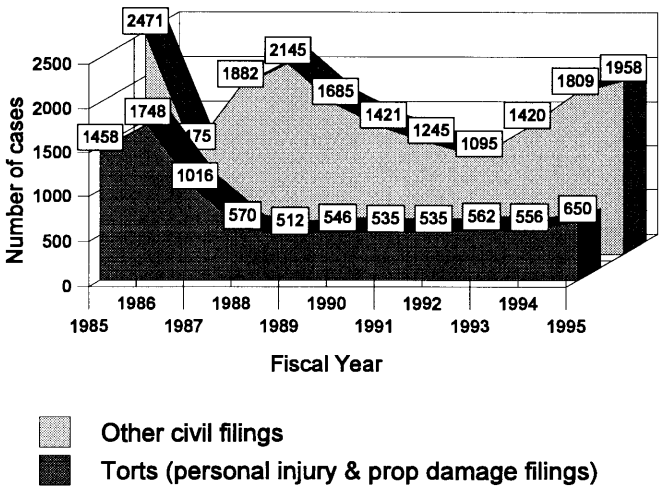
slightly or remained relatively constant until 1992.[425] Figure 1 depicts the trend graphically.[426] Thus, Alaska's statewide tort filing trends resemble those in U.S. jurisdictions that do not shift attorney's fees. The similarity suggests that fee-shifting in Alaska does not cause differences between Alaska's trends and those elsewhere.

We also compared tort filings statewide and in Anchorage to other civil filings from mid-1985 through mid-1995. Figure 2 shows that tort filings in Anchorage dropped sharply from FY 1986-89 and remained flat compared to other types of civil filings, which were more volatile during the late 1980s. Figure 1 shows the same trend statewide. For the past few years, tort filings statewide and in Anchorage have been moving upward in numbers, but not as rapidly as other civil filings.

Figure 2

Tort Filings Compared to Other Civil Filings, Anchorage

Adapted from National Center for State Courts & Ak. Ct. System Reports



Another way to understand tort trends is to examine filing rates in specific years rather than looking at actual numbers or percentages of filings. Figure 3 compares Alaska's population-adjusted tort filing rates to those in twenty-eight other states for which the National Center had data. Alaska's rates consistently fell in the lowest group (fewer than 200 tort filings per 100,000 population).[427] The methods by which states

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PROVISIONAL 1989 ESTIMATES 17 (1990). Another possible explanation for the decreases in tort filings after 1986 could be passage of "tort reform" legislation in Alaska in 1986 (see ch. 139 SLA 1986).

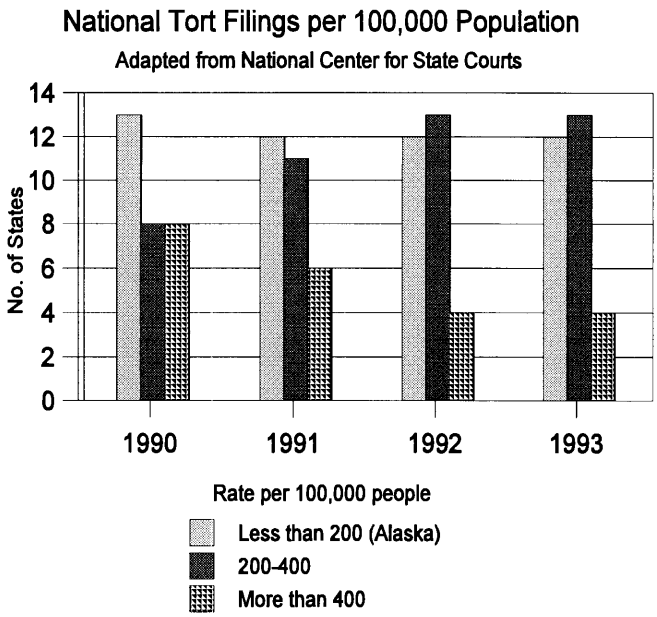
Other civil filings statewide showed a slightly different trend than tort filings. While they, too, increased steadily from 1982-1985 and fell between 1985 and 1986, the 1985-86 drop was only 17%. By 1987, civil filings were on the increase again. The spike in 1989 could reflect judicial real estate foreclosure filings related to the bust. Although exact figures are not available from the court system, a superior court law clerk who worked for the court in 1987 and 1988 confirmed that judicial foreclosures were a large part of the case load during those years.

[425] NCSC STATISTICS, 1992, *supra* note 419, at 17.

[426] Data on "other civil filings" come from the court system's annual reports. Other civil filings included administrative review (primarily workers' comp cases), "debt/contract," and "other" or "general" cases. Domestic relations, probate and children's matters do not appear on this graph.

[427] *See* NCSC STATISTICS, 1992, *supra* note 419, at 18; NCSC STATISTICS, 1993, *supra* note 420, at 22. Between 1990 and 1994, Alaska's tort filing rates per 100,000 population hovered between 139 and

Figure 3



count and classify civil cases affect filing rates as do economic, social and cultural factors. Many of the states in the low group[428] had significant rural populations and one or two large cities like Alaska.[429] Many of the states in the higher groups, on the other hand, had larger proportions of urban residents. Thus, Alaska did not seem demographically out of place with the other states in the lowest group. In short, although we can not exclude the possibility that Alaska's relatively low tort filing rate is related to fee shifting, neither can we conclude from these data that Alaska's Rule 82 perceptibly "chills" the filing of tort claims.

Although tort cases tend to take center stage in discussions of fee shifting, they do not reflect the complete civil litigation picture. Contract cases form a large part of the total civil caseload in most jurisdictions, including Alaska. Aggregate national trends for contract cases are difficult to pinpoint, since most states' contract filings have shown substantial year-to-year variation.[430] Research suggests that contract filing rates are tied to changes in the economy, with economic downturns leading to fewer contract filings over the next several years.[431] In Alaska, the number of contract cases filed in 1992 declined by 21 percent from the number filed in 1990.[432] Compared to the

150. In 1990 and 1992, Alaska's population-adjusted rates were greater than the rates in five of the twenty-nine states reporting. *See* NCSC STATISTICS, 1992, *supra* note 419, at 18. In 1992, Alaska's rate was greater than the rates in six of the twenty-nine states reporting. *See id.* In 1993, Alaska's rate was higher than the rates in seven of the twenty-nine states reporting. *See* NCSC STATISTICS, 1993, *supra* note 421, at 22.

[428] The low group included: Alaska, Colorado, Idaho, Indiana, Kansas, Maine, Minnesota, North Carolina, North Dakota, Puerto Rico, Utah and Wisconsin.

[429] Approximately half of Alaska's residents live in the city of Anchorage.

[430] NCSC STATISTICS, 1992, *supra* note 419, at 20.

[431] NCSC STATISTICS, 1993, *supra* note 420, at 26.

[432] *Id.*

trend in tort filings in 1990-1992, Alaska's contract filings declined more rapidly during the same period.

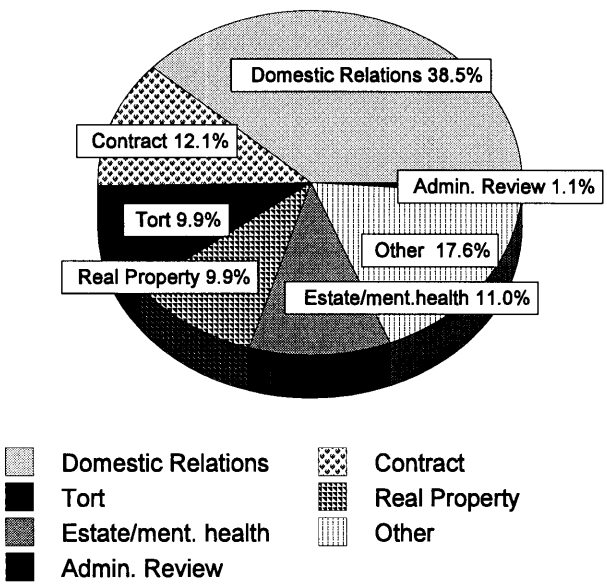
B. Caseload Composition

General filing trends do not reveal much about actual caseload composition. What proportion of cases in Alaska courts are personal injury or malpractice cases versus contract or other cases? Does Alaska have relatively fewer tort cases compared to other states? The National Center on State Courts has compiled data on national trends in caseload composition that help answer these questions. The national data indicate that contract, tort and real property suits together are the second-largest component of total civil caseloads, after domestic relations cases.[433]

Figure 4

National Civil Caseload Composition

Adapted from National Center for State Courts,1992 data for 27 states



The pie chart in Figure 4 shows that contract, tort and real property cases (general civil cases) made up about 32% of the total civil court caseloads in general jurisdiction trial courts in the United States in 1992.[434] Contract cases accounted for 12% of the national general civil total, and tort suits (including personal injury, malpractice, wrongful death, and property damage cases) and real property rights cases made up about 10% each.[435]

[433] National Center for State Courts, *Caseloads Rise in State Courts*, 1 NAT'L CENTER FOR ST. CTS. J. 1, 15 (1994). To improve the comparison, we omitted small claims cases from the national pie chart (Figure 1.17, *id.*).

[434] *Id.*

[435] *Id.*

Figure 5

Superior Court Civil Cases, Alaska 1992-93

Adapted from Alaska Court System Annual Report (1993)

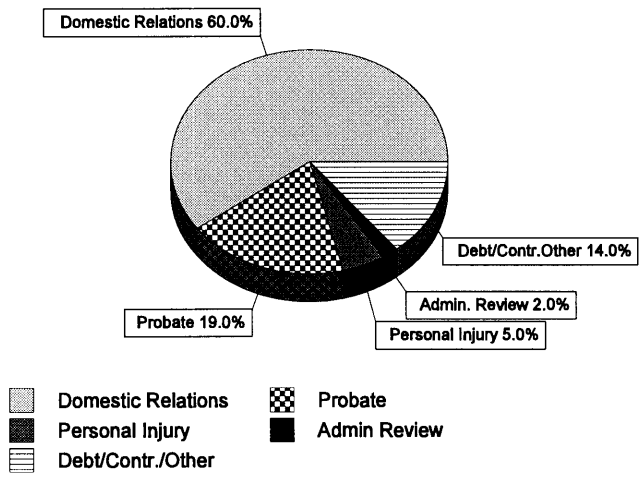


Figure 5 shows Alaska's caseload composition in the general jurisdiction trial court. The main difference between Alaska's total civil caseload and the national caseload data was that domestic relations cases (including civil domestic violence cases) made up a larger percentage of the total caseload in Alaska (60%) than in the national data (39%).[436] Probate (estate) cases also comprised a larger proportion in Alaska (19%) than nationally (10%).

Alaska's courts had somewhat fewer "general civil" cases in the total caseload than other states taken together. In Alaska, tort, contract, real property and other general civil cases made up about 19% of the total civil caseload.[437] Within the category of general civil cases, tort cases (personal injury and premises liability) were only 5%.[438] The differences between Alaska and the national figures may well arise from differences in ways of defining cases, but they also may reflect significant differences in the composition of Alaska's civil caseload. If they do reflect real differences, fee shifting may account for some or all of the difference. This evaluation did not consider all of the possible factors that could create a caseload in which domestic relations and probate cases constitute a relatively large percentage of the general trial court's work, and civil and tort cases make up a smaller-than-typical proportion of civil cases.[439]

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[436] *See* ALASKA COURT SYSTEM, 1993 ANNUAL REPORT, S-18 (Alaska Court System 1994) (hereinafter "ALASKA COURT SYSTEM 1993"). Note that the Alaska data may not be strictly comparable to the national data.

[437] *See* ALASKA COURT SYSTEM 1993, *supra* note 436, at S-18.

[438] *Id.* at S-32. A third category of general civil cases, described as "Other" by the court system, comprised 52% of the total. *See id.* This category may include real property cases.

[439] The types of cases that constitute the caseloads vary significantly by state. Alaska's caseload does not include enforcement/collection proceedings or temporary injunctions which many courts do count. Because neither these nor small claims cases which Alaska handles in the district court are counted in the superior court totals, the chart may skew the proportions of types of cases handled in the various courts enough to make it appear that Alaska has lower than average tort filings.

C. Trial Rates and Prevailing Parties

1. Trial Rates

Trial rates may vary as a result of fee shifting. Some have predicted that attorney fee shifting would encourage earlier case settlement.[440] Data collected by the National Center for State Courts showed that trial rates for civil caseloads (including domestic relations and small claims cases) in general jurisdiction courts in twenty-seven states in 1993 averaged 7.6%, with bench trials accounting for 6.4% of the total.[441] Alaska reported a total trial rate of 3.9% to the National Center for that time period, excluding domestic relations and small claims cases.[442]

In Anchorage in 1993, the state's general jurisdiction trial court resolved about 7% of its domestic relations cases by trial, and about 3% of its "other civil" cases by trial (other civil cases exclude domestic relations, probate and children's cases).[443] As with most jurisdictions, non-jury trials occurred far more often than jury trials. In the "other civil" category, non jury trials were over twice as common as jury trials (forty-seven non jury trials compared to twenty jury trials).

Figure 6 shows how Anchorage superior court disposition methods have varied over time.[444] Trials, both jury and non-jury have constituted a small percentage of case dispositions, remaining stable as a percentage of the overall caseload. As in most other jurisdictions, jury trial rates vary little from year to year.[445]

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[440] This is one of the purposes frequently stated for Alaska's Rule 82. See discussion in Chapter 4, *supra*.

[441] NATIONAL CENTER FOR STATE COURTS, 1993, *supra* note 420, at 14. The total trial rates included domestic relations and small claims trials in some states, but not in Alaska. As a result, Alaska's totals probably appear skewed towards the low end of the trial rate scale.

[442] *See* ALASKA COURT SYSTEM 1993, *supra* note 436, at S-30, S-34.

[443] Alaska's limited jurisdiction trial court which hears small claims cases, resolved about 8% by trial in the higher-volume locations. *Id.* at S-48.

[444] Data taken from Alaska Court System annual reports, 1989 through 1995. Much of the variation in methods of disposition other than trials may result from changing methods of categorizing cases or from changes in training for clerks entering data.

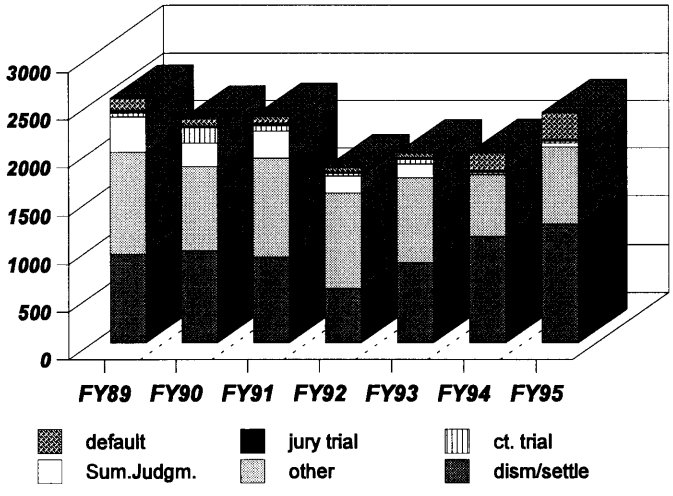
[445] NCSC STATISTICS, 1993, *supra* note 420, at 14. "Unlike bench trial rates . . . there is little variation in jury trial rates." *Id.*

Courts in most jurisdictions try tort cases less frequently than other civil cases. Data collected from the nation's seventy-five most populous counties from 1991-1992 showed that courts resolved only 3% of tort cases at trial.[446] Although more medical malpractice, premises liability and product liability torts went to trial,[447] only 2% of auto accident cases (the largest category of tort) went to trial.[448]

Figure 6

Other Civil Case Dispositions, FY89 to FY95

Anchorage Cases, Alaska Court Reports, 1989 - 1995



In the sample of state court cases collected for the current study, 3% of the civil cases concluded with a trial.[449] More tort cases in the sample—about 4%—went to trial than did other types of civil cases.[450] Nine percent of wrongful death cases in the sample and 28% of malpractice cases went to trial.[451] This finding shows the complexity of the possible effects of Rule 82. Alaska may have fewer tort filings overall, but more tort trials. Even a few

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[446] Hanson, Ostrom and Rottman, *Tort Change is Thorny*, 22 NATIONAL L. JOURNAL, at A21 (Jan. 30, 1995). *See also*, Franklin, *Learning Curve: Lawyers Must Confront Impact of Changes on Litigation Strategies*, 81 A.B.A. J. 62, 65 (1995) (data from National Center for State Courts from a project sponsored by Dep't of Justice Bureau of Justice Statistics). Another source provided data indicating that 4% of tort cases went to jury trial. *Taking the "Pulse" of Tort Litigation,* 1 STATE COURT REPORTER 3 (1995).

[447] Franklin, *supra* note 446, at 65. Medical malpractice cases were resolved at trial 6.9% of the time, premises liability cases 3.8% of the time, and product liability cases 3.3% of the time. *Id.*

[448] *Id.*

[449] About 67% of the 85 trials in the Anchorage state court case sample were non-jury trials. The sample was designed to be representative of cases to which Rule 82 would apply. See Appendix A for a detailed methodology.

[450] The sample was drawn from all civil cases closed in Anchorage in 1993. The database was weighted and included 40 tort jury and non-jury trials, of 737 cases. Included were all cases described as malpractice, property damage, wrongful death and personal injury. Data provided by the court to the legislature as a fiscal note for 1995 tort reform legislation also cited a trial rate of 4% for tort cases in Alaska in FY94 (fiscal note, CSHB 158 (FIN).

[451] Seven of the nine malpractice cases that went to trial were coded as non-jury trials. This high rate of non-jury trials for malpractice cases may be a coding error related to Alaska's statutory pre-screening procedure for medical malpractice cases (see A.S. § 09.55.536(1994)). The category also included legal and accounting malpractice cases, some of which may have gone to trial.

trials make substantial work for the court and increase costs to parties and the justice system. It may be that fee shifting discourages some plaintiffs from filing tort cases, but encourages at least a few of those who make the decision to file to pursue their cases more aggressively. Any savings made because fewer cases enter the courts may be offset by increased resources devoted to trials.

2. Prevailing Parties at Trial

Nationally, 16% of cases tried in 1993 were malpractice.[452] In Alaska, 11% were malpractice.[453] Plaintiffs' attorneys told us in interviews that they did not take as many malpractice cases to trial because about 75% of malpractice trial verdicts were for defendants.[454] None mentioned Rule 82 as a major factor in their decision. In fact, we found that the defendants and plaintiffs prevailed equally (50% - 50%) in the handful of Alaska malpractice trials.[455]

State court data collected for the current study contained six personal injury jury trials in which an identifiable party prevailed. Of those six trials, defendants prevailed in four, or 67%. In property damage jury trials, the split was 50/50 for plaintiffs and defendants. Only in civil/contract jury trials did plaintiffs claim an edge, with four of the six plaintiffs prevailing. Overall, the split was 50/50.

Plaintiffs fared better in non-jury trials for civil/contract cases, with ten of sixteen plaintiffs winning at trial (63%).[456] Plaintiffs did better at non-jury trials for personal

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[452] NCSC STATISTICS, 1993, *supra* note 420, at 24. Another source said that 6.9% of medical malpractice cases were resolved at trial. Franklin, *supra* note 446, at 65. Other national data indicate that medical malpractice cases account for 11% of all jury trials, and that jury trials are twice as prevalent among medical malpractice cases than among civil dispositions in general. Goerdt, Ostrom, Rottman, LaFountain and Kauder, "*Litigation Dimensions: Torts and Contracts in Large Urban Courts,*" 19 STATE COURT JOURNAL 24 (1995) [hereinafter, "*Litigation Dimensions*"].

[453] The variations in data about trial rates in malpractice cases may result from including more cases (all malpractice rather than just medical malpractice) or may result from using different databases. All sources appear to agree that malpractice cases went to trial more often than other types of torts or civil cases.

[454] National data supported this perception. One source said that 30% of malpractice verdicts were for plaintiffs. NCSC STATISTICS 1993, *supra* note 420, at 25. Overall, plaintiffs won about 50% of the time in jury trials (*id.*), consistent with Alaska's experience.

[455] These data come from the Anchorage civil state court case sample collected by the Judicial Council for this report.

[456] These data take into account only the cases in which one or the other party clearly prevailed; nineteen of the fifty-three non-jury trials ended in a dismissal as the final action.

injury suits, with all of the four plaintiffs prevailing (100%). In injunctive relief suits, defendants prevailed at two-thirds of the non-jury trials, and in non-jury malpractice and property damage trials, plaintiffs and defendants split fifty/fifty. These small numbers cannot state with statistical accuracy the likelihood that any particular case will result in a certain outcome, but they suggest that civil trials in Alaska may not favor either plaintiffs or defendants with any certainty.[457]

The outcomes appear consistent with the results of the attorney interviews. Attorneys gave the merits of the case the primary place in their panoply of reasons for taking the risks of trial. Client interest played a strong role, and attorneys did say that a few clients who saw their case as particularly strong viewed Rule 82 as an added incentive to go to trial. Most, however, saw the chance of having to pay attorney's fees as an added reason to avoid trial.

D. Federal District Court Data

Alaska's federal district courts apply fee shifting to some federal cases under the District's Local Rules.[458] We reviewed all federal cases closed in 1993 to which Rule 82 might have applied, either because they were diversity cases[459] or because the district court's local rules apply Rule 82. Three hundred and fifty-nine cases met these criteria. We reviewed the composition of this group of cases, as well as data from the district court's and Ninth Circuit's reports.

Figure 7

Federal Court Case Composition

Anchorage Civil Cases, Closed 1993

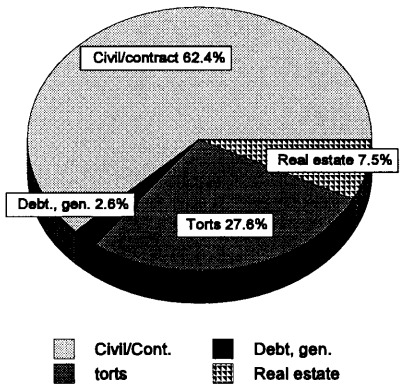

Figure 7 shows the composition of the federal cases. Tort cases made up about 28% (N=96) of the group of civil cases closed in the Anchorage federal district court in 1993 that we reviewed. Within this group, the seventy-five personal injury cases constituted the largest group (78%), with small numbers of malpractice (N=2), property damage

[457] Again, this finding is consistent with national data that suggest that plaintiffs and defendants prevail in about equal numbers in civil trials.

[458] D.AK.LR 54.3. See discussion in Chapter 3, *supra.*

[459] Rule 82 applies to diversity cases in federal court in which the court applies state law. Rule 82 would apply to diversity cases under Local Rule 54.3, even if it did not apply otherwise.

(N=7) and wrongful death (N=12) cases. For comparison, the Anchorage civil court caseload had 19% torts, and the national data showed an average of 32% torts in civil caseloads for selected jurisdictions.[460]

Among federal district court cases in Anchorage examined for the current study,[461] 5% of the cases concluded with a trial.[462] As in the state court in Anchorage, the federal district court in Alaska appeared to try a larger percentage of tort cases than of other civil cases. About 7% of federal personal injury cases went to trial, as did about 8% of wrongful death cases.[463] In the federal court cases, 5% of the "other contract" cases went to trial.[464] This pattern of relatively low tort filings and higher tort trial rates resembles that found for state court cases in the 1993 Anchorage database and in the statewide data.

E. Summary

Comparing Alaska's filing trends and caseload composition to those in other states was difficult because the data often were not strictly comparable. The comparison suggested that Alaska's tort filing trends resembled trends in jurisdictions that did not shift fees. The data supported a different conclusion for caseload composition. Alaska's state courts may have had a lower rate of tort filings than other state courts. We could not say whether lack of data comparability, other social, cultural and economic factors, or fee shifting caused the differences in caseload.

The finding that other jurisdictions had lower rates of tort trials compared to other civil trials while Anchorage had higher rates of tort trials emphasized the need to consider all aspects of case processing when looking for effects of fee shifting. Taken as a whole, these data suggest that if fee shifting affects case filing trends and trial

[460] The federal courts did not have any domestic relations cases in their caseload, and the composition of the civil court caseload varied in other significant ways. These data should not be used to draw firm conclusions about effects of fee shifting or other policies.

[461] From the group of all cases closed in the U.S. District Court at Anchorage in 1993, we excluded cases to which Local Rule 54.3 would not apply, and examined the remaining 359 federal cases.

[462] Of the nineteen federal cases resolved at trial, most (79%) were resolved without a jury. In both the state and federal cases, about 1% of all cases were resolved by jury trial.

[463] Neither of the two federal malpractice cases went to trial.

[464] Three of the four federal jury trials in 1993 were civil and contract cases.

rates in Alaska, the effects are complex, and may result in a net situation little different from that found in states that do not shift fees.

Chapter 6
Amount and Frequency of Attorney Fee Awards in Anchorage Cases

Another question addressed in this study is how Rule 82 operates in practice. How often are attorney's fee awards made, and how much money typically is awarded? To answer these questions, we examined groups of recently closed state and federal court cases in Anchorage. Generally, we sampled cases to which Rule 82 would apply. See Appendix A (Methodology) for an explanation of how we sampled the cases. See Appendix D (Composition of Case Samples) for a description of the types of cases in the sample. We also interviewed 161 litigation attorneys licensed to practice in Alaska.[465] We asked them to identify two of their most recently resolved civil cases and to answer a series of questions about each case.[466]

[465] The attorneys' names were drawn at random from a list of 240 attorneys whose names appeared in litigated cases filed with the state court system in Anchorage.

[466] Appendix B contains a copy of the interview questionnaire.

A. Frequency of Attorney's Fee Awards

How often does the court award attorney's fees? Although Rule 82 applies in principle to most state court civil cases[467] and to all federal diversity cases,[468] we did not expect to find many fee awards in the court case files. Until a case progresses to judgment, one party has not prevailed and the court would not make a fee award. We know from experience that most cases settle before that point. The data confirmed the hypothesis: Only about 10% of state cases contained a Rule 82 attorney's fee award,[469] and only 6% of the federal cases reviewed had a Rule 82 attorney's fee award.[470]

While we anticipated finding few fee awards in cases settled short of judgment, we were surprised that relatively few of the trial cases contained a fee award. Fee awards were made in only about half (52%) of the state court trial cases, and only 22% of the federal cases resolved at trial.[471] One possible explanation might have been that bench trials and hearings were difficult to distinguish in the case files. However, a review of the state court cases failed to support the hypothesis that hearings had been mistakenly coded as trials.

Because the court files contained little explanation for the relatively low number of fee awards in trial cases, we asked the judges and attorneys chosen for this study about situations in which a Rule 82 award would not occur after trial.[472] Eight of the 29 trial judges interviewed said they had not made fee awards in cases where neither party prevailed. Six said they did not make fee awards if both parties prevailed in some significant respect ("a wash"). Eleven judges reported that they did not make fee awards if the prevailing party did not ask for one—for example, if the party "forgot to file the motion," or "didn't bother to file a motion."[473]

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[467] See Chapter 4, *supra* for an explanation of the legal scope and application of the rule.

[468] U.S. DIST. CT. GEN. LOCAL R. 54.3. See Chapter 3, *supra* at note 199, for the text of the rule.

[469] The ninety-three cases in our state court sample that contained a fee award served as the basis of our description of attorney fee awards.

[470] Twenty federal cases contained a Rule 82 fee award.

[471] The federal court made fee awards in all of the jury trials (N=4). The extremely low incidence of fee awards in federal non-jury trials could reflect the ambiguity of a "trial" versus a "hearing."

[472] While the judges and attorneys could not speak with authority about our specific case file data, their general knowledge and experience with the civil litigation system was relevant.

[473] The current version of the state rule requires that the party asking for a fee award file a motion "within 10 days after the date shown in the clerk's certificate of distribution on the judgment .."

The attorney interviews supported the judges' observations. Of the cases attorneys described to us[474] that were adjudicated,[475] Rule 82 awards occurred in slightly over half (57%). The most common reason attorneys gave for lack of a Rule 82 award in adjudicated cases was post-judgment settlement (about a third of the cases). The attorneys reported that post-judgment settlements took a number of forms. Perhaps the most common form of settlement involved the prevailing party's agreement not to apply for fees in exchange for the loser's promise not to file a notice of appeal, or to dismiss the appeal ("the trade"). The attorneys reported that about twelve percent of the adjudicated cases lacking a Rule 82 award had settled for "the trade."

The next most common reason attorneys gave for lack of a Rule 82 attorney's fee award in an adjudicated case was that a state or federal statute precluded operation of Rule 82. Other reasons in order of their frequency included: neither party prevailed, a contract provision governed the attorney's fee award, the prevailing party failed to request a fee award for a reason other than post-judgment settlement, and the losing party declared bankruptcy.

Similarly, we were surprised at how few of the default judgments contained a fee award. Fee awards appeared in only 38% of the state cases that ended with a default judgment, and in only one of the twenty-four federal cases that ended with a default judgment. Further analysis of the state court default judgments without Rule 82 awards showed that almost all were based on causes of action arising out of negligence, while those that did contain fee awards involved other matters. This finding is explained by a 1986 amendment to the state statute authorizing attorney fee awards that prohibited fee awards in negligence cases concluded by default.[476]

Cases ending in a judgment other than a default were more likely than cases ending in dismissal or settlement to contain Rule 82 awards; however, not all the judgments

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[474] Recall that each of the 161 attorneys interviewed was asked to describe two recently resolved litigation cases.

[475] Adjudicated cases include those resolved by trial or dispositive motion.

[476] The 1986 tort reform legislation added language prohibiting fee awards to the prevailing party in uncontested negligence suits. *See* 1986 Alaska Sess. Laws ch. 139 § 4, amending ALASKA STAT. § 09.60.010. The statute currently reads in relevant part: "Unless specifically authorized by statute or by agreement between the parties, attorney fees may not be awarded to a party in a civil action for personal injury, death, or property damage related to or arising out of fault, as defined in AS 09.17.900, unless the civil action is contested without trial, or fully contested as determined by the court." The definition of "contested" is open to debate.

contained fee awards. About 59% of the state cases with a judgment other than a default had a Rule 82 award. Only about one quarter of the federal cases that concluded with a judgment other than a default contained a Rule 82 award. Again, the case files contained little information to explain the absence of a Rule 82 award.[477] In a very few instances (in less than 1% of the state case and in one federal case), the file contained a ruling by the judge that the parties must bear their own fees.

The judges suggested other reasons why cases with a judgment might not contain a fee award. Almost all of the judges said that they would not make a fee award if the prevailing party did not request one. They speculated that these cases might have settled post-judgment, with the prevailing party agreeing to forego a fee award in exchange for some concession from the loser as to an appeal, a payment plan, or other terms. As discussed above, interviews with attorneys for this study suggested that Rule 82 awards do play a significant role in post-judgment settlements, although it seems unlikely that post-judgment settlements accounted for all the judgments in which no fee award was made.

Five of the judges said they declined to make fee awards if the "equities" of a case weighed against it. The most common equitable scenario they identified as mitigating against a fee was where "one party prevails on the law, but the equities favor the loser." One judge gave an example in which the plaintiff sued the parents of neighborhood children who had burglarized his house. The judge dismissed the case because he found that the parents were not legally liable for the damage caused by their childrens' actions, but denied the parents' fee request. Two other judges reported denying fee awards "where the attorney in a small claims case has not improved the process," and where "neither side has clean hands."

One judge reported declining to make fee awards in small claims cases (to discourage over-litigation) and denying fee awards where the prevailing party was not paying for his attorney (for example, where the party was represented under a prepaid legal plan or by the state Attorney General's office). Another did not make awards when a fee award would result in a "windfall" for the prevailing party (for example, where fees for a contested summary judgment motion would exceed the actual attorney's fees incurred).

[477] One hypothesis as to why so few judgments contained fee awards was that some of them were stipulated lump-sum judgments that did not break out attorney's fees.

In a few instances, cases that settled contained a Rule 82 award (39 of the 439 state cases coded as "settled" and two of the 11 federal cases coded as "settled"). One explanation was described by two judges (one state and one federal) for cases in which the parties reach settlement on everything except fees. These judges instruct the parties to submit the fees to be decided on motion. Another explanation was suggested by our interviews with attorneys. Some attorneys described cases in which the judge had granted a partial or full summary judgment motion which had resolved the major part of the case, and then awarded attorney's fees on the motion. The attorneys then settled the remaining issues.[478]

Most discussions about attorney's fees occur in the context of tort cases. However, tort cases do not comprise the majority of cases in which fees are shifted. For example, the federal court made three quarters of its Rule 82 awards in federal civil and contract cases.[479] Only one (5%) award was made in a federal personal injury case[480] and one each in malpractice, injunctive relief, real estate and property damage cases. No awards occurred in a wrongful death case. In the state court sample, personal injury cases accounted for about 28% of cases and 16% of the Rule 82 awards.

B. Amounts of Attorney's Fee Awards

A second issue is the size of attorney's fee awards. How often does the prevailing party win a large fee award? In state court, about 39% of the Rule 82 awards were under $1,000. One third fell between $1,000 and $5,000, and about 27% exceeded $5,000.[481] The median Rule 82 award was $2,240.[482] The federal Rule 82 awards were larger. Most (60%) of the federal Rule 82 awards exceeded $5,000.[483] Thirty percent fell between $1,000 and $5,000. Only two were less than $1,000. The median Rule 82 award for federal cases was $10,854.[484]

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[478] The settlement usually involved waivers of attorney's fees. *See Ch*apter 7 for details.

[479] Recall that civil and contract cases accounted for about 60% of our federal cases.

[480] Recall that these were about 21% of the federal cases.

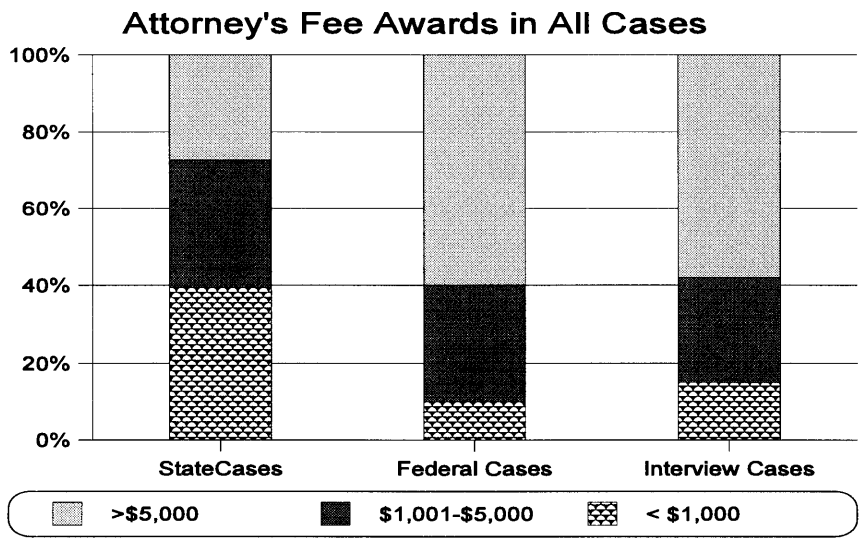
[481] Our state court sample contained only two awards greater than $50,000.

[482] The largest state court award was $120,846; the smallest was $120.

[483] The federal cases contained seven awards greater than $100,000. One reason for the difference may be that cases in federal court may involve larger damages and judgments than the average state court case. Another may be that attorneys spend more time on federal cases than on state court cases. *See* Kritzer, Grossman, McNichol, Trubek & Sarat, *supra* note 289, at 8.

[484] The largest award was $654,913; the smallest was $375.

Eighty-seven cases described by attorneys involved a fee award for which they knew the amount. Of these, 15% were less than $1,000. About 27% fell between $1,000 and $5,000. Fifty-eight percent exceeded $5,000. Eight of the awards described by attorneys exceeded $50,000. The median Rule 82 award described by attorneys was $9,000.[485] Fee awards in cases described to us by attorneys probably were larger than those in the case files because we asked attorneys specifically to tell us about recent trials or contested cases, thus biasing the attorney case sample toward the higher end of the case value range.[486] Also, attorneys may have included court costs with attorney's fees.



The data from attorney interviews suggest that fee awards in cases that went to trial or were otherwise strongly contested often climbed into the tens of thousands of dollars. However, the more representative data from the state and federal court files confirmed that cases cases containing large fee awards are outnumbered by smaller award cases.[487]

[485] The largest award was $650,000; the smallest was $74.

[486] Although the bar chart above compares fee awards in all cases, note that the data are not strictly comparable because of the different sampling techniques. Note also that the attorneys told us about both state and federal cases.

[487] Although fee awards in the hundreds of thousands of dollars were not the norm, attorneys' and litigants' knowledge that they could occur may nevertheless affect their behavior.

In the cases reported to us by attorneys, differences between the values of plaintiffs' awards and defendants' awards emerged with cross-tabulations. Calculations showed that 31% of defendants versus only 14% of plaintiffs received awards of $5,000 to $150,000. In other words, defendants told us about cases that resulted in larger awards more often than did plaintiffs' attorneys.

Chapter 7
Fee Shifting's Effects on Case Filing, Settlement & Litigation Strategy

This chapter explores, through attorney and judge interviews,[488] Rule 82's effects on the initial decision whether to file a lawsuit, litigation strategy, settlements, and on clients. Some predictions in the literature and in public debate seem to "assume that the impact of attorney fee-shifting rules will be general in that more or less litigation, encouragement of settlement, or whatever will exist across the board."[489] A better view, and one supported by our data, is that two-way fee shifting has "a number of effects on litigant behavior at many points in the bringing and conduct of a case...."[490]

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[488] We interviewed 161 attorneys and all trial court judges in Anchorage. Copies of the interview questionnaires we used are included in Appendix B.

[489] Rowe, *Predicting the Effects, supra* note 40, at 142.

[490] Rowe, *Legal Theory, supra* note 39, at 665. Rowe went on to say that "the present state of knowledge" rendered "the direction and strength of the effects...subject [to] much speculation and uncertainty." *Id.*

Following Rowe's analysis, we distinguish between effects of two-way fee shifting that occur before a case is filed, and those that occur after the case is filed and contested.[491] Thus, the first part of this chapter explores how fee shifting affects the client's and lawyer's decision about whether to file a claim. Part two describes the effects of fee shifting after the case has been filed and contested.

As Rowe and others had predicted, we found that understanding the effects of fee shifting requires examining several different factors related to specific cases.[492] Factors attorneys identified in our interviews included: the characteristics of the disputants (aversion to risk, prior experience with the legal system, financial resources), the nature of the case (type of case, strength of claims, value of case) and use of offers of judgment.[493]

A. Rule 82's Effects on Filing Cases

An important question asked about the effects of fee shifting is whether it discourages some potential claimants from using the courts.[494] One commentator predicted the likely effects thus:

> With a two-way rule there are so many cross-cutting effects and factors--encouragement from possible recovery of one's own fees, discouragement from possible liability for an adversary's fees, the presence or absence of risk aversion--that no *general* prediction of the relative overall effects of the American and English rules on the likelihood that prospective plaintiffs will pursue claims seems possible.[495]

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[491] *See* Rowe, *Predicting the Effects*, *supra* note 40, at 144.

[492] Rowe refers to the key aspects of the situation to which fee shifting applies as "situation factors." He defines situation factors as being of three main types: disputant characteristics, relative significance of the fee amounts and the stakes in the litigation, and the parties' perceptions of the strength of their cases.

[493] These factors correspond roughly to Rowe's factors, listed above.

[494] *See* Rowe, *Predicting the Effects*, *supra* note 40, at 143.

[495] *Id.* at 147 (citation omitted).

As we explain below, our data supported this view that the cross-cutting effects rendered generalization difficult.

1. Effects on Clients' and Attorneys' Decisions to File

We asked each attorney to recall an instance at any time in the past when Rule 82 played a significant role in a prospective client's decision not to file suit or assert a claim.[496] Only 35% of the attorneys interviewed said that they could. While the attorneys agreed that Rule 82 often affected clients in unquantifiable ways, few said it had played a pivotal or deciding role in clients' decisions to file.

Attorneys who said Rule 82 had not played a role in their clients' decisions to file most often said that the overall cost of litigation, not Rule 82, was the deciding factor. Defense attorneys who answered in the negative pointed out that Rule 82 did not apply when defending against a claim, except in the decision whether to assert a counterclaim.[497] A plaintiffs' personal injury attorney who had not seen any effect on his clients pointed out that the possibility of an adverse attorney fee award would not deter a plaintiff who was judgment proof because of a devastating injury. Another attorney said he had seen clients "register concern" over the possibility of an adverse fee award, but "it did not deter them from filing." One attorney told of a client of moderate means who believed so strongly in her employment case that she did not let the possibility of an adverse award faze her: "She recognized her [Rule 82] exposure and was willing to go bankrupt."

a. Ability to Withstand Adverse Award - Of the attorneys who did recall instances in which Rule 82 affected a potential client's decision to assert a claim, most emphasized the importance of the party's financial ability to fund the litigation and withstand an adverse award. For example, one attorney said that Rule 82, along with other cost variables, played a role in several of his smaller business clients' decisions not to file a lawsuit. An attorney who represented both injured plaintiffs and municipal entities said that "the people who don't go to court are those who just can't afford to lose."[498]

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[496] Notice that the attorneys' responses were not limited to their experience with the two recently resolved cases.

[497] Only a handful of attorneys told us that Rule 82 played a role in counterclaims.

[498] Of course, Rule 82 is not unique in its propensity to affect people of moderate means more than very poor or very wealthy people. Often, parties of moderate means are less able to hire a lawyer than are the very wealthy (who can afford to pay legal fees) or the very poor (many of whom are served

b. Risk Preference - As Rowe and others have predicted, the chilling effect depended to some extent on the individual client's aversion to risk.[499] Our interviews supported the idea that *some* plaintiffs are risk-averse (those with assets, i.e., something to lose) and thus more likely to forego filing. One attorney remembered potential tort claimants who were widows with "nice nest eggs." The attorney wanted to take the case for a contingent fee, but the widows decided not to sue because they believed the case would be difficult to win and they feared "the risk of losing their assets in a Rule 82 judgment."[500] A plaintiffs' attorney agreed that fear of a large Rule 82 award discourages "normal people with decent cases" from using the courts. Another attorney described a case in which he told prospective clients about "the risks" of a Rule 82 award, and "they never came back."[501]

An attorney who represented both large institutional and individual clients believed that "individuals, rather than corporations, seem more affected by Rule 82. Generally, the large institutional clients say, 'Yeah, yeah, yeah, we know about it and we'll take the risk.' Individual clients agonize more over whether a claim is worth the risk." One attorney who represented mostly small to large commercial entities (mostly businesses) summed it up this way: "The rule is most significant to middle-class clients; it doesn't really matter to large institutional clients or penniless clients."

Further analysis tended to support the theory that the "chilling" effect influenced individuals more than institutions. Among attorneys who spent more than half their practice representing plaintiffs in negligence actions (likely to be individuals),[502] 52%

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by Legal Services or other resources for low-income people).

[499] According to Rowe, "'risk preference' refers to parties' attitudes toward possible gain and loss under conditions of uncertainty. Someone who is 'risk averse' in a situation will place a negative value on uncertainty, preferring a smaller sure thing to a larger possible gain with equal net expected value. Someone who is 'risk neutral,' by contrast, will be indifferent among choices with equal expected values" (citation omitted). Rowe, *Predicting the Effects, supra* note 40, at 142 n.19. Individuals or small entities who do not make regular use of the courts ("one-shotters") are viewed as risk averse. Governments and larger businesses that use the courts regularly and tend to be well financed ("repeat players") are viewed as risk neutral. *Id.* at 142. The distinctions between "one-shot" and "repeat players" were first pointed out by Marc Galanter in a pair of articles published in 1974 and 1975 in LAW & SOC'Y REV.

[500] In situations like these, the potential claimants are deterred by the possibility of a very large adverse award, despite the fact that statistically awards of that size are not common (see Chapter 6).

[501] He added, however, that this was "not a common circumstance. Most people believe in their cause so strongly" that they are not deterred.

[502] National data show that individuals are plaintiffs in 96% of all tort cases. *Litigation dimensions, supra* note 452, at 13, Fig. 2.2.

said they could recall an instance in which Rule 82 had played a role in their clients' decisions not to file a lawsuit. Among attorneys who said more than half their practice consisted of representing defendants in negligence cases (likely to be insurance companies or large, self-insured entities), only 17% said they could recall an instance in which Rule 82 played a role in a prospective client's decision not to assert a claim or file a lawsuit.[503] Attorneys who spent more than half their time handling business and corporate cases were slightly less likely than the sample as a whole to recall a case in which Rule 82 chilled their client's access to the court (only 23% could remember an incident).

We also wondered whether in some cases, attorneys were using Rule 82 to discourage potential clients with weak or otherwise undesirable cases from filing. We asked attorneys whether they use Rule 82 to "screen out" potential clients with weak or otherwise undesirable cases. A few said that they did on occasion, although others said they would just be honest that they case was not a strong one. One of the attorneys who did use the rule to screen cases said, "You can use Rule 82 as a more graceful excuse when you've decided you don't want to take the case."

c. Strength of Claim - Attorneys also emphasized that the strength of the claim played an important role in this analysis, although the effects were somewhat contradictory. In general, attorneys reported that Rule 82 did not often deter people with strong claims from filing and it could encourage them. Said one attorney, "...I don't think it [deciding not to file a lawsuit for fear of an adverse attorney fee award] has ever happened with anyone with a very good case. Ever." An attorney defending a real estate matter who thought that the plaintiff had a strong case said "Rule 82 was the reason the plaintiff filed before looking into settlement possibilities."

On the other hand, Rule 82 could deter people with weak claims from filing. One attorney said that "Rule 82 assumed more importance" if the client had "a weak case." Another described an incident in which a prospective client decided not to sue over a real estate matter after the attorney explained Rule 82 and said that he thought the client had a weak case. One attorney said that Rule 82 affected clients' decisions "regularly when liability is looking weak and the client is of modest means (i.e., $10,000 in the bank.)" An attorney who specialized in employment law said it happens

[503] Many defense attorneys answered "no" to this question because their clients generally are not the ones filing the claims. However, the question was phrased to include claims that defendants do file, such as counterclaims and cross-claims.

"quite a bit with employment plaintiffs who learn of the potential Rule 82 loss. Numerous ones balk at the risk and move on with their lives."[504]

d. Costs in Relation to Stakes - Rowe predicts that "The larger the fee in relation to the amount at stake, the greater should be the influence of fee concerns."[505] Our data supported this prediction, at least in cases that the attorney could handle quickly and with a minimum of effort. Thus, in small or medium-sized collections cases (and also in meritorious but uncomplicated small claims cases) the rule may have encouraged attorneys to take cases that they otherwise would not. For example, about six of the attorneys interviewed had high-volume collections practices. Rule 82 played an important role in the economic feasibility of these cases. One attorney reported that he would not file many of his cases without the prospect of Rule 82 to "sweeten the pot."[506] He receives 10% of what is collected on the debt and keeps the Rule 82 award. Another attorney explained that his firm had a deal with a collection agency client to retain 20% off the top of whatever the firm collected. In his opinion, neither his firm nor the collection agency would find this deal economical without Rule 82. Another attorney described a $6,000 debt collection case. By keeping his fees within the probable Rule 82 amount, the attorney made it economically feasible for the small business client to pursue the matter. Two district court judges noted that Rule 82 played a significant role in the "profit margin" of simple collections cases. These judges thought parties would use the courts less often for collections cases if they could not use Rule 82 to make them economically viable.

One attorney described his experience with clients who focussed "on the upside" of a potential Rule 82 award; in those cases he ". . . explained to the client that [my law firm] is not going to wait for the Rule 82 award before being paid." Another attorney had experience with the rule sometimes encouraging clients to file litigation too eagerly because they think they would "see this big chunk of money back" or would receive their actual fees. Another attorney who sometimes handled "small" cases in district court agreed that in straightforward cases, a Rule 82 award "often puts us ahead, because I know how to do them for cheap." As part of her case strategy she always

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[504] *See Bozarth v. Atlantic Richfield*, 833 P.2d 2 (Alaska 1992).

[505] Rowe, *Predicting the Effects, supra* note 40, at 143.

[506] Posted on this attorney's wall is a framed check for $1.20 which represents his Rule 82 fees for collecting a $4 bad check.

requested a fee award. She often asked the judge to vary from the schedule, usually citing the losing party's unreasonable insistence on a trial.

2. Litigation Created by Rule 82

Our interviews revealed insurance-coverage cases in Alaska as a type of litigation uniquely created by Rule 82.[507] The Alaska Supreme Court has held that insurance contracts covering unlimited court costs obligate the insurer to pay Rule 82 attorney's fees as an additional item of policy coverage calculated on the full amount of a projected jury verdict rendered against the insured defendant.[508] Because the extra amount for Rule 82 fees can cause the value of the claim to exceed the face value of the policy, many insurance companies have sought to exclude attorney's fees from their policy coverage. Many claimants have challenged the validity of those Rule 82 exclusions. Attorneys identified the resulting policy-coverage disputes as a significant source of litigation. A personal injury insurance defense attorney said, "We always have to consider: Does the policy limit Rule 82s to the face value of the policy, and is the limitation effective?" Another attorney recognized the issue but said that "most insurance companies have figured out how to write effective exclusions by now."[509]

Still, insurance defense attorneys consistently reported spending time researching and negotiating coverage issues. An insurance defense attorney who reported spending 1-2% of his time researching and negotiating Rule 82 coverage issues said that the rule created "big stakes problems" when interpreting policy limits, with policy limit issues "always a sticking point" in settlement negotiations. A personal injury attorney

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[507] *See* Marer & Schuck, *Alaska's Rule 82 Fees: A Trap for Unwary Insurers*, DEF. COUNSEL J. 214 (1990). Insurance coverage cases also are discussed *infra* in the context of settlement strategies.

[508] *See Schultz v. Travelers Indem. Co.*, 754 P.2d 265, 267 (Alaska 1988); *Guin v. Ha*, 591 P.2d 1281, 1285-86 (Alaska 1979). The insurer's obligation to tender as settlement the maximum limits of insurance coverage is grounded in the insurer's legal duty to act in good faith to protect the interests of the insured. *Schultz*, 754 P.2d at 266-67. Marer & Schuck warn that ". . . . a company writing any type of liability policy in any of the other 49 states, can find itself paying many times the amount of policy limits if its insured is sued under Alaska law, depending on the jury's award of damages or even the amount of a settlement." Marer & Schuck, *supra* note 507, at 214.

[509] Under 3 A.A.C. 29.010, insurance companies could limit their Rule 82 exposure by making full disclosure to the insured. In the fall of 1995, the Alaska Division of Insurance issued a proposed order to repeal 3 A.A.C. 29.010 and replace it with a regulation that seemed to be more specific as to exactly what language insurance companies could use to notify their insureds of limitation of Rule 82 coverage. (Proposed Order on file with the Alaska Judicial Council). The Attorney General's office was reviewing the proposed order in September of 1995. Telephone Conversation with Assistant Attorney General Signe Anderson, September 11, 1995. The order probably will not be effective until January of 1996.

estimated that half of his Rule 82 practice centered on the insurance policy coverage question; another said coverage issues arose in his practice "twelve times a year." An attorney who handled both insurance defense and plaintiff personal injury cases reported that most of his federal practice involved diversity cases litigating the validity of the insurance company's Rule 82 endorsement.

B. Rule 82's Effects on Conduct of Case

A great deal of the debate over fee shifting concerns how it affects the conduct of a case. Understanding this variable depends in part on understanding how both sides interact with each other once a claim has been filed and contested.[510] We asked attorneys to tell us about two recently resolved litigation cases.[511] Our inquiries about these cases focussed on four specific areas: litigation strategy, settlement, approach to Rule 68 offers, and effect on client's decisions about the case.

1. Rule 82's Influence on Litigation Strategy

We asked attorneys, "Did Rule 82 influence your litigation strategy [in this case]?" Many (65%) of the attorneys interviewed denied that Rule 82 affected their litigation strategy in the cases described. Attorneys who said that Rule 82 had not affected their litigation strategy typically said that they litigated the case on its merits, regardless of Rule 82. Others paid no attention to the rule because the opposing party was judgment-proof, or because they believed that the case would settle.

Thirty-five percent of the attorneys interviewed said that Rule 82 did affect their litigation strategy in one of the cases they described to us. The rule seemed to affect plaintiff and defense attorneys similarly, as about a third of each group said that it affected their strategy in the cases described. These attorneys typically said it affected either their choice of forum, their approach to Rule 68 offers, or their approach to post-trial litigation.

a. Effect on Choice of Forum - Attorneys in some cases chose among federal court, alternative dispute resolution, and state courts with Rule 82. They weighed the type

[510] Rowe, *Predicting the Effects, supra* note 40, at 143.

[511] Appendix C contains a description of the types of cases attorneys described, fee awards in those cases and other information.

of case, other fee-shifting opportunities and their clients' various interests against the benefits or drawbacks of Rule 82. One of the attorneys recalled two instances in the past year in which Rule 82 played a role in his clients' decisions to resolve a dispute outside the courts (through arbitration or mediation) instead of litigating. One attorney who handled a Jones Act personal injury case said he considered Rule 82 when deciding whether to file in state or federal court.[512] One attorney reported filing an admiralty case in state court "just to get Rule 82 coverage." Two government attorneys (one who handled environmental pollution cases and one who handled antitrust and consumer affairs) said that they preferred federal to state court because federal court often offered a statutory claim that included 100% of the prevailing plaintiff's reasonable attorney's fees, rather than the partial compensation available under Rule 82.

b. Unique Effects on Litigation Strategy- Sometimes Rule 82 has a unique effect on litigation strategy in specific cases. An attorney who successfully defended a landowner against a lien foreclosure reported that because he viewed the plaintiff's claims as "entirely frivolous," he conducted the case with a "continuous eye on opportunities to shore up a future request to enhance the fee award."[513] Another attorney reported a legal malpractice case in which his opponent "may have asserted counterclaims based in part on Rule 82 considerations." He felt opposing counsel asserted one counterclaim as "an additional ground to neutralize Rule 82 for my client, and to provide him [opposing counsel] with a basis for a Rule 82 award." An attorney who handled employment law cases said that Rule 82 considerations "always" enter his practice "at the front end, in evaluating whether to file a counterclaim or rather assert the same issue as an affirmative defense in offset."

2. Rule 82's Influence on Settlement Strategy

The literature predicts different effects on settlement strategy. One observer suggested that the English rule "would probably have little effect or provide only a mild

[512] The other factor affecting that decision was his greater familiarity with state court.

[513] His Rule 82 motion requested 90% of his actual fees. He reported spending roughly twenty hours on Rule 82 issues, none of which he characterized as over and above what good lawyering would require. The judge disagreed with his position and awarded the 20% of actuals called for by the schedule.

stimulus to the rate of settlement."[514] While some economic analyses have predicted that fee shifting would decrease the likelihood of settlement,[515] most commentators believe that fee shifting would encourage settlement in many cases. Rowe expected two-way fee shifting to affect the likelihood, timing, and terms of settlement.[516]

To explore these issues, we asked the attorneys whether Rule 82 had influenced their settlement strategy in either of the two cases they described. In many (63%) of the cases, the attorneys said it had not.[517] Attorneys who saw no effect often said that the case had little chance of settling anyway, whether because the parties were "too far apart" or were otherwise determined to litigate.[518] Many said the Rule 82 amount at issue was "too small" to have any significant influence. An attorney whose client eventually got a Rule 82 judgment against him said, "My client was unreasonable and completely unwilling to settle. Rule 82 did not affect my client." Another said a Rule 82 award was "not collectible, anyhow." As one attorney explained, "You think of it [the Rule 82 award], but it has no significant influence" on settlement strategy.

In about 37% of the cases described (114 cases), attorneys reported that the rule did affect their settlement strategy. Where the rule did affect settlement strategy, the interaction was complex and depended in part on each attorney's perception of the strength of the case, the type of case, and the relative financial status of the parties. Attorneys told us that Rule 82 affected their estimates of what cases were worth, the timing of the settlement, their bargaining strategy, and post-judgment settlements.

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[514] Donohue, *supra* note 106, at 208. Donohue suggests that combining fee shifting with contingent fee contracts will make little difference to plaintiffs who do not believe they have much chance of success. He thinks that optimistic plaintiffs will be less likely to settle if they think they can avoid paying defendants' costs. *Id.* at 215.

[515] *See, e.g.*, Snyder & Hughes, *supra* note 106, at 348. "Recent works by Bowles and Hause have unified these considerations; both argue that parties often will settle claims to avoid costly litigation under the English Rule. Hause also argues that the prospect of greater litigation costs is likely to discourage some potential plaintiffs from filing claims. These refinements are particularly important for empirical analysis because they indicate that reforms such as the English rule, in addition to affecting litigant behavior, will change the set of claims that is observed at each stage. *Id.*

[516] Rowe, *Predicting the Effects, supra* note 40, at 154.

[517] Their answers depended on whether the case settled or went to trial. In about 43% of settled cases the attorneys said that Rule 82 had affected their settlement strategy, versus about a third of the cases resolved by adjudication.

[518] Recall that to some extent, the interviewers encouraged attorneys to talk about tried rather than settled cases, so the sample is somewhat biased in favor of litigated cases.

a. Likelihood of Settlement - The literature predicts that fee shifting could work both to encourage and to discourage settlement, depending on the circumstances of each case.[519] Our interviews confirmed that both influences occurred.

Some literature about fee shifting discusses settlement in terms of how fee shifting widens or narrows the "bargaining span."[520] Attorneys in our interviews found that Rule 82 fee awards contributed to settlement both by narrowing the gap between each party's net gain at trial and in other ways. They used Rule 82 fees as bargaining chips at all stages of cases to induce settlement. A common settlement tactic was an offer to waive attorney's fees. One attorney told of a debt case in which he waived his Rule 82 award in exchange for the defendant's agreement to make payments over time. Another collections attorney described a subrogation case in which he waived potential attorney's fees "as an incentive for the defendant to settle."[521] Another attorney described a case in which he agreed to waive Rule 82 fees on a non-opposed summary judgment motion in exchange for the losing party's promise to pay the judgment by a certain date.

A personal injury defense attorney described a case in which his client prevailed on summary judgment as to the core claim, leaving collateral issues for trial. He settled the case by waiving his right to Rule 82 fees on the core claim in exchange for dismissal of plaintiff's remaining claims. Another attorney told of a real estate foreclosure in which he offered to waive Rule 82 fees in exchange for the debtor's immediate lump sum payment. In one case described at a trial lawyers' focus group meeting,[522] the plaintiff gave up her potential punitive damage claim in a wrongful death case in exchange for the defendant's promise not to seek an attorney fee award against her if she lost at trial. An attorney who had a mediation practice said he "commonly persuades the parties to drop out claims" in exchange for waivers of interest and Rule 82 fees.

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[519] Rowe, *Predicting the Effects, supra* note 40, at 155-60.

[520] *See, e.g., id.* at 155. The "bargaining span" is the area of overlap between each of the parties' expected net at trial. *See id.*

[521] He added that he often used this tactic to settle cases but that it did not adversely affect his profit because his client paid him a percentage of the amount collected.

[522] To pre-test the attorney interview questionnaire, we administered it to members of a trial lawyers association.

Some of the literature predicts that in certain cases, fee shifting can act to discourage settlement.[523] About six attorneys described cases in which attorney's fees tended to act as "deal breakers." One attorney described a tort case with a strong defense in which he said that Rule 82 made him less willing to settle for "nuisance value" because he knew the plaintiff had to consider an adverse Rule 82 award. In a case in which the plaintiff's attorney felt sure he would prevail at trial, he made it clear that he would not willingly settle without attorney's fees. Another defense attorney who had a strong case said Rule 82 "made me more confident in the decision to go to trial." Two plaintiffs' attorneys told of clients in contingent fee cases who balked at settling because they reasoned that their awards would be bigger after trial when the attorney's fees were added. This effect may be more pronounced where one party believes that the opponent is an entity from which a fee can be collected. An attorney representing a municipal entity reported a case in which he believed his opponent was "less inclined to settle and more inclined to litigate" because he knew he could collect his fee award.

Some have predicted that fee shifting can drive parties further apart than they would be with no shifting if they have different estimates of the likelihood that the shift will occur.[524] An example of this dynamic occurred in a small claims action involving $1,000. The defendant's attorney noted, "If Rule 82 hadn't existed, this case would never have gone to trial. Each party thought they could get fees."

b. Terms of Settlement: Increasing and Decreasing Value of Claims - Particularly if the defendant's liability was fairly certain, defense attorneys told us that they increased their settlement offers based on the likely fee award.[525] One personal injury defense attorney said Rule 82 made him value the case described "a little higher" and that he had used it to convince his clients (insurers) to "come up with a little more money." Asked whether Rule 82 affected his settlement strategy in the personal injury case he described, a defense attorney said, "It's just an extra 10% added to the amount my

[523] For example, Donohue concludes that adoption of the British rule would decrease the settlement range by about 20%, although he adds that the settlement rate would not necessarily fall by that percentage. Donohue, *supra* note 106, at 208. Settlement rate is the actual rate at which parties settle while the settlement range describes the differences between the net amount that the plaintiff expects to receive and the defendant expects to pay if they proceed to trial. *Id.*

[524] Rowe, *Predicting the Effects, supra* note 40, at 146.

[525] Regional in-house counsel to a large insurance company in Alaska confirmed that the settlement value in a case brought under Alaska law is higher than that in most other states because of the fee-shifting rule.

client will pay in the end."[526] Another personal injury defense attorney described how Rule 82 affected his settlement strategy in one case: "I set out what I think the verdict will be, plus interest, plus costs, plus attorney's fees based on the schedule and then I work with that total." A plaintiff personal injury attorney agreed that "even though the written settlement says that each side will bear its own costs and fees, the Rule 82 amounts have been factored in along with liability, costs, and so forth."

In about four of the cases described, attorneys told us how Rule 82 had increased the settlement value beyond the face value of the insurance policy limit.[527] One case involved an injured plaintiff seeking to recover under an insurance policy that limited coverage to $50,000. In this case, however, the plaintiff's damages equaled or exceeded the face value of the policy. If plaintiff's counsel had made a "policy limits" demand and the insurance company had accepted the settlement offer, the insurance company would have paid the policy limit ($50,000) *plus* a Rule 82 award.[528] In this case, however, plaintiff's counsel demanded the face value of the policy ($50,000) plus 10% of the projected verdict if the case had gone to trial (damages were estimated at $250,000).[529] The case eventually settled for over $50,000.

Attorneys who represented insurance companies identified this scenario as an important way that Rule 82 affected their clients' decisions about when to settle a case, and how much to offer. As one defense attorney recalled, "after I explained about Rule 82 and policy limits, [the insurance company] followed my recommendations to pay and settled." Explained plaintiff's attorney, "[t]he insurance company pays Rule 82 fees on top of the policy, and they don't want to pay any more. The rule tells them they have to pay attention. It makes bad boys behave."

Only a handful of the attorneys said that Rule 82 had acted to discount the value of the settlement in either of the two cases they described. However, they more frequently mentioned this effect when later asked the more general question, "Do you

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[526] This same attorney's standard written case evaluation format included a subsection entitled "Alaska Add Ons." This section explained Alaska's Rule 82 and statutory prejudgment interest.

[527] See discussion *supra* at section A.2.

[528] Case law in Alaska interprets insurance policies that cover "costs" of litigation to include Rule 82 attorney's fees in addition to the face value of the policy. *Schultz*, 754 P.2d at 267; *Guin* 591 P.2d at 1285-86. If the plaintiff had accepted the offer, the court probably would have awarded about $3,250 in Rule 82 attorney's fees. *See* AK.R.CIV. P. 82(b)(1).

[529] *See* AK. R.CIV. P. 82(b)(1).

recall any instances in which Rule 82 played a significant role in your client's decisions about a case?" Most attorneys identified the party of moderate means whose case involved some risk as most likely to be affected. One plaintiffs' personal injury attorney recalled three or four times within the past year that fear of Rule 82 exposure caused a client with what he considered a good claim to settle for "less than the case was worth." He said that clients affected in this way by the rule typically "have assets." Another plaintiffs' personal injury attorney remembered cases in which a client's fear of a Rule 82 award persuaded the client to accept an offer that she thought "should have been rejected." An attorney who represented a municipality told of a case in which the "realistic possibility of an adverse fee award" contributed to the ultimate decision to "mitigate what the client otherwise felt entitled to, just to avoid the risk."

c. Effect on Timing of Case Settlement. - Some attorneys believed that Rule 82 created an incentive to settle earlier, especially in cases with strong liability.[530] A defense attorney confirmed that where the plaintiff has a "valid" cause of action, the defendant's Rule 82 "exposure is more clear," and the defense will probably "pursue settlement earlier."[531] Another defense attorney told about a breach of contract case in which he "advised taking an aggressive settlement strategy instead of protracted litigation," because the plaintiff's strong liability case "enhanced Rule 82 exposure."

Rule 82 created an even stronger incentive for defendants to settle earlier in cases in which the defendant's liability was clear and the damages were large. Since Rule 82 generally mandates fee awards for prevailing plaintiffs based on a percentage of the recovery, a large recovery means a relatively large fee award. One plaintiff's attorney said, "[j]ust whisper Rule 82 once or twice when the damages are so big [$50 million in this case], and the other guy gets religion to settle."

Defense attorneys sometimes were able to take advantage of plaintiffs' fears of an adverse Rule 82 award and encourage them to settle earlier. One, who said his case involved a "solvent plaintiff with a frivolous claim," announced that "we would look for

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[530] Rowe suggests that "fee shifting liberates the stronger side...from the concern about incurring further unrecoverable expenses" which it must weigh under the American rule. Rowe, *Predicting the Effects*, *supra* note 40, at 160. We found very few cases in which the attorney told us that fee shifting contributed to the stronger side's use of substantial delaying tactics, probably because Rule 82 provides only *partial* compensation for fees incurred.

[531] Regional in-house counsel to a large insurance company in Alaska said that Rule 82 encourages settlement in cases where liability is clear or probable.

all our fees if the case went forward."[532] Another said he sometimes announced during settlement negotiations that his client intended to pursue and collect a Rule 82 award if the case proceeded to litigation. Another said he "used Rule 82 as a warning to the plaintiffs after they rejected our settlement offer." Defense attorneys tended to use this strategy when they thought the plaintiff had a weak case. Another attorney told of a real estate case in which both sides feared an adverse Rule 82 award because it looked likely that both sides would prevail in some aspect. He said, "Everyone was concerned about Rule 82 exposure," and the case settled in mediation.

d. "Reality Check" - Rowe also predicted that "the greater penalty for mistaken estimating [of case strength and value] will produce the same effect of making both parties' estimates more realistic" under a fee-shifting system.[533] The attorney interviews supported this theory to some degree. When asked to describe the purpose of Rule 82, seventeen attorneys said that it functioned as "a reality check," or caused both parties to make a "full evaluation," or "early and realistic assessment" or "careful analysis" of the case. Another was more specific, saying it functioned as a reality check only for "nonjudgment-proof clients."

e. Post-Judgment Settlements - The attorney interviews revealed attorney's fee awards as an important element of post-judgment settlements. [534] Attorneys reported that the "appeal trade" also happened after the fee award. Of the approximately 167 cases in the interview sample resolved at trial or by dispositive motion, 41 were appealed post-judgment. In five of those 41 cases (12%), the appellant dropped the appeal in exchange for the appellee's promise not to collect attorney's fees.[535] An additional ten cases had settled for attorney's fees before the appellant filed a notice of appeal. Thus, in fifteen cases the party who was entitled to a fee award waived the award in exchange for the losing party's promise not to appeal, or dismissed the appeal in exchange for the prevailing party's promise to waive collection of the fee award.[536]

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[532] He said that "threat" brought the parties together for "fruitful settlement discussions."

[533] Rowe, *Predicting the Effects, supra* note 40, at 158.

[534] Another discussion of post-judgment appeals appeared in Chapter 6 in the context of cases in which the court did not award fees.

[535] In an additional three cases, the prevailing party offered "the trade" to settle the case, but the appellant rejected the offer.

[536] We do not know whether those ten appellants who settled pre-notice would have appealed if the appellee had rejected the offer of the trade. Thus, we can not tell from these data whether and how the trade affects appellate filings.

One attorney's comments explained the importance of this trade: "Rule 82 initially did not affect my settlement strategy [in this case], but it will have a major impact on my ability to settle the case before appeal."

Attorneys described other types of post-judgment settlements in which Rule 82 played a role. In one case, the plaintiff agreed to pay off her Rule 82 judgment to one defendant by handing over 5% of her gross recovery from another defendant. Another attorney recounted a harassment case in which the defendant prevailed partially on summary judgment and received a fee award. The case settled with the defendant agreeing to pay the plaintiff for the remaining claims, minus the Rule 82 award.

f. Judicial Settlement Conferences - We also asked judges how Rule 82 affects their ability to settle cases. Almost all of the judges reported regularly mentioning the rule and its consequences at some point during settlement conferences.[537] The timing and emphasis of the Rule 82 discussion depended on the individual judge, the parties and the case itself. Most judges said they brought in the rule as one of the costs of going to trial (along with fees for the party's own attorney and interest on the judgment) or when discussing the downside of going to trial and the risks of losing. One judge reported emphasizing the rule "when the attorney can't control the client" or when one side has "a crummy case." Another judge discussed the rule "if the parties have made offers," but not before then.

In deciding how much emphasis to give the rule during settlement discussions, one judge liked to wait for the parties to bring it up. Another judge's emphasis varied depending on whether liability was clear. Some judges said they routinely mentioned it "early," or "all the time," while others said they mentioned it "sometimes" or "at no particular time." While these judges generally felt it necessary to discuss the rule, none described it as a deciding factor in the settlement conference. Said one, "Rule 82 is just a thumb on the scale."

One judge purposefully did not discuss the rule during settlement conferences. He said that generally he "stays away from Rule 82 in settlement conferences." He viewed discussion of the rule as "an [improper] implicit threat." The only time he felt comfortable discussing it was "if the plaintiff does not seem to understand the rule."

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[537] Only one of the federal judges reported discussing the rule in settlement conferences "in diversity cases." The other two said they would mention it if it applied.

A handful of judges who normally mentioned the rule said that at times they would not. One said he would not discuss the rule in front of the client if he thought it would "embarrass the attorney." Another said he did not bring it up if the parties had reached a settlement without mention of Rule 82 fees. In those cases, he assumed that each side would bear its own costs and fees. Another tactic described by two judges if the parties reached settlement but did not agree on fees was to have the parties submit fees to be decided on motion. One judge remarked that an attorney fee award often was "emotionally charged money," and she did not mention Rule 82 if she sensed it might be a "deal breaker." Another judge would not discuss the rule with a party who had a strong case, because under those circumstances it was not an incentive to settle.

g. Effect on "One-Shot" versus "Repeat Players" - Attorneys' comments and commentators' predictions suggested that Rule 82 affects institutional (repeat-player) litigants more than individuals (one-shot players). To explore this, we sorted all the attorneys who said Rule 82 had affected their settlement strategy by case type and by whether the attorney represented plaintiff or defendant. The 113 case subset included personal injury, debt, other contract, real estate, malpractice and other civil cases. We analyzed four case types: personal injury, debt, real estate and malpractice.

In three of the four case types, individual litigants were more likely than institutional litigants to say that Rule 82 had affected their settlement strategy. In personal injury cases, plaintiffs (individuals) were affected by the rule more frequently than defendants (often corporations and insurance companies in our sample), by a ratio of 28 plaintiffs to 20 defendants.[538] In real estate matters, more defendants (often individuals) said they were affected by Rule 82 than plaintiffs (often lenders), by a ratio of ten defendants to four plaintiffs. In the five malpractice cases, plaintiffs (individuals) were more likely to be affected than defendants (insurance companies, doctors, professionals, and hospitals), by a ratio of 4:1. Debt cases were the exception to the trend. In those matters, the institutional plaintiffs (banks, collection agencies) were affected more often than the individual defendants (by a ratio of four plaintiffs versus one defendant). A quick review of the attorney's narrative comments in those cases explained the difference: the high-volume collections attorneys are paid a percentage of what they recover and said they often offered to waive their Rule 82 fees in exchange for the debtor's confession of judgment or payment plan. So, where Rule 82 influenced

[538] Note that attorneys representing insurance companies said in the interviews that their clients were affected.

individuals, the effect tended to be negative (fear of adverse reward), and where it affected institutions, the effect tended to be positive (waiving prospective fee award to induce settlement).

3. Rule 82's Effect in Cases Involving Rule 68 Offers of Judgment[539]

Rowe predicted that two-way fee shifting could have different effects depending on whether an offer of judgment provision were operating in the case.[540] This is because Rule 68 can reverse a fee shift that otherwise would occur. He hypothesized that the main effects of offers of judgment would be to encourage *earlier* settlement and to provide parties with a means to combat efforts at discounting settlement offers for expected litigation costs.[541] However, Rowe also predicted that an offer of judgment could make settlement *less* likely in cases in which liability were certain or probable and the parties disagreed about damages.[542]

Alaska has an offer of judgment provision in both state and federal courts. The state court's Rule 68, adopted in 1959, came from the Federal Rules of Civil Procedure.[543] The current state version of Rule 68 permits either the plaintiff or the defendant to make an offer of judgment. If the defendant makes a "successful" offer (for example,

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[539] For another discussion of Rule 68, see Chapter 4, *supra*.

[540] Rowe, *Predicting the Effects*, *supra* note 40, at 154.

[541] *Id.* at 166.

[542] *Id.* at 168. Rowe argues that once the defendant makes a formal offer, fee shifting goes from being tied to the liability result (on which the parties agree) to the damages outcome (on which the parties differ), and this new element of disagreement makes settlement less likely. *Id.*

[543] Originally, only defendants could make offers of judgment under the state Rule 68:

> At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued. . . .If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer.

Supreme Court Order 5 (Oct. 9, 1959). A 1987 amendment allowed the party making the claim to file an offer of judgment. *See* Supreme Court Order 818 (April 22, 1987).

In state court, Rule 68's promise to the successful defendant of "costs incurred after the making of the offer" always has been interpreted to include attorney's fees calculated under Rule 82. A 1987 amendment to Rule 68 made this practice explicit by specifying that "costs and attorney's fees" be awarded to the successful defendant offeror. *See* Supreme Court Order 818 (April 22, 1987).

offers $50,000 and the plaintiff recovers only $40,000), then the plaintiff must pay the defendant's post-offer costs and attorney's fees.[544] To better understand the interplay between Rules 68 and 82, we asked attorneys whether Rule 82 affected their approach to Rule 68 offers in either of the cases they described to us.

The data from the attorney interviews suggested that defendants found the offer of judgment provision created a strong incentive for plaintiffs to settle.[545] Approximately 67 (20%) of the cases described involved one or more Rule 68 offers of judgment. Although a few attorneys said that Rule 82 did not influence their approach to offers of judgment, many said that it did.[546] An attorney who said he was not affected said, "if the offer is made and you know you can beat it, then it's obvious that the offer doesn't make much difference."

Many attorneys said that Rule 82 did affect their approaches to Rule 68 offers. One experienced personal injury defense attorney said, "I filed a Rule 68 offer so I could get the Rule 82 fees. In general, Rule 82 influences my [Rule 68] strategy quite a bit." Another attorney confirmed that "because of Rule 82 I tend to make Rule 68 offers." One attorney said, "I use [Rule] 68 a lot, in about 75% of my cases, or wherever I have a commercial client who understands the cost of litigation--usually after preliminary discovery."

Defense attorneys especially liked the Rule 68/82 combination in cases where liability was clear but the amount of damages was at issue.[547] As one defense attorney said, "we knew we'd have liability against us and wanted to get a good offer out." By making a "good offer," she hoped to offset some of what her client would owe the

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[544] "If judgment finally rendered by the court is not more favorable to the offeree than the offer...the offeree must pay the costs and attorney's fees incurred after the making of the offer (as would be calculated under Civil Rules 79 and 82 if the offeror were the prevailing party). The offeree may not be awarded costs of attorney's fees incurred after the making of the offer." AK. R.CIV. P. 68.

[545] This is consistent with trends in England. Rowe, *Predicting the Effects, supra* note 40, at 165 (citation omitted).

[546] See Chapter 4 for an explanation of how Rule 68 interacts with Rule 82.

[547] At first blush, this finding seems to contradict Rowe's prediction that offers of judgment would make cases less likely to settle under these circumstances. However, Rowe went on to predict that other factors, such as risk aversion and diminishing marginal utility of wealth, would work against the offer of judgment to encourage settlement. Rowe, *Predicting the Effects, supra* note 40, at 168. Comments from our attorneys supported the theory that fear of an adverse fee award consuming the judgment created a great deal of pressure to settle. Also, it appeared that many attorneys, both plaintiff and defense, exchanged multiple offers of judgment throughout the case, as discovery progressed.

plaintiff. An attorney defending a contract case in state court said, "All it [the Rule 68 offer] does is set a floor we have to beat. It reallocates our probability of success and our estimate of the possible result for the client." A plaintiff's attorney confirmed that "anytime an offer is made by the defendant, we have to weigh the value of beating the offer. If we're wrong, it's devastating."[548] He added that depending on the defense firm, the fees could "skyrocket."

In state court, if the plaintiff makes a successful offer (for example, offers $50,000 and recovers $60,000), the defendant must pay an increased amount of prejudgment interest.[549] Attorneys told us about seven state court cases in which plaintiffs used Rule 68 offers.[550] Unlike the defense offers, however, plaintiffs' offers seemed to function more as negotiation tools and did not seem to be taken as seriously as defendants' offers. Said one defendant, "[The] plaintiff made lots of Rule 68 offers— he used it as a negotiation tool every few weeks." Another said, "Plaintiffs made Rule 68 offers, but we never took them seriously."

One issue respondents identified was whether to make Rule 68 offers inclusive or exclusive of costs and fees. When offers are inclusive, Rule 82 plays a role to the extent that "in order to calculate the Rule 68 award you have to calculate in the attorney's fees." A negligence defense attorney said he always made offers exclusive of pre-judgment interest, costs and attorney's fees because "[t]he judges try to find ways not to penalize plaintiffs with Rule 68 offers. So I don't give them the opportunity to adjust Rule 82s, costs and prejudgment interest in such a way that plaintiffs beat our offers." One defense attorney said she made both an exclusive and an inclusive offer to "try to beat them with both."

4. Effects on Clients' Approach to Case

a. In General - We wanted to distinguish between what effect Rule 82 might have had on the attorney's handling of the case versus the effect on the client. Did the rule have a more pronounced effect, or a different effect, on clients' decisions about the case,

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[548] One author has questioned the fairness of the client shouldering the burden when the judgment falls short of the Rule 68 offer, since litigants rely on their attorneys' advice in valuing their claims. Kordziel, *supra* note 176, at 456.

[549] *See* AK. R.CIV. P. 68. In this case, the plaintiff as the prevailing party also is entitled to costs under Rule 79 and attorney's fees under Rule 82.

[550] Plaintiffs in federal court cannot make Rule 68 settlement offers.

as opposed to their attorney's decisions? We asked each attorney to recall any instances in which Rule 82 played a significant role in a client's decisions about a case.

Forty-four percent could not recall any significant effect on their clients. They gave several explanations. Some pointed out that the client pays most attention to his or her own attorney's fees. The possibility of having to pay part of the opponent's fees as well just added to the existing expense. Some said the client relies most on the attorney's advice about whether the case is strong. Others said that the amount of fees at stake was too small to make a difference. Many said that their clients considered Rule 82 issues but their decisions were not controlled by the rule.

About half (56%) of the attorneys interviewed could recall at least one instance in which the rule had affected their client's approach to a case.[551] Breaking these answers down by area of practice yielded some surprising results. Those who spent more than half their time representing plaintiffs in negligence cases were *not* more likely than the sample as a whole to recall an instance in which their client had been affected (52%). However, 75% of the attorneys who spent half or more of their time representing *defendants* in negligence actions (i.e., insurance companies, professionals, corporations, and self-insured entities) said that they could recall an instance when their clients had been affected.

Twelve of the 44 defense attorneys who answered "yes" said that Rule 82 had played a role in their clients' decisions in the policy limits/bad faith situation. Said one, "Rule 82 fees are a big concern in coverage cases and very important to insurance companies and the endorsements on their policies." Said another, "If the amount [of the injury] is in excess of policy limits, we always make the good faith risk analysis." Said another, "especially in insurance policy cases, it plays a role in calculating what's a policy limits denial."

Attorneys who represented insurance companies recalled other ways that Rule 82 had affected their clients' decisions. One said that "out-of-state insurance companies hate to deal with Alaska because of peculiarities like Rule 82." He recalled past decisions in which Rule 82 played a role, but could not remember any in the past year. Others said that the rule affected the way insurance companies decided how to value

[551] Respondents' estimates of the frequency with which this occurred ranged from "more than 75 times" to "once or twice."

claims. For example, one said: "When I call up [Insurance Company X], Rule 82 plays a big role in the way they settle cases."[552]

Attorneys who represented individuals whose decisions had been affected by Rule 82 spoke most often of people who, fearing an adverse award, declined to file at all or settled earlier or for less than the attorney thought they deserved.[553] For example, one attorney remembered two plaintiff-clients in the past year who had "settled for less" because they decided they "wouldn't take the risk."[554] Another told of an "older couple" who were defendants in real estate litigation. "The other side proposed to settle; we probably could have gotten a better settlement. They were afraid of losing the land and also having to pay attorney's fees." Some attorneys also described cases in which fear of an adverse award inhibited a litigant from going to trial. Said another attorney, "the average person comes in with the average claim with average odds--Rule 82 will discourage filing the lawsuit unless they have nothing to lose. The average person will decide to protect their assets."

Other attorneys discounted the theory that the fear of an adverse award often inhibited litigants from filing cases or going to trial. Some attorneys said that clients did not hear or listen to their attorneys' warnings that they would have to pay the other side's fees if they lost. Others noted that litigants who represented themselves might not know about Rule 82.[555] One defense attorney recounted a case in which the *pro se* plaintiff did not take her Rule 82 exposure seriously until after she got her own

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[552] These results were at odds with some attorneys' beliefs that Rule 82 did not affect large, institutional defendants. One said it affected "individuals more than corporations." A plaintiffs' attorney thought that large corporations or insurance companies generally did not fear adverse fee awards, because they could "afford to pay."

[553] These comments were not inconsistent with predictions of fee-shifting's effects when combined with risk aversion. Rowe predicted that although fee shifting increases the possible range of outcomes compared to the American rule, two-way fee shifting "will make a risk-averse party more inclined to settle, without having a contrary effect on the adversary, and thus make settlement more likely." Rowe, *Predicting the Effects, supra* note 40, at 158-59. He went on to predict that risk aversion, "particularly when it is combined with the threat of a loss that may force a party into debt, or come out of modest savings with which one may be especially reluctant to part" could be strong enough to encourage settlements. *Id.* at 159.

[554] In total, twenty-four attorneys gave an answer along these lines when asked to recall a time that Rule 82 had affected a client's decisions in a case. Most said it had happened two or three times in the last year; however, two others said "ten times," one said twenty times and another said "25-50 times."

[555] Three attorneys (two plaintiff and one defense) mentioned experiences with clients who misunderstood Rule 82 to mean "full fees" rather than "partial fees." One plaintiff's attorney said it was "pretty typical" in his experience that clients misunderstood Rule 82 to mean "all fees" rather than partial fees.

lawyer. Another plaintiff's attorney said that "working people without means are not deterred by Rule 82 because bankruptcy does not intimidate them."

Another attorney said she often discussed the rule when her insurance company client "wants to file lots of motions that are not required and I want to discourage potentially vexatious conduct." This same attorney has used the rule to "calm a client who wanted to take the scorched earth approach." Another attorney said that Rule 82 "helps promote responsible litigation" by "giving an attorney who wants to see his client use litigation responsibly a persuasive argument." Another attorney said that he "sometimes" used the prospect of a Rule 82 award to "persuade clients to take or not take certain actions in a case."

b. Case-Specific - We also asked each attorney whether Rule 82 affected the client's decisions in either of the cases described to us. While over half of the attorneys interviewed had said they could recall an instance in which Rule 82 affected their client's decisions about a case, only 28% said that it had affected their clients' decisions in either of the cases described.[556] The difference may be that cases in which Rule 82 played a significant or unusually large role stuck in their minds, but were not common enough to appear often in the sample of two recently resolved litigation cases. Attorneys' responses to this question focussed primarily on settlement and tended to reinforce their previous comments about the rule's effect on settlement strategy.

C. Rule 82's Effect on Post-Judgment Litigation

One of the questions asked by jurisdictions considering fee shifting is how much attorney and judge time the system will demand. The interview comments revealed that fee shifting presents a potential drain on court and attorney resources in two areas: Rule 82 motion work and other post-judgment litigation related to fee-shifting issues. Other areas in which Rule 82 affects post-judgment litigation include litigation related to Rule 68 offers, bankruptcy filings, and appeals.

[556] Their responses also were interesting when compared to the percentage who said Rule 82 affected their settlement strategy (37%), and their litigation strategy (35%).

1. Post-Judgment Rule 68 Litigation

Some post-judgment litigation was related to Rule 68 offers. If an unaccepted Rule 68 offer was close to the amount of the judgment, the amount of costs, fees and interest sometimes could make the difference between beating the offer or not. While the interview data did not suggest that these motions happened often, they were resource-intensive. One attorney described a case in which he had made a $700,000 offer of judgment. The plaintiff did not accept the offer and ended up with a $600,000 verdict at trial. In that case, the plaintiff requested $90,000 in attorney's fees rather than the $62,000 under the schedule.[557] The defense attorney estimated that his firm had billed 25 hours to Rule 82 issues, all of them "warranted so that the award remains under our offer of judgment."

Another attorney recounted a Rule 68 offer that the plaintiffs had turned down and had failed to better at trial. He said, "I expect Rule 82 to be awarded, and I expect that both plaintiffs will appeal, asking for extra dollars over the schedule. They'll ask for enough extra to bring the total up to [the amount of the Rule 68 offer]."

2. Bankruptcy Filings

A third type of post-judgment litigation related to Rule 82 awards is bankruptcy filings. The party against whom an attorney fee award is made, usually the plaintiff, may shed the judgment in bankruptcy court. Although bankruptcy did not seem to be a frequent occurrence, at least two attorneys told us about cases in which the plaintiff had lost at trial and filed bankruptcy to avoid paying the Rule 82 award. One plaintiff personal injury attorney recalled a case in which the court assessed a substantial Rule 82 award against his client, a minor, who lost at trial. He remarked that even though the client was a minor, "I'm going to have to run him through bankruptcy." A defense attorney who successfully defended a wrongful termination case in state court complained that he never received a Rule 82 award because the plaintiff declared bankruptcy before the fees were decided.

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[557] This amount, in addition to pre-judgment interest and costs under Rule 79, would bring the total award over $700,000, thus making the plaintiff the prevailing party. In this case, the attorney phrased the offer of judgment to include all the components (e.g., costs, attorney's fees) of a potential judgment.

3. Waiver of Appeals

Attorneys also said in interviews that Rule 82 provided a bargaining chip for settling cases before or soon after appeal. In this scenario, the party with the attorney fee award (or the party entitled to the fee award) traded collection of fees for the losing party's promise not to appeal (or dismissal of the notice of appeal). One attorney said, "at the conclusion of every case we win, we get 'the trade;' you can count on it like snow in winter." This trade is discussed in more detail under Rule 82's effect on settlement, above.

Chapter 8
Other Consequences of Rule 82

This study identified a number of effects that Rule 82 has on civil litigation. A quick look at those effects revealed that some were intended and some were not.[558] Distinguishing between these two categories is important to policy makers and others who are considering fee shifting in their own jurisdictions. The first part of this chapter discusses the rule's intended purposes, including purposes articulated by the Alaska Supreme Court, purposes identified by attorneys in interviews, and purposes discussed in the literature. The second part of this chapter discusses three unintended consequences of fee shifting identified during this study.

[558] At least one other study of fee shifting also found unintended consequences. Susan Mezey and Susan Olson analyzed all federal court decisions from 1980 to 1990 involving the federal Equal Access to Justice Act. Mezey & Olson, *Fee Shifting and Public Policy: the Equal Access to Justice Act* 77 JUDICATURE 13, 16 (1993). The authors concluded that fee-shifting under the EAJA appeared to have been ineffective in achieving Congress' intent of deregulation, "because the goal of the legislation was dependent on intervening decisions by litigants, lawyers, and judges." *Id.* at 19. Their analysis showed that "fee-shifting statutes are a problematic method of achieving substantive legislative policy goals, especially if drafted as broadly as the EAJA." *Id.* at 20.

A. Intended Consequences of Rule 82

As discussed in Chapter 4, the Alaska Supreme Court has said that the primary purpose of Rule 82 is to partially compensate a prevailing party for the productive work done by his or her attorney.[559] Ancillary purposes identified by the court include discouraging bad faith or vexatious conduct, encouraging public interest litigation, and encouraging settlement and avoiding protracted litigation.[560] Commentators believe discouraging frivolous claims to be an important purpose of fee shifting.

We asked attorneys what purpose(s) they thought Rule 82 served and whether it achieved its purpose. Slightly over half (54.7%) of the attorneys interviewed said that the rule achieved its purpose. Although about 30% of the respondents identified partial compensation as the rule's primary purpose, interviewees saw several other purposes as well. An equal number of respondents cited case settlement as the rule's purpose. Some other purposes included "increasing plaintiffs' recovery," "forcing defendants to unnecessarily compromise claims," "providing access to the courts for those who would not otherwise be able to afford representation," "even the playing field for small plaintiffs," "discouraging litigation," "acting as a reality check," "encouraging careful evaluation of your case," "providing a negotiation tool," "encouraging settlements," "promoting economic justice," "promoting responsible litigation," and "preventing plaintiffs so inclined from having a 'free shot.'" The present survey also asked judges whether the rule achieved its goals of partial compensation, promoting case settlement, and discouraging frivolous litigation.

Attorneys who answered a written questionnaire on Rule 82 in 1992 gave an equally great variety of responses. Those respondents perceived beneficial effects on the litigation process, including a greater level of fairness, indemnity of the winner, a punitive function, a "private attorney general" effect, and a settlement incentive.[561]

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[559] *Stepanov v. Gavrilovich*, 594 P.2d 30, 37 (Alaska 1979); *Malvo v. J.C. Penney*, 512 P.2d 575, 587-88 (Alaska 1973); *State v. Abbott*, 498 P.2d 712,731 (Alaska 1972); *Preferred General Agency v. Raffetto*, 391 P.2d 951, 954 (Alaska 1964).

[560] In *Demoski v. New*, 737 P.2d 780, 788 (Alaska 1987), *State v. University of Alaska*, 624 P.2d 807, 817 (Alaska 1981), and *Davis v. Hallett*, 587 P.2d 1170, 1171-72 (Alaska 1978) the court established the rule that trial courts may award attorney's fees in cases involving frivolous litigation and unnecessarily contentious conduct. In *Miklautsch v. Dominick*, 452 P.2d 438, 441 (Alaska 1969) the court recognized that Rules 82 and 68 encourage settlement.

[561] *Kordziel, supra* note 176, at 453. The subcommittee's survey and the present study also were consistent on the issue of whether to rescind the rule. Eighty percent of the respondents to the survey

1. Partial Compensation

Attorneys interviewed for the present study most frequently saw partial compensation as the primary purpose of Rule 82.[562] Said one attorney, "it compensates someone for having to pursue or defend a claim." They believed that a "loser pays" rule promoted fairness: "it is intended primarily to shift litigation costs to the appropriate party," and "it is intended to serve what is a natural reaction at least at first blush--that justice includes full compensation."

Several doubted the rule's ability to achieve the partial compensation goal.[563] "It's supposed to compensate people; but it doesn't work that way. It doesn't compensate defendants because they usually can't collect the fees."[564] Others pointed out that the rule can both over- and under-compensate when compared to the actual time an attorney spent on a case. One attorney who typically represented plaintiffs in small dollar-value cases of medium complexity said that the small Rule 82 awards authorized by the schedule "have nothing to do with how much I'm going to have to spend to prove my case." Others complained that the monetary amount recovery schedule in b(1) can overcompensate. As one attorney said, "in a big case [a large dollar value case], Rule 82 is a windfall; it's not partial compensation whatsoever."[565]

Most judges thought the rule achieved its purpose of partial compensation, although three questioned whether the awards were high enough to do this in "any meaningful way." One was "troubled" that the scheduled amounts were "so much lower than what it really costs to hire an attorney." Three said the answer depended upon whether the prevailing party collected its award; one specifically thought that the rule did not

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said that the rule should not be rescinded, while 73% of the respondents in the current study favored retaining the rule. *Id.* at 467.

[562] Fifty of the 161 respondents (31%) identified partial compensation as a goal, although not all of those thought the rule achieved this goal.

[563] Note that one of the most frequently heard suggestions for changing the rule was to increase the fee percentages.

[564] Rowe questions the assumption that prevailing defendants deserve to be indemnified for their legal fees in all cases. Rowe, *supra* note 39, at 658-60. He argues that the prevailing plaintiff deserves to be made whole because the defendant has legally wronged him, while a defendant who prevails against a plaintiff's good-faith claim has suffered no legal "wrong." *Id.* at 658-59.

[565] This is more likely to be true with default judgments. The court requires the judge or the clerk to note actual attorney's fees in default judgments over $50,000.

achieve this purpose when the defendant prevailed in a tort case because defendants so rarely collected fee awards.

Judges also were asked whether they thought that the rule's schedule awarded adequate compensation. Most said "yes." Two thought the scheduled amounts were too low in small recovery cases and in tried cases worth less than $10,000. Said one, "the adequacy of the scheduled amount is in the eyes of the beholder." Another remarked that in a number of cases "the equities" favored either a larger or smaller award than the schedule permitted. One federal judge noted that the partial nature of the award helped discourage people from litigating small cases ("spending $10 to retrieve $5").[566]

2. Discourage Bad Faith/Vexatious Conduct

Discouraging bad faith or vexatious conduct often is described as one of the most important purposes of fee shifting. Numerous statutes and court rules authorize fee awards as a sanction for bad faith conduct. Yet only three of our 161 respondents identified this rationale for fee shifting. Said one, "the rule probably helps discourage vexatious litigation." Another said it "penalizes bad faith litigants," and the third said it was a "deterrent to defendants who would otherwise stonewall."

A related goal is that fee shifting should "punish" bad behavior. Rowe said that "Punishment for unjustified or undesirable behavior--sometimes in the transaction giving rise to litigation and sometimes in connection with the bringing or conduct of the litigation itself--finds considerable acceptance as a reason to shift fees in certain situations."[567] Two other attorneys identified a "penalty" rationale for the rule. Said one, "[the rule] penalizes the loser a bit by making him pay some of the costs." Said

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[566] Some argue this same point as a disadvantage of the American rule. Professor Ehrenzweig cited his own case of a moving company that cheated his family out of its belongings as an example of an "airtight" small claims case. Lacking the $100 for a retainer, he argued that the litigation should have been financed by a fee award against the moving company at the end of the case. *See* Ehrenzweig, *Reimbursement of Counsel Fees and the Great Society*, 54 CALIF. L. REV. 792, 792 (1966). One attorney interviewed said that awards of actual fees would overcome this "problem." Whether the encouragement of small claims filings is a desirable result depends on one's perspective--litigant or court administrator.

[567] Rowe, *supra* note 39, at 660. Rowe noted that at least three analytically separable notions underlie this rationale: deterrence of aggravated misconduct, imposing punishment on one guilty of such misconduct, and compensation for persons damaged by the aggravated misconduct. *Id.* Rowe concluded, however, that "only in certain situations" does punishment have any proper relationship to fee shifting. *Id.* at 661. Fee shifting should be used "to deter and compensate for the costs imposed by dilatory and harassing litigation tactics." *Id.*

another, "An attorney fee award is a penalty in the good sense of the word. The penalizing aspect of a fee award discourages undue delay and encourages settlement."

One attorney who thought the rule served a "good purpose" also believed that fee awards on occasion were too punitive: "...sometimes it's like beating the s--t out of a kid instead of just spanking him." Another attorney, who saw the rule as "a complete failure," said that it "further embitters the loser in a lawsuit." Said a third of his insurance company client, "For this insurer, getting the positive Rule 82 award is all about 'the sting' and not about compensating it for part of my fees. The award, even if collected, will have a negligible economic influence for my client."

3. Encourage Public Interest Litigation

None of the attorneys interviewed specifically mentioned the "private attorney general" goal for the rule.[568] Four, however, gave a related "access to the courts" rationale. One said that Rule 82 "provides access to the courts for plaintiffs who wouldn't otherwise be able to afford competent representation." Another said it allows a "poor plaintiff access to the courts." A third said, "In theory, it enables a person to take on a legitimate case and get counsel." The fourth said it tends to "even the playing field for small plaintiffs."

We interviewed eleven attorneys who handled cases involving large public interest attorney's fee awards. Four represented governmental entities against whom fees were awarded, and seven represented public interest litigants (two of these seven were private practitioners and five were members of public interest law firms.) The public interest lawyers uniformly described their roles as "private attorneys general."

Interviews with public interest attorneys suggested that the court's public interest exception to the normal operation of Rule 82 meets the goal of encouraging the filing of lawsuits that seek to enforce rights deemed to have special social importance. Prevailing party attorney's fees collected from governmental entities are an important

[568] Rowe noted that "a good many courts and legislatures" had authorized fee shifting on a "private attorney general" theory to a party who successfully brings an action seeking to enforce a right deemed to have special social importance." Rowe, *supra* note 40 at 662-63. The Alaska Supreme Court has created common-law exceptions to the operation of Rule 82 to encourage plaintiffs to raise issues of public interest in the courts. *See Anchorage v. McCabe*, 568 P.2d 986, 990 (Alaska 1977). The exceptions remove the risk of an attorney fee award against the unsuccessful public interest litigant and allow the prevailing public interest party to recover full, instead of partial, attorney's fees.

source of funding for some public interest law enterprises in the state.[569] Consequently, litigation against the state and its political subdivisions represents a significant portion of these public interest firms' cases.

We asked whether the public interest exception encouraged public interest lawsuits by shielding the plaintiff from the risk of an adverse fee award. The plaintiffs' attorneys agreed that without the exception, their clients might be chilled from free use of the court. One attorney said that this protection enabled many subsistence lawsuits to be filed against the State.

We asked whether the public interest exception encouraged lawsuits by authorizing full fees to the prevailing public interest party. Said one attorney, "If there was not the possibility of recovering attorney's fees, most of these cases are not worth litigating. But these are the cases that aren't about a monetary recovery. These are cases about clean water, about health and public safety, about subsistence rights. The value is incalculable."

Public interest lawyers also take clients who do not qualify for public interest status. Explained one attorney, "Even if we don't think public interest status is certain, we won't drop a case because they can't qualify. Then we look to (b)(3) and appeal to the discretion of the court. Most of these clients have no assets." In fact, all of the cases described by these attorneys involved active litigation over public interest status, as well as over which of the requested fees were "necessarily incurred."[570] Appeals involving the fee awards were filed in half of the cases described.

Private practitioners who represented a public interest client likened the situation to a contingent fee personal injury case. In both, the client cannot fund the litigation, and attorney's fees are deferred until the end. Neither private lawyer saw any adverse business impact from taking public interest cases.

Governmental lawyers uniformly criticized their public interest opponents for seeking excessive fees. One lawyer described a case involving questions about rights to a freshwater fishery. After issuing a preliminary injunction, the judge stayed the

[569] See Appendix E for a table summarizing the total amounts of costs, attorney's fees and interest that the State of Alaska has paid to prevailing public interest litigants in public interest litigation from fiscal year 1989-1993.

[570] The full fee award is limited to actual, reasonable fees necessarily incurred.

court case while the parties resolved the issues through an administrative process. Two years later, when the parties dismissed the case without prejudice, the public interest party requested more than $80,000 in attorney's fees associated with the administrative hearings during the intervening years.[571]

4. Encourage Settlement/Avoid Protracted Litigation

The goal of encouraging settlement was mentioned as often as the goal of partial compensation.[572] Said one attorney, "Rule 82 and interest provide sort of a 'slush fund' from which to negotiate." Some thought that the rule encouraged settlement only in certain circumstances. "It encourages marginal claimants and defendants to settle cases," or "in weaker cases it plays an important role in encouraging settlement," or "it compels settlement among solvent parties." Three specifically mentioned the rule's use "as a negotiating tool in settling" post-judgment.[573]

Defense attorneys believed that the rule could avoid protracted litigation, at least in some cases. One defense attorney said, "It may slow down people who have weak cases." One attorney specified that it helps avoid protracted litigation only among parties with assets: "It negatively impacts the ability of the middle class to litigate." Other defense attorneys believed that the rule actually encouraged more litigation by increasing the amount of the defendant's liability. Said one, "It's one of those additional things--more money to oppress defendants."

All but two of the judges believed that the rule helped promote case settlement to some degree or in some instances, although none characterized it as the driving force behind settlement. One judge said it helped promote case settlement, except for judgment-proof parties. Another said it encouraged settlement in "uncertain" cases.

Few judges saw the rule as discouraging protracted litigation. One judge described this goal as "an afterthought." Most thought that non-economic factors, not fee awards, fueled lengthy litigation. District court judges thought that the rule "had some small effect on ending protracted litigation earlier" or ended protracted litigation by

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[571] The state's attorney objected to the fee request for administrative actions that he equated to lobbying. The trial judge agreed, finding that an attorney's fee award was not proper absent an adjudication on the merits.

[572] Fifty of the 161 attorneys (31%) cited case settlement as a purpose.

[573] Chapter 7 discusses the rule's role in post-judgment settlements.

promoting case settlement. One judge believed that the rule reduced protracted litigation except for judgment-proof plaintiffs or defendants who were not deterred by a large award.

5. Discourage Frivolous Claims

Many believe that fee-shifting schemes can be justified by their expected or actual economic incentive effects.[574] Among the most widely accepted hypothesis is that two-way fee shifting, when compared to the American rule, would discourage weak or frivolous litigation through the threat of adverse shifting.[575] The respondents in this survey of experienced litigators did not see that as an actual result of fee shifting. Sixty-four percent of the attorneys in the interview sample said that Rule 82 did not help discourage frivolous claims or frivolous litigation.[576] Respondents who did not think the rule achieved this purpose reiterated the idea that the rule did not deter judgment-proof parties or very wealthy parties. Others said that some frivolous claim litigants were "so totally convinced" of the rightness of their position that the possibility of an adverse fee award did not matter to them, or that "folks who make them [frivolous claims] don't give a damn," or "that sort of hard-headed analysis isn't made by people who bring frivolous claims," or "people who bring frivolous claims aren't easily discouraged." A few attorneys who did not think the rule discourages frivolous claims did think that it "makes people think more seriously before filing marginal claims," or "makes plaintiffs make sure their cases are stronger."

The 36% who saw Rule 82 as discouraging frivolous claims usually said it "helps" or "would have some impact" but did not by itself prevent frivolous filings. A defense attorney noted that "where the case is weak, it gives the lawyer an 'out.'" A few said that the rule cut down on both frivolous and meritorious litigation.

About twenty attorneys believed that attorneys, not Rule 82, should bear the burden of reducing frivolous claims by carefully screening cases. Two wished that judges would resolve more state court claims on summary judgment, three wished that judges would use Alaska's Civil Rule 11 more aggressively, and one wished for a rule specifically sanctioning frivolous cases. Three others believed that the rule discouraged

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[574] Rowe, *Legal Theory, supra* note 39, at 653.

[575] *Id.* At 665-66.

[576] Nine percent had no opinion or were not sure.

frivolous claimants from pursuing their cases to trial but did not stop them from filing and settling frivolous claims for "nuisance value."[577] One attorney said he thought Rule 82 "encourages frivolous maritime claims to be filed in federal rather than state court."[578]

From the perspective of some of the district court judges, they thought the rule played a small role in discouraging claims that lacked merit from going to trial. Said one, "it lets plaintiffs with frivolous claims know it's not a free ride." One pointed out that it discouraged those claims only if the party had an attorney who could explain the rule's potential adverse consequences "in graphic terms." Three did not think it discouraged meritless claims, and one thought that it had little effect in *pro se* cases. One judge said, "there are a lot of cases that lack merit in which people think they're going to get huge amounts of money when they're not." Another commented, "the attorneys trying them don't think they lack merit."

B. Unintended Consequences of Rule 82

Civil litigation is extremely varied and complex. It is not surprising, then, that a general rule such as Rule 82 would have some unintended consequences when applied across the board to almost every type of civil case. One such consequence is specific to personal injury cases, usually ones taken on contingent fee, where the plaintiff has few assets. If the plaintiff wins, his award is increased by addition of Rule 82 fees and the insurance company pays the full award. If the plaintiff loses, however, the attorney fee award against him is not collectible because he has so few assets. Under these circumstances, Rule 82's two-way shift is transformed into a one-way shift in favor of the plaintiff.[579]

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[577] A plaintiff's attorney said the rule did not prevent him from "finessing small nuisance amounts from a defendant if my client has no money and is undeterred by Rule 82 exposure."

[578] Attorney's fees generally are not available in maritime cases filed in federal court under the federal court's admiralty jurisdiction (*see Kalmbach v. Insurance Co. of Penn.*, 422 F.Supp. 44, 46 (D.Alaska 1976)); fees are available in admiralty actions filed in Alaska's state court (*see Williams v. Eckert*, 643 P.2d 991, 997 (Alaska 1982)).

[579] This scenario is consistent with Florida's experience with two-way fee shifting in medical malpractice cases from 1980-1985. The medical lobby, which originally had lobbied for fee shifting, asked the legislature to revoke the law in part because their payouts were larger when they lost but they seldom could collect from the opposing party when they won. Snyder & Hughes, *supra* note 106, at 356 n.25.

1. Transformation of Two-Way Shift into One-Way Shift

The most frequent criticism of Rule 82 by personal injury defense attorneys was that they could not collect fee awards from the losing plaintiffs. Insurance personal injury defense attorneys said that successful defendants rarely can collect fee awards from plaintiffs, while plaintiffs "always" get their fee awards paid by the "deep pocket" defendant. Said one, "Plaintiffs don't pay, and so it [the rule] only works one way. When we go for it and try to collect our Rule 82 award, we're seen as ogres." A medical malpractice defense attorney with over ten years' experience could recall only one instance in which an unsuccessful plaintiff had the resources to warrant the defendant's attempt to collect a Rule 82 judgment. He said, "my client [the defendant doctor] was so angry at the plaintiff's conduct in the case that he asked me to try to collect the judgment. The plaintiff ended up declaring bankruptcy." Another personal injury insurance defense attorney could not think of a single litigation case in which liability was questionable and the plaintiff had any assets at all. Only twice in his eight-year career had he "bothered going after a plaintiff to satisfy a Rule 82 judgment." Yet another personal injury defense attorney said in almost 20 years of experience he "had witnessed no more than five instances in which prevailing defendants have collected their Rule 82 awards."

The attorney interview data supported the defense attorneys' observations but revealed a variety of reasons besides judgment-proof plaintiffs that made fee awards uncollectible. Of the 57 cases in the attorney interview sample in which fees were awarded and the attorneys knew whether they had been paid, 40% said that the fees had been paid, and 60% said the fees had not been paid.[580] Twenty-one of the 57 cases were torts (malpractice, admiralty, personal injury, auto accidents and fraud); and defendants prevailed in 14 of those 21 cases (67%). Of the 21 cases in which the defendant prevailed, the fee award was collected in only 4.[581] Of the remaining 9 cases, 2 settled and the settlement involved waiver of fees, the judgment in one was assigned, two others were on appeal, and in the remaining four the plaintiff was judgment-proof (one because he is a paraplegic).

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[580] Forty attorneys said they did not know whether the fee award had been satisfied. Some did not know because their motions were pending at the time of the interview, and some because other attorneys or paralegals handled the collection of judgments.

[581] In a fifth case, the losing plaintiff's attorney reported that his client will pay the fee award to the defendant.

On the other hand, some attorneys are more creative in their collection attempts than others. One personal injury defense attorney with over two decades of litigation experience reported that he collects at least some part of a Rule 82 award for his insurance clients "about 40% of the time."[582] To illustrate, he gave the example of an unsuccessful plaintiff with "four or five kids" who is "sending me $50 a month."[583]

2. Discouragement of Meritorious Claims

A handful of attorneys said that Rule 82 encouraged meritorious and non-meritorious claims. While the data do not suggest that this effect is particularly widespread, attorneys told us of instances in which the fear of an adverse Rule 82 awards deterred a potential plaintiff with a valid or decent claim from seeking redress through the courts. This issue is discussed more in Chapter 7, Section A.

3. Encouragement of Creditor Access to Courts

As discussed in Chapter 7, Section A, in small or medium-sized collections cases the rule may have encouraged attorneys to take cases that they otherwise would not. This consequence can be viewed as positive or negative, depending on one's perspective. Certainly increased debt filings create a burden on the court system that otherwise would not exist. On the other hand, one could argue that justice is better served by a system which makes the filing of uncomplicated and meritorious cases economical.[584]

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[582] This was the attorney who had assigned his fee award to a creditor of the losing plaintiff.

[583] This attorney criticized the loser pays rule, among other reasons, because "when it does apply to plaintiffs it often causes personal tragedies."

[584] *See* Ehrenzweig, *supra* note 566.

Part III

Conclusions and Recommendations

Chapter 9
Conclusions

A. Conclusions

This study has made a detailed examination of attorney's fee shifting in Alaska, both by collecting extensive data from case files and by conducting thorough interviews with numerous attorneys, judges and others with knowledge of the operation of Civil Rule 82. From these data we have been able to describe the rule's operation in some detail. However, it is important to remember that the study could not compare these data to a control group of cases in which Rule 82 did not apply, because Rule 82 applies to most civil cases in the state and to federal diversity cases.[585] Thus, we were not directly able to compare how cases would be litigated with and without the application of Rule 82. Nevertheless, the findings of this report should help Alaskans understand the effects of Rule 82, and assist policy makers nationwide to evaluate proposed fee shifting rules or statutes in their jurisdictions.

[585] The rule does not apply to divorce and a few other types of cases, which either cannot be compared because they differ in nature or are too few in number to make a statistically valid analysis.

1. Rule 82 Seldom Plays a Significant Role in Civil Litigation

The major conclusion of this report is that attorney fee shifting in Alaska seldom plays a significant role in civil litigation. An almost infinite number of factors structures the litigation of civil claims. These include, but certainly are not limited to, the type of dispute involved, the parties' personalities, the parties' financial resources, the strength of the legal claims involved, and the magnitude of the stakes. The possibility of having to pay the other side's attorney's fees is only a minor factor on this list.[586]

a. Awards were Relatively Infrequent - One measure of Rule 82's influence is the frequency with which fee awards occur. Rule 82 awards were made in only a small percentage of cases examined for this study: only 10% of the state court case sample and 6% of federal court cases. Even among cases resolved at trial or on dispositive motion (a small fraction of the total civil caseload), few fee awards were made, either because the case settled before the fee award, neither party prevailed, both parties prevailed in some respect, or a contract provision or statute governed the fee award.

b. Awards were Not Often Collected - Even in those few cases in which fee awards were made, they were not always paid. In only 40% of the 57 cases attorneys described that had a fee award[587] did the prevailing party collect the award. Parties did not collect awards because the person against whom the award was made was judgment-proof, declared bankruptcy, or because the prevailing party waived fees as part of a post-judgment settlement.

c. The Rule Did Not Often Affect Filing Decisions - In another example of the subtlety of Rule 82's effects, only 35% of the 161 experienced litigators we interviewed could remember *any* case in which the rule played a significant role in their clients' decisions to file a claim or assert a counterclaim. The overall cost of litigation and the attorney's assessment of the strength of the case played the largest role in the filing decision.

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[586] Conversely, the possibility of being reimbursed for some attorney's fees at the end of the case also is a minor factor on this list, with the possible exception of debt cases discussed later.

[587] An additional 42 cases in the attorney interview database contained fee awards; however, attorneys did not know in those cases whether the award had been collected.

d. The Rule Did Not Often Affect Litigation or Settlement Strategies - Rule 82 influenced litigation strategy in only 34% of the 305 recently resolved civil litigation cases described by these attorneys. It affected settlement strategy in 37% of the cases. Attorneys said that they litigated and made decisions about settlements on the merits of the case, regardless of Rule 82. In some instances, Rule 82 played no role because the potential fee award was too small or was not collectible.

While Rule 82 applies to most civil litigation in Alaska, our data suggested that it influenced only a minority of cases. Among the cases it did influence, its effects were subtle. It was part of the legal landscape (virtually all of the attorneys we interviewed said that they made sure their clients knew about Rule 82 before filing a litigation case), but it seldom played more than a minor role in civil litigation strategies.

2. The Effects of Rule 82 Vary

Keeping in mind that Rule 82 played only a minor role in most civil litigation in Anchorage, we examined those cases in which fee shifting did have an effect. Understanding Rule 82's effects in these cases requires careful attention to the context in which the rule operates: the stage of the litigation, the type of case, the parties' financial resources, the strengths of the parties' claims and defenses, and the parties' relative approach to risk.

a. The Rule Affected Parties of Moderate Means more Significantly than Others - The two factors that interact most decisively with Rule 82 to influence litigation strategy are the parties' financial resources and the strength of their cases. Generally, the rule affects parties of moderate means more than it does parties with more resources, and much more than parties with few financial resources ("judgment-proof" parties). The rule tends to discourage filing and encourage settlement for parties who perceive weaknesses in their cases. Conversely, it may occasionally encourage a litigant to pursue more aggressively a case that he or she believes to be especially strong.

The rule tended to discourage potential litigants with moderate financial assets (middle-class people) in all types of cases from initial filing unless they had a strong case. The weaker the case, the more likely the possibility of an adverse award. For those who had assets to lose to an adverse attorney fee award, Rule 82 assumed greater importance, along with the strength of case, in the decision whether to file.

We tried to measure the frequency with which Rule 82 played a role in discouraging potential litigants from using the courts. About half (52%) of the plaintiff's attorneys interviewed for this report could recall an instance in which Rule 82 played a significant role in their client's decision to assert a claim.[588] Cases described by these attorneys included tort, contract and real property cases. A few attorneys (mostly plaintiff's attorneys) thought the rule discouraged some plaintiffs of moderate means with "decent" or "average" cases from seeking redress in the courts, while most believed that the effect occurred only with plaintiffs who had below-average or weak cases.

Analysis of Alaska's civil litigation trends did not foreclose the possibility that Rule 82 discourages potential tort claimants from filing suit, although the picture is by no means clear. The rate at which tort cases are filed in Alaska's courts may be lower compared to other states, and torts seem to comprise a smaller proportion of the total civil caseload in Alaska than in other states.[589] Many factors could account for these data, including cultural, social and economic factors, local legal culture, lack of comparability of data, or Rule 82. Moreover, Alaska's overall civil filing rates are very close to the median for jurisdictions which do not shift fees. Attorneys interviewed for this study did not believe that Rule 82 discouraged indigent or otherwise judgment-proof plaintiffs from access to the courts. Further, over half (55%) of the attorneys denied that the rule discouraged potential plaintiffs with "frivolous" or extremely weak cases from filing, although some thought that it did.[590] Thus, if the rule plays a role in discouraging potential tort plaintiffs from using the courts, its impact is selective and depends heavily on case strength and parties' assets.

Contract and debt cases presented a slightly different picture. In some small collection actions, debt cases, and meritorious but uncomplicated small claims cases, attorneys and judges believed that the rule actually encouraged filing. For at least some of these cases, the probability of a fee award at the end made filing economically feasible, where otherwise it may not have been.

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[588] Note that a few of these attorneys could have been referring to cases in which the rule encouraged filing.

[589] On the other hand, some evidence suggested that tort cases go to trial more often in Alaska than elsewhere. It may be that fee shifting discourages at least some plaintiffs from filing, but encourages those who do to pursue their cases more aggressively.

[590] Thirty-six percent said it did discourage frivolous claims, and 9% did not answer or had no opinion.

b. The Rule Increased Filings in Some Cases - Rule 82 contributed to increased filings in other ways. Among the cases that would not be found in a jurisdiction that did not shift fees were insurance policy limits/bad faith cases and appeals of fee awards. Parties may file too few of these cases to affect statewide trends,[591] but they did consume a substantial amount of time for some attorneys (insurance defense) and a small to moderate amount of time for attorneys with appellate practices. The supreme court justices did not seem to think fee award issues consumed undue judicial resources, although jurisdictions adopting fee shifting for the first time could probably expect appellate judges to spend a moderate amount of time at the front end establishing case law on fee-shifting issues.

c. The Rule Had Little Effect on the Filing of Frivolous Claims - Of particular note is our finding that the rule did not seem to affect the filing of "frivolous" claims.[592] One obvious problem with this finding is the difficulty of distinguishing a "frivolous" suit from one that is merely below average or weak in some aspect (it depends upon one's perspective). Another problem is a lack of information about the volume of frivolous cases.[593] Comments from attorneys and judges in the current study suggested that "frivolous" litigation is driven by factors generally outside the influence of Rule 82, particularly noneconomic factors. These factors include litigating for a principle or because of emotion. A few attorneys in the current study told about cases in which they thought their opponent had evaluated the case incorrectly at the beginning, had gotten the client's hopes up, and then felt obliged to follow through with litigation. Two attorneys told about cases in which their clients "unreasonably" insisted on trying the case against the attorney's advice and lost badly.

d. The Rule's Effects in Settlement Strategy Often were Contradictory - The rule had moderate and often contradictory effects on settlement strategy. It increased the value of reasonable cases, pushed strong cases towards trial, and caused some plaintiffs to discount their claims. In tort cases where a claimant had a strong case and the damages were substantial, Rule 82 encouraged the defense to settle a case earlier than

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[591] The increased litigation in these areas may be offset by the chilling effect discussed previously.

[592] Recall that 55% of the attorneys interviewed for this study denied that the rule discouraged potential plaintiffs with "frivolous" or extremely weak cases from filing, although thirty-six percent thought that it did. Nine percent did not answer or had no opinion.

[593] An important topic for future study would be a systematic empirical evaluation of frivolous cases.

it otherwise might (the likelihood of a large adverse fee award after trial encouraged settlement short of trial). For optimistic plaintiffs, the likelihood of increasing total recovery with a fee award after trial discouraged early settlement, at least where the case was being handled under a contingent fee contract. It encouraged settlement in some cases by increasing the stakes, while it discouraged settlement in a few by driving the parties' offers further apart. The rule caused some litigants, most noticeably plaintiffs with assets who feared adverse awards, to discount their claims. It influenced some litigants with especially strong cases to inflate their claims (attorneys who represent insurance companies said they automatically add 10% to the value of claim because of Rule 82).

Given the rule's ability to encourage settlement in many types of cases, does the rule put undue pressure on some litigants to settle?[594] The answer depends on the context. Plaintiff's attorneys thought that the rule sometimes unduly pressured clients of moderate means to settle for less than they otherwise felt they deserved. This seemed true in all types of cases, including contingent fee personal injury cases and contract cases. Some defense attorneys also claimed that the rule put undue pressure on their insurance company clients to settle in policy-limits cases and cases against judgment-proof plaintiffs. Some evidence suggested that cases in Alaska were filed and settled for "nuisance value," although these data did not permit us to say whether it happened less here than in American rule jurisdictions.

Judges were asked what changes they would expect to see in their courts if the supreme court revoked the rule. A slight majority said that "a few more cases would go to trial that currently settle," or "litigation might increase by a small percentage." One judge expected to see fewer parties filing fewer non-tort lawsuits, especially those in which they could recover little money.[595]

A large minority of the judges predicted that if the court revoked the rule the only change in their courts would be "less work ruling on fee motions." These judges either did not believe that Rule 82 promoted case settlement, or they made few fee awards

[594] In the 1992 survey of Bar members regarding Rule 82, 69% of respondents did not believe that Rule 82 put "excessive pressure on moderate income people to settle valid claims." Twenty-four percent thought that the rule did exert excessive pressure to settle on these clients.

[595] One criticism of the American rule is that "the little man" in small suits cannot afford to file justified suits because they recover only small damages if they prevail, not enough to cover the attorney's fees, and attorneys do not take these cases on contingency fees. *See* Ehrenzweig, *supra* note 566, at 795-96.

because of the nature of their caseloads. The federal judges in particular reported making very few Rule 82 fee awards.

3. A Majority of Alaska Practitioners Like the Rule

Seventy-three percent of the attorneys in our interview sample, a representative cross-section of Alaska attorneys who used the rule, recommended that the court retain it.[596] Similarly, 80% of the 508 attorneys responding to the 1992 supreme court survey voted to retain the rule.

A notable minority (35%) of attorneys in the current study who spent half or more of their time defending negligence cases wanted to get rid of the rule. These attorneys believed that the disadvantages to their clients of increased payouts outweighed any advantages of recouping trial costs, using Rule 82 as a hammer (also with Rule 68 offers) to force settlement, or discouraging marginal or frivolous claims.

On the other hand, 96% of the attorneys who spent half or more of their time handling business and corporate matters wanted to keep the rule. These attorneys, who often represented creditors and other "repeat players," believed that the advantages for case settlement and increased recoveries outweighed any disadvantages. Like the Bar as a whole, plaintiff's attorneys who favored keeping the rule (70%) thought that the advantages of higher recoveries outweighed any chilling effects or undue pressure to settle on their clients. It seemed that attorneys who had an adequate portfolio of cases to choose from -- i.e., who could choose strong cases-- believed the rule worked to their advantage more often than not.

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[596] Many of the attorneys who wanted to keep the rule suggested changing it. Most of their suggestions amounted to "tinkering," not fundamental changes. About a dozen attorneys wanted to increase the percentage recoveries for monetary and/or nonmonetary judgments. Other suggestions included: cap the nonmonetary judgment recovery amount; go back to the pre-1993 rule; make an exception in employment cases; increase to full fee recovery; change fees in default judgments to a percentage of actual fees; remove the distinction between "contested" and "contested with trial;" link the amount of the fee award to the parties' relative reasonableness in settlement negotiations [this approach currently is forbidden by case law. *See Van Dort v. Culliton,* 797 P.2d 642, 645 (1990)*; Myers v. Snow White Cleaners,* 770 P.2d 750, 752 (Alaska 1989)]; eliminate attorney's fee awards for the defense in plaintiff personal injury cases absent a finding that the case was frivolous; require the plaintiff or the plaintiff's attorney to post an "attorney's fee bond" in personal injury cases; exempt smaller-value cases from the rule; give trial judges more discretion in making fee awards; give trial judges less discretion in making fee awards; and consider the relative wealth of the parties. The fact that so many wanted changes suggests that attorneys have different goals for the rule depending on their practices. They suggested the changes that would most benefit their clients or themselves.

To sum up, the three most apparent effects of Rule 82 were its effect of discouraging some middle class parties from filing cases that either wealthy or poor plaintiffs would file; its effect of discouraging some suits (or defenses) of questionable merit; and its effect of encouraging litigation in strong cases that might otherwise settle. The first effect appears negative, although its impact is minimized because it seldom occurs and because judges have the discretion to mitigate it under the current rule. The second effect seems positive, and the third may be positive or negative, depending on the observer's perspective. Increased litigation burdens the courts. On the other hand, certain legitimate suits may only be possible with the award of attorney's fees. Examples include the pursuit of relatively small debt cases, some types of public interest suits, and meritorious but uncomplicated small claims cases. Finally, a majority of attorneys and judges in Alaska believe the rule works in a positive way more often than not. The majority favor keeping the rule, although a significant minority of insurance defense practitioners favor repeal.

4. A Word About the Limitations of the Data

Any attempt to empirically isolate the effect of a specific factor on the conduct of civil litigation is difficult at best. Realizing this at the outset, we tried to design a study that would use information from a variety of sources, knowing that each would suffer from its own shortcoming. Examining overall filing trends or caseload composition gave part of the picture; but the data often were not available in a useful form, were not entirely comparable between jurisdictions, or may not have been comparable within a jurisdiction from one year to the next (for example, the court may have decided to count cases differently). Information gathered directly from court files yielded solid data on the most basic questions (Was there a fee award? How much was the fee award?), but did not begin to explain what happened outside of the courtroom, before the case was opened, or after the case was closed. (Why was there no fee award? Did the case settle, and if so why? What were the terms of the settlement?) Interviews with practitioners answered many of the questions raised by the court data and shed light on how the litigation was conducted outside of the court, but practitioners' perspectives were limited and sharply shaped by their own experiences (for example, a practitioner who advocated only for insurance companies in negligence cases had a very different perspective on fee shifting from one who advocated primarily for business clients in debt cases.) Judges had a wider perspective but did not have access to information about what happened outside the court case. When interpreting the data from these various sources, we tried to be mindful of both their shortcomings and their strengths.

The theoretical framework established by others who have thought and written about fee shifting greatly assisted in interpretation. In general, many of the findings of this study were consistent with predictions made by the most thoughtful of the commentators—those who predicted that the effects of two-way fee shifting would be subtle, complex and often contradictory, and would vary depending on case characteristics and disputant characteristics.

Chapter 10
Recommendations

A. Recommendations

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

1. Recommendations to Alaska Policymakers

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

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

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

If the Alaska Supreme Court intended to set defendant and plaintiff recoveries the same, it would be more effective to hold them both to a percentage of actuals. Another possibility is to base fee awards on the amount of recovery (and in the event of no recovery, on the amount in controversy).[597] This approach would ensure that both plaintiffs and defendants recovered fees based on the same schedule, and it would increase the predictability of the defendant's fee award. Drawbacks are that plaintiff's attorneys would have to estimate time spent and document it with affidavits or time sheets (in certain cases, like contingent fee and high-volume collections cases, they do not keep time sheets); and parties probably would disagree about the amount in controversy in the event of a defense verdict, requiring parties and judges to spend more time than they currently do settling the amount of fees. Also, because the amount of an attorney's fee award to a successful plaintiff might be less predictable, Rule 82's influence in settling cases might decrease.

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

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

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

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

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

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

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

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

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

2. Recommendations to National Policy makers

Our primary recommendation to national policy makers is to carefully think through the often-conflicting effects of shifting attorney's fees before adopting wholesale reforms. The subtle and complex interactions of fee shifting with other aspects of the civil justice system urge caution. Just as Alaskans should exercise caution in considering changes to the present system, other policy makers should approach overall change in fee-shifting practices with great caution.

A primary reason for this recommendation is that attorneys and judges in state courts nationally are neither familiar nor comfortable with an attorney's fee-shifting rule. Adopting a totally new system inevitably brings substantial disruption and added work to the justice system. Given the two-sided and often minor nature of Rule 82's effects, any substantial disruption is arguably unjustified.

Any reforms that involve attorney's fees nationally or in other states should carefully analyze the effects of fee shifting on different types of cases (tort vs. contract vs. debt collection), on parties with different financial resources, and on the other factors discussed in this report. The current study clearly shows that the effects of attorney's fee shifting vary greatly depending on the situation. Particular caution is urged towards those who support fee shifting because of expected economic incentive effects, such as decreasing claims, speeding dispositions, or inducing settlement. In Alaska's experience, the rule's effects in these areas have been very complex, subtle and often contradictory.

Because the data suggested that the rule affected different types of cases in identifiably different ways, policy-makers should clarify the rationales underlying fee shifting, and the desired effects and goals. For example, if the primary rationale for fee shifting is fairness to both sides (either the make-whole or general indemnity rationale), recoveries for both defendants and plaintiffs might be a percentage of actual fees. Judges interviewed for the present study said that they were very comfortable reviewing billings for excessive time or hourly rates, and that these reviews were somewhat tedious but rarely too time consuming.

Policy makers whose rationales include discouraging frivolous or meritless litigation probably should not adopt a scheme similar to Alaska's.[601] Our data did not show that Alaska's system significantly deterred frivolous litigation. The cost to another jurisdiction of implementing the new system probably would outweigh any benefits.[602] However, policy makers who believe that a punitive or deterrent rationale justifies fee shifting could consider a rule permitting fee awards in cases where the judge found the claim or defense to be frivolous. Interviews from the current study suggest that by the time the trial judge has seen the case through to disposition, the judge has a fairly strong opinion as to the merits of the litigation. To limit the judge's discretion, however, the law should set guidelines for determining the amount of the award. Our preference would be to see the fee award related to a percentage of the amount the loser's unreasonable conduct caused the winner to expend in fees.[603]

We do recommend including some factors similar to the ones in Alaska's 82(b)(3) to build some flexibility into the system. These factors seem broad enough to give judges and litigants leeway in appropriate cases, but specific enough to create needed uniformity in decisions.

Policy-makers considering adopting fee shifting should keep in mind two potential problems highlighted by attorneys interviewed for the present study. The first issue was the potential large adverse fee award that chilled access to the courts or put undue pressure to settle on litigants of moderate means.[604] This phenomenon did not seem to

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[601] To the extent that policy makers wish to discourage litigation, we also recommend against shifting full fees. First, the prospect of full fees could create the problem of "the tail wagging the dog," where the fee amount at stake exceeds the amount in controversy and begins to control the litigation. Also, the specter of full fees probably would magnify the "chilling" effect identified in this report on plaintiffs of moderate means with average or weaker cases. Full fees also would magnify the effect identified in this report of encouraging protracted litigation and case filings for parties with strong claims.

[602] One author noted that any rule aimed at deterring frivolous litigation should focus on attorneys, rather than on their clients, because the attorneys are better able to judge whether a claim has merit than are lay persons. Kordziel, *supra* note 176, at 445. This author suggested, as did a handful of attorneys interviewed for the present report, that Alaska Civil Rule 11 (or its federal counterpart) is the proper means for deterring frivolous litigation. *Id.* Two attorneys interviewed for this study wished that state judges would weed out weak and marginal claims by granting summary judgment more often.

[603] Setting the award as a percentage of the amount in controversy or at some arbitrary amount could result in fee awards out of proportion to the amount spent.

[604] One commentator has suggested that the contingent fee lawyer, not his or her plaintiff client, be put at risk for costs. Kritzer, *supra* note 18, at 57. He predicts that "this type of cost-shifting arrangement probably would discourage speculative litigation....[and] encourage plaintiff lawyers to take on the kinds of smaller cases that are not as attractive under the contingent fee system." *Id.* Another

be widespread in our data, but occurred relatively often in certain kinds of cases (cases suffering from some legal weakness such as unclear liability or "soft" damages, plaintiffs who were very risk-averse, or insurance companies facing "unlimited" Rule 82 exposure exceeding the face value of policy). Some national proposals that would shift total instead of only partial attorney's fees would exaggerate this effect.

The second issue was the two-way fee shift that becomes a one-way shift in practice, as has happened in most jurisdictions.[605] A recurring criticism of Rule 82 was that it was "unfair" or "biased" because of this one-way shift phenomenon.[606] A lawyer within the insurance industry who had experience with two-way fee shifting in Alaska reported that the fee-shifting rule rarely benefited the successful insurer, that insurers rarely collected awards from unsuccessful plaintiffs, and that the insurance industry did not believe that fewer people filed "nuisance lawsuits" in Alaska than in jurisdictions without fee shifting.

B. Conclusion

In conclusion, Alaska's rule requiring the loser in a lawsuit to pay part of the winner's attorney's fees has not dramatically changed the legal system in Alaska. Its effects are both complex and subtle, and can only be understood in the context of the particular situations in which they arise. We hope this report provides the basis for policy makers in Alaska and elsewhere to acquire a better understanding of this complex but important issue. We also hope that jurisdictions considering experimenting with fee shifting will encourage further study of any new fee shifting schemes.

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approach is suggested by the Legal Society of England, which has created a special kind of insurance, called Accident Line Protect, to protect the client from having to pay his or her own solicitor's fees and the opponent's fees in the event of a loss. Also, Europeans have developed legal insurance which pays the claimant's own attorney without diminishing the claimant's damage award, *and* pays the costs due the opponent in the event of defeat. Pfennigstorf, *supra* note 7, at 60.

[605] We note, however, one argument that it is not unfair to deny fees to prevailing defendants in non-frivolous lawsuits. Rowe reasoned that a defendant who prevails against a plaintiff's good-faith claim has suffered no legal "wrong" that would entitle him or her to compensation. Rowe, *Legal Theory*, *supra* note 39, at 658-59.

[606] This view was consistent with the outcome of fee shifting in the early 1980s in Florida medical malpractice cases studied by Snyder & Hughes. The study is discussed *supra* at note 109.

Appendix A

Methodology

Appendix A

Methodology

The project staff and advisory committee initially decided to focus approximately equal resources on collecting information from interviews and from court case files, both state and federal. As staff began to analyze the case file data and reported preliminary findings to the advisory committee, they changed the focus to emphasize interview data more than case file information. This appendix summarizes the methodology used to compile and analyze each type of information. Please contact the Judicial Council for more detailed descriptions.

A. Interviews

Project staff interviewed 161 attorneys about their practices in state and federal courts, seven attorneys who concentrated their practices in federal courts, all of the Anchorage trial court judges, the five Alaska supreme court justices, and seventeen attorneys with specialized practices in public interest law and insurance company representation. Staff also talked with five federal judges, one bankruptcy judge, and two magistrates.

1. Selection and Interviews

a) Attorneys with State and Federal Practices. Staff recorded the names of all attorneys whose names appeared in 500 randomly selected cases from the database of selected civil cases closed in 1993 by the Anchorage trial courts. Of these attorneys, staff could not contact two (the attorneys had no phone or address listed with the Alaska Bar Association; because Alaska is a mandatory Bar membership state, this was the most reliable method of locating attorneys. Staff also used local telephone directories, and other sources to help locate attorneys who did not have current addresses with the Bar Association). Another six lived out of state; staff interviewed them by phone. Finally, staff made repeated contacts with twenty-one attorneys, but could not complete an interview with them.

Staff designed an interview form that captured a few pieces of data about the attorney's type of practice, moved onto a series of specific questions about two recent cases, and culminated with questions about more general experience with Rule 82, and

the attorney's opinions and recommendations about Rule 82. After pretesting the interview with a group of volunteers from the Alaska Trial Lawyers' Association and with four individual attorneys, staff began scheduling interviews. The Project Attorney, Project Director, and Senior Staff Associate all interviewed attorneys. The average interviewed required about one hour to conduct, one hour to record (staff wrote a two-to-three page summary of each one) and one-half hour to enter data in the database.

b) Attorneys with Federal Practices. Staff used the same procedure applied in the larger group of interviewees to randomly select the names of twenty-five attorneys from the list of federal civil cases closed in 1993. The Project Attorney screened the twenty-five attorneys with a brief phone survey to find those whose percentage of federal practice exceeded fifty percent. The Project Attorney interviewed the seven attorneys who qualified, using the interview questionnaire and procedures designed for the earlier set of interviews.

c) Anchorage Trial Court Judges. Staff designed a different interview form for judges, emphasizing the judge's use of Rule 82 as a case management tool. All of the Anchorage trial court judges were invited to participate; all completed the interviews. The group included twelve from the state superior court (general jurisdiction), nine from the state district court (small claims, civil cases up to $50,000), all five federal trial court judges, and three federal magistrates. The interviews required anywhere form forty-five minutes to over an hour to complete, and an hour to summarize.

d) Alaska Supreme Court. All five of Alaska's Supreme Court justices met with project staff to participate in semi-structured interviews. All discussed the Supreme Court's earlier efforts to evaluate the effectiveness of Rule 82, the effects of the 1993 changes to the rule, and their views on the need for further changes. In addition, one justice, Jay A. Rabinowitz, served on the Project's Advisory Committee, and offered suggestions and comments throughout the project.

e) Other Interviews. Other groups and individuals contributed important perspectives on Rule 82. Early in the project, a representative of an Alaska tort reform group contacted the Council and commented on his group's views of the rule. Staff contacted and interviewed eleven attorneys who specialized in public interest law because case law treats public interest parties differently from other parties. The insurance industry also had expressed strong views on Rule 82 at various times, so staff contacted five attorneys and representatives of the industry; however, only one

consented to be interviewed. In general, the specialized interviews took about an hour each to complete. Staff did not write separate summaries or incorporate data from these interviews into a database.

2. Analysis

The Council's Executive Director created a database in Microsoft Access 2.0, and staff entered data from each of the attorney interviews. Within the database, one table held demographic information about individual attorneys, and one contained data about the two specific cases (the total number of attorney interview cases was 305). The Research Analyst transported selected fields to SPSS 6.0 for analysis. The Research Analyst also created Access reports to print the content of the longer text fields.

Staff combined responses from both sets of attorney interviews for the analysis. Frequency tables in SPSS for each of the major variables, and cross-tabulated variables to evaluate study hypotheses constituted the primary analysis. Staff systematically reviewed the text reports to discern patterns of responses to the interview question.

Information from the smaller groups of interviews (judges, justices, and special interest groups) remained separate during the analysis. Staff used the data from these sources to emphasize or contrast with patterns found in the larger body of interviews. The judges' comments on case management and the justices' perspectives on changes in the Rule appear in separate sections of the report.

B. Case File Data

1. Selection of Cases

a) State. The Anchorage trial court technical operations department provided staff with a comma-delimited ASCII file of 13,108 civil cases coded as closed in 1993 by trial court clerks. The court system did not include on this list any cases coded as domestic relations, small claims or administrative review/appeal since Rule 82 did not apply in these cases. In addition, staff excluded all cases coded as debt, forcible entry and detainer, foreign judgment and change of name from the file. The 5,456 debt cases included several thousand old loan cases settled, dismissed or closed in 1993 in an effort by the courts to clear the dockets. The 4,938 forcible entry and detainer cases included primarily landlord/tenant cases. Foreign judgment and change of name

totaled 222. Staff selected all remaining cases coded as trial cases, injunctive relief and malpractice cases as potentially being most relevant to the study. Of the 2,492 remaining cases, staff randomly selected a total set of 727 cases.

b) Federal. Staff worked with the Federal Judicial Center to obtain a list of cases closed in the U.S. Anchorage District Court in 1993. Cases where Rule 82 did not apply were excluded. (Cases excluded for this reason involved recovery and enforcement, recovery of defaulted student loans, bankruptcy appeals under Rule 801, withdrawal, vacate sentence, habeas corpus, antitrust, civil rights, commerce: ICC rates and other similar commerce cases, RICO, drug forfeiture, air line regulations, railway labor act, ERISA, copyright, patent, securities, commodities exchange, taxes, Freedom of Information Act, and social security). Staff decided to review all 137 diversity cases. After reviewing the remaining cases, staff decided to include all of them, giving a set of 359 cases closed in 1993 to be coded.

2. Data Collection

A data entry form was created in SPSS to use on laptop computers. State and federal court personnel gave Council staff access to files, both on shelves and in archives. Cases on appeal, sealed, or otherwise unavailable accounted for 132 or 15% of the state cases, and 124 or 26% of the federal cases. Data verification was performed using frequency analysis. In circumstances where missing data occurred staff returned to the original files to complete data collection.

3. Analysis

The data was analyzed using SPSS. In the state court data variables were weighted according to the category percentages of cases collected. The primary analysis were frequencies and cross tabulations with associated cell percentages. Specific results of primary interest are discussed in Chapters 6, 7, and 8.

Appendix B

Judge and Attorney Interview Questionnaires

Appendix B

Rule 82 SJI Project Interview Form

October 11, 1994

Attorney Name: **M/F** **Admission Date:**

Demographics

1. *Licensed in any other states?* Y/N Where?
   Previously practiced there? Y/N Still practicing there? % time Y/N

2. *Practice Environment:*
   Private/ Solo Private / Small [2-3]
   Private / Medium [3-5] Private/ Medium [6-9] Private / Large [10 or more]
   Government Public Interest In House Law Department

3. *Federal Court Practice?* Y/N Percentage %

4. *What are the substantive areas in which you concentrate 5% or more of your practice?* [HO]

Screening Questions

5. Have you taken any cases through trial [verdict rendered] in the last 2 years? Y/N 12 mos?Y/N

6. Have you had any cases resolved on dispositive motions within the last year? Y/N

7. Have you settled any fully joined cases within the last year? Y/N

8. Did you have any cases in the last year that settled before the issues were fully joined? Y/N

9. Have any of your cases in the last year been resolved [not settled] after the complaint was filed but before the issues were joined? [E.g., defaults, voluntary dismissals] Y/N

Describe two most recent cases.	**Case 1**	**Case 2**
10. Was the case in State or Federal court?		
11. What type of case [substantive area]?		
12. Did you represent plaintiff or defendant?		
13. Was it a jury trial or bench trial?		
14. Who prevailed?		
15. How much was at issue?		
16. Were money damages awarded? Amount	Y/N $	Y/N $
17. Were money damages collected? Amount		
18. Describe any other affirmative relief ordered.		

19. Were R.82 fees awarded? If no R.82 fees awarded, why not? • Parties waived • Statutory provision governed • Contract governed • No prevailing party • Other:		
20. Were R.82 fees awarded from the schedule?		
21. If the fees awarded varied from the schedule, what factors if any did the judge cite in awarding the variance? [(a) - (j)]		
22. If R.82 fees were awarded, was the award paid in full or in part?		
23. If the R.82 fees were paid, did someone other than the party pay the award?		
24. If the outcome was not money damages and R.82 fees were sought, were the fees as requested found reasonable by the court?		
25. If not, what factors did the court use to find that the requested fees were not reasonable?		
26. What was the total R.82 request?		
27. Did R.82 influence your litigation strategy? • In selecting the forum? • In making or responding to R.68 offers? • In staffing the case? • In your discovery plan? • In other ways?		
28. Did R.82 influence your settlement strategy?		
29. Did R.82 affect your approach to R.68 offers?		
30. Do you think R.82 influenced your client's approach to the case? • To settlement?		
31. Over and above what good lawyering would require, how many extra hours did you and others in your firm spend on this case addressing R.82 issues?		
32. What would have been the best settlement in that case?		
33. Were things at issue other than $?		

34. Did you compromise any of your fees, voluntarily or not, after the outcome was achieved?		
35. What was your fee arrangement with your client regarding the case? [e.g. hourly, contingent fee, prepaid legal plan etc.]		
36. If contingent fee case, what was the arrangement? %, floating amount		
37. Would you have litigated the case differently two years ago? Describe.		
38. How do you think R.82 affected your opponent's strategy in litigating the case?		
39. In your opinion did R.82 operate fairly in the case described? Why or why not?		

Questions / Trial Cases Only

	Case 1	Case 2
40. How much attorney time was used to litigate R. 82 issues?		

Questions / Dispositive Cases Only

41. If the issues were joined but not tried, how was the case concluded? • Voluntary dismissal • Involuntary dismissal • Summary Judgment • Other:		

Questions / Settlement Cases Only

42. At what stage in the litigation did the case settle? • Dismissal motions pending • Discovery ongoing • Discovery closed • Summary judgment pending • Pretrial conference • Trial pending		
43. Which of the following events, if any, was involved in achieving the settlement? • Settlement conference before judge • Mediation / Third Party Neutral • Negotiations between Counsel • Negotiations between Clients w/o Counsel		
44. If a settlement conference was convened before a judge, did the judge mention or discuss R.82?		

45. Did the written settlement agreement explicitly mention attorneys fees?		
46. If the settlement agreement referred to attorneys fees, were those fees determined according to R.82?		
47. Did the settlement agreement provide for each party to bear its own costs and fees?		
48. Was money paid in settlement? Amount?	$	$
49. What was the last significant event that occurred in the case prior to achieving full settlement?		

Questions / Defaults Only

50. If a default judgment resolved your case, did the clerk or the court decide the R. 82 fees?		
51. If the R.82 fees were awarded by the court, did the court cite any factors in determining the amount of the award?		

Questions / Appeals

52. Did any party file a motion to reconsider the R.82 award?		
53. Was an appeal filed?		
54. If so, were R.82 issues raised on appeal?		
55. If so, were those issues raised by the prevailing party?		
56. If a R.82 issue was appealed, describe the issue raised?		
57. Was the R.82 award modified on appeal?		
58. Did the appeal involve issues other than R. 82?		

Questions / Federal Practitioners

59. In your federal practice, does R.82 come into play?	
60. What was the most recent type of federal case in which R.82 came into play?	
61. What was the basis for federal jurisdiction in that case?	
62. Do you use any different strategies in federal court when R.82 applies than in those federal cases in which it does not?	
63. Do you use different strategies in federal court cases applying R.82 when compared with similar cases in state court? If so, please explain.	
64. Do you advise your clients about R.82's effects in federal litigation the same way you describe it to your clients with litigation in state court?	

Questions / Other State Practitioners

65. Do you have experience litigating in states that do not shift fees?	
66. Do case strategies differ in those states when compared to similar cases in Alaska state courts?	
67. Do client relations differ in those states from comparable Alaska cases?	

Questions / Not Specific to the Two Recent Cases

68. In your experience, are R.82 issues litigated in a pro forma fashion?	Y/N
69. What general topics do you cover with a new client at the start of any new litigation case?	
70. As a typical matter in your practice, when do you first explain the operation of Civil Rule 82 to your client?	
71. In addition to your first discussion of R.82 in your typical litigation case, do you regularly discuss the operation of the rule at any other times?	
72. Do you describe the potential consequences of R.82 in your standard engagement letter or fee agreement?	
73. Do you recall any instances in which R.82 played a role in your client's decision not to file a lawsuit or assert a claim?	
74. If you recall an instance in which R.82 influenced someone not to file suit, please describe the circumstances.	

75. Have you had any experience with R. 82 issues in fee arbitrations? If so, please describe.	
76. Have you had any experience with R.82 issues as a part of an attorney malpractice claim? If so, please describe.	
77. Who do you typically represent in litigation matters?	
78. Have you always typically represented that type of client in litigation matters?	
79. Do your tactics in litigating a case change when R.82 fees are at stake?	
80. Do you recall any instances in which R.82 played a role in your client's decisions about a case? How many times in the last year did this occur?	
81. Does your strategy differ when your client pays hourly fees rather than a contingent fee?	
82. In your experience, is there any time that R.82 makes you want to do things differently from what your client wants. If so, please describe how.	
83. When does this occur?	
84. Do you ever use R.82 to help you screen clients before accepting a case? If so, describe.	
85. What purposes does R.82 serve in Alaska civil practice?	
86. Does the rule achieve those purposes?	
86a. Does the rule discourage claims that are frivolous?	
86b. Do you have any experience in which the rule is used as a sanctioning mechanism by the court?	
87. Has your R.82 practice changed significantly in the last two years?	
88. In your opinion, should R.82 remain in effect as currently written?	
89. If you advocate changes to the rule, what changes would you like to see?	
90. In the last year, how many initial client contacts did you have?	

91. How many of those did you decline to represent?	
92. How many of those initial contacts did not return?	
93. Have you had any particularly noteworthy experiences, either positive or negative, with R.82 that occurred more than 12 months ago, or that we did not already cover?	

Other Comments?

What are the substantive areas in which you concentrate 5% or more of your practice?

Circle	
Admiralty/Marine	_____%
Antitrust	_____%
Administrative Law	_____%
Appellate Practice	_____%
Banking/S&L	_____%
Bankruptcy	_____%
Business & Corporate	_____%
Commercial	_____%
Consumer Law	_____%
Criminal Law	_____%
Domestic Relations	_____%
General Practice	_____%
Government	_____%
Labor	_____%
Land Use Law	_____%
Mineral and Natural Resources	_____%
Municipal/School Districts	_____%
Negligence - Plaintiff	_____%
Negilgence - Defendant	_____%
Real Estate	_____%
Taxation	_____%
Utilities & Communications	_____%
Wills, Trusts & Estate	_____%
Planning	_____%
Other (e.g. Native, Civil Rights, Environmental, Securities, Military, Antitrust, Aviation)	_____%

Rule 82 - Judicial Questionnaire
January 13, 1994

Judge:_____ Interviewer:_____
Date: / /95

1. Do you use R.82 as a case management tool? If so, how?

_____
_____
_____
_____

2. Within the last twelve months, have you considered any applications for R.82 attorneys fees prior to the entry of a final judgment in a case? ☐ Yes ☐ No

   a. Under what circumstances do you consider such pre-judgment applications for attorneys fees appropriate?

_____
_____
_____

3. Regarding settlement conferences you conduct:

   a. When and how do you introduce R.82 into the discussion?

_____
_____
_____
_____

   b. Are there any circumstances when you purposefully refrain from mentioning R.82? If so, when does that occur?

_____
_____
_____

4. Our data indicate that in some trial cases the judge does not make a R.82 award, and attorneys have commented on occasions when judges have discouraged them from requesting fees. Under what are the circumstances would you not make a R.82 award post-judgment?

a. Neither party prevailed?
b. Both parties prevailed in some aspect?
c. Parties waived?
d. Other?_____

5. Several of the attorneys who participated in the interviews have described circumstances in which the measure of a R.82 award post-trial determined whether or not the R.68 offeree beat an unaccepted offer.

a. Does information regarding unaccepted R.68 offers influence you in evaluating R.82 requests? ☐ Yes ☐ No

If so, how? _____

_____

If not, why not?_____

_____

8. Under what circumstances are you called upon to determine the prevailing party?

_____

_____

_____

_____

9. Please describe how you analyze a R.82 request in a case resulting in a monetary judgment._____

_____

_____

_____

10. Please describe how you analyze a R.82 application in a case resulting in a non-monetary judgment._____

_____

_____

a. In making an award under R.82(b)(2), do you analyze the need for the legal services reported? ☐ Yes ☐ No

b. What degree of specificity do you require in the affidavit of counsel accompanying a request for fees under R.82(b)(2)?

_____

_____

11. Many practitioners stated that preparing the fee application was time consuming because they had to include the direct billings with the affidavits. Does the Anchorage court have a local custom or expectation that actual billling statements shall be included? ☐ Yes ☐ No

a. Do other communities differ from this practice?

☐ Yes ☐ No ☐ Don't know

12. Do you apply any general guidelines to determine when an exercise of discretion under R.82(b)(3) is warranted? ☐ Yes ☐ No

Please explain:_____

_____

_____

_____

13. Within the last twelve months, have you enhanced or reduced a R.82 award based upon the following circumstances:

complexity	Y N	
length of trial	Y N	
reasonableness of the hourly rate charged and the number of hours expended	Y N	
reasonableness in the number of attorneys used	Y N	
an attorney's efforts to minimize fees	Y N	
reasonableness of defenses and claims by both sides	Y N	
vexatious or bad faith conduct	Y N	
relationship between the amount of work performed and the significance of the matters at stake	Y N	
a deterrent effect on similarly situated litigants from voluntary use of the courts	Y N	

extent to which fees reflect outside consideration, e.g., desire to discourage claims by others.	Y N	
other equitable factores.	Y N	

14. How often do attorneys ask you for extensions to file R.82 requests?

1. Almost always
2. Frequently
3. Sometimes (about half the time)
4. Seldom
5. Almost never

15. How do you apply R.82 in contract cases that provide for the payment of reasonable attorneys fees as an element of contract damages?

_____
_____
_____
_____

a. Does R.82 provide the local rule of reasonableness? □ Yes □ No

16. When comparing fee shifting under R.82 with statutory fee shifting [e.g., Wage & Hour Act cases] which do you think is most effective? □ R82 □ Statute □ Depends

In what way?

_____
_____
_____

17. If you were inclined to modify R.82, how would you change it?

_____
_____
_____

18. If R.82 were revoked, what do you think would be the impact in your court?

_____
_____
_____

19. Does R.82 achieve its purpose of partially compensating the prevailing party for attorneys fees incurred in prosecuting or defending a lawsuit? ☐ Yes ☐ No ☐ Sometimes

_____

_____

a. In your opinion, is the scheduled amount typically adequate?
☐ Yes ☐ No ☐ Sometimes

_____

_____

b. In your opinion, does the rule work fairly in contingent fee cases?
☐ Yes ☐ No ☐ Sometimes

_____

_____

20. Do you think R.82 promotes case settlement? ☐ Yes ☐ No ☐ Sometimes
Explain:_____

_____

_____

21. Do you think R.82 reduces protracted litigation? ☐ Yes ☐ No ☐ Sometimes
Explain:_____

_____

_____

22. Do you think R.82 helps to discourage claims that lack merit from going to trial?
☐ Yes ☐ No ☐ Sometimes
Explain:_____

_____

_____

23. When comparing R.82 motions practice under the current version of the rule with practice prior to the 1993 changes, would you estimate that the amount of litigation has:
☐ increased ☐ decreased ☐ remained about the same

a. Since the court adopted the recent changes, have you seen any increase or decrease in the amount of appellate issues regarding R.82?
☐ increase ☐ decrease ☐ about the same

24. Other comments?

_____

_____

_____

_____

25. What recommendations would you offer to other jurisdictions considering the adoption of fee shifting rules?_____

_____

_____

_____

_____.

Appendix C

Attorney Interview Data

Appendix C
Attorney Interview Data

We interviewed 161 attorneys licensed to practice in Alaska for the present study. The attorneys' names were drawn at random from a list of 240 attorneys whose names appeared in litigation cases filed with the state court system in Anchorage. *See* Methodology, Appendix A. The interview questionnaire, attached as Appendix B, consisted of two parts. In the first part, attorneys were asked to identify two of their most recently resolved civil cases and to answer a series of questions about each case, including questions about subsequent appellate litigation.[1] In the second part, the attorneys were asked to describe their general experience with and opinion of Rule 82, especially in noteworthy cases.

I. Respondent Demographics

Almost all of the attorneys interviewed were in private practice.[2] Over half were either sole practitioners or worked in small-to-medium private civil firms in the Anchorage area. Sole practitioners comprised 30% of the attorneys interviewed, and those practicing in a firm of 2-3 attorneys comprised 19% of the sample. About 9% worked in medium-sized firms of 4-5 attorneys. Those who worked for larger firms (more than 6 attorneys) comprised about 35% of the sample. Most (83%) reported having some federal court practice, and 42% were licensed in a state other than Alaska.[3] Most had substantial practice experience, with about 75% having been admitted in Alaska before 1985. Most were male (87%).

About 19% said they spent more than half their time handling negligence defense cases. About 14% said they spent more than half their time handling plaintiff's negligence cases. About 16% reported spending more than half their time handling commercial and business cases.

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[1] Attorneys who identified themselves as having a federal practice or having experience from another jurisdiction also were asked to describe any differences related to Rule 82.

[2] Of the 161 total, seven (4%) were in government practice.

[3] Few who reported being licensed in another state said they had practiced there for any length of time.

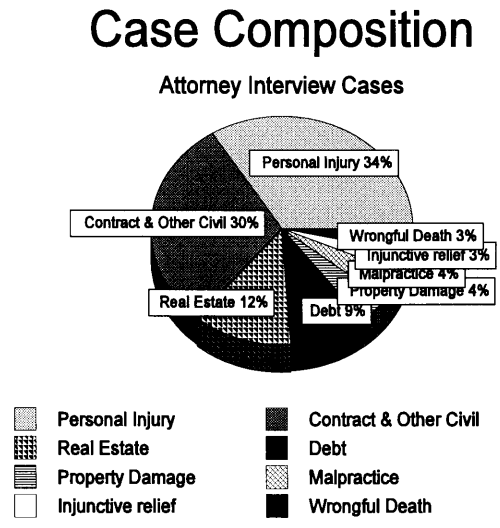
These litigation attorneys were roughly representative of the general membership of the Alaska Bar Association,[4] with the exceptions that male practitioners and sole practitioners were somewhat over-represented in the study sample.[5]

II. Cases Described

A. Case Composition.

The 161 interview attorneys described 305 cases to us.[6] About 80% of the cases described were state court cases, with the remainder filed in federal court. Figure 1 shows the composition of the cases described.

Figure 1



[4] All attorneys who practice in Alaska must be members of the Alaska Bar Association.

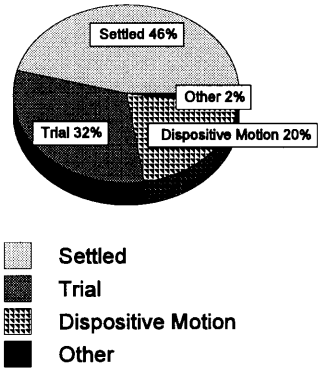
[5] In a 1989 Bar Membership Survey about 70% of the respondents described their practice as mainly civil, and about 66% said they practice in Anchorage. The average number of years of practice was about 11, with most of them in Alaska. About 19% of the attorneys responding to the survey were sole practitioners, and about 28% worked in offices of 2-5 attorneys. Twenty-three percent worked in firms of six or more attorneys. About 19% were state or local government employees. Three-quarters of the members of the Alaska Bar were male in 1989 (among private practitioners, 82% were male). The 1989 survey found female attorneys to be over-represented in government employment, with 39.4% working for the government compared to 18.3% in private practice.

[6] Although each attorney was asked to describe two cases resolved within the past year, some could only describe one and one could not describe any.

Figure 2

Case Dispositions

Attorney Interview Cases



B. Case Dispositions

Figure 2 shows case dispositions. Almost half of the cases described were settled. About 17% were resolved by jury trial and 14% by bench trial.[7] About 20% were resolved by dispositive motion,[8] and 2% (N=7) were resolved some other way. None of the cases described were default judgments.

C. Value of Cases

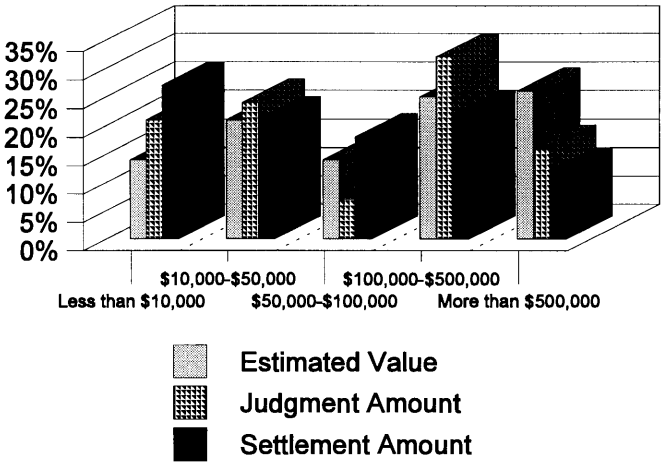
Attorneys were asked to estimate how much money they thought was at issue in the cases they described. Figure 3 shows the distributions of attorneys' estimated values of the cases they described.

Attorneys who described cases in which a judgment was entered described judgment amounts[9] generally smaller than the potential values they initially had assigned to them. Judgments in cases that were not settled ranged from

Figure 3

Values of Cases

Attorney Interview Data



[7] Compared to their representation in court case files, trials were over-represented in this sample in order to ensure that we had enough trials to analyze. Attorneys who reported resolving a case at trial within the past year were asked to describe the trial case even if it was not among their two most recently resolved cases.

[8] Dispositive motions include summary judgments and dismissals on the merits.

[9] For purposes of this discussion, judgment amounts are inclusive of costs, attorney's fees, and interest.

nothing to $5,500,000. Figure 3 shows the distribution of judgment amounts in cases with a judgment other than zero.

Settled cases also involved values significantly less than the potential values that attorneys had assigned. Values ranged from zero to $6,750,000. The chart entitled "Values of Cases" shows the distribution of settlement amount for cases that settled.

E. Winners and Losers

In the interview sample for the current study, the division between attorneys who represented plaintiffs versus those representing defendants was equal.[10] Distinctions occurred when representation was compared to practice environment: Most (about 70%) of the solo practitioners told us about cases in which they represented plaintiffs, while most (about 68%) of the lawyers in firms of ten or more attorneys told us about cases in which they represented defendants.

Hourly fee arrangements were the most common in the cases described, with about 58% of the cases financed in that manner. Contingent fee arrangements accounted for about a quarter of the cases described.

The identities of the prevailing parties were evenly distributed. Over a third of the time (38% of the cases), the attorney said that neither party could be characterized as prevailing. Thirty-two percent of the time, the attorney said that the defendant had prevailed. Just over 29% of the time, the attorney said that the plaintiff had prevailed.

Differences emerged when the prevailing party was matched against case type. Plaintiffs prevailed disproportionately in debt (59%), property damage (55%) and, to a lesser degree, real estate cases (34%). Defendants prevailed disproportionately in malpractice cases (45%). In personal injury cases, the frequency with which plaintiffs prevailed was lower than expected.

Cross-tabulation revealed that when the attorney whom we interviewed represented the plaintiff, 71% of the time he or she told us about a case in which the plaintiff prevailed. Similarly, when the attorney had represented the defendant, 71% of the time he or she told us about a case in which the defendant prevailed.

---

[10] In less than 1% of the cases the attorney represented a party other than the plaintiff or the defendant.

II. Attorney's Fee Awards in Cases Described

The cases that attorneys described to us were characterized by relatively large and frequent fee awards, at least as compared to the case file data. The fee awards in these cases also were reasonably likely to vary from the amounts due under the schedules set forth in the rule.

A. Amount of Fee Awards

Of the 87 cases involving a fee award, 15% were less than $1,000. About 27% fell between $1,000 and $5,000. Fifty-eight percent exceeded $50,000. Eight awards exceeded $50,000. The median award was $9,000.[11]

The attorney interview data differed from the case file data on the frequency with which fee awards varied from the scheduled amounts. The attorneys told us that fees were awarded according to the schedule only 64% of the time. In the 32 cases in which the judge varied from the schedule, they most often did so based on "other equitable factors" (cited 31% of the time), "reasonableness of claims and defenses asserted" (cited about 12% of the time), litigants' "vexatious conduct" (cited about 15% of the time), and "complexity of the litigation" (cited about 15% of the time). Length of trial was cited in one case.

Variances from the schedule seemed to be related somewhat to whether the attorney represented plaintiff or defendant. Attorneys who represented defendants were slightly more likely to receive awards not calculated from the schedules than were plaintiffs.

B. Frequency of Fee Awards

Attorney fee awards were relatively frequent in this case sample, at least as compared to the federal and state case file samples.[12] Attorneys told us that Rule 82 awards were made in 87 of the 305 cases discussed, or about 28% of the time.[13]

---

[11] The largest award was $120,846; the smallest was $120.

[12] Recall that trials are over-represented in this sample.

[13] In 8% of the cases described, we could not determine whether a fee award had been made, either because a fee request was pending at the time of the interview or the attorney could not remember.

By case type, awards were more likely to be made in civil and contract cases than in personal injury cases. Fewer than 27% of personal injury cases involved a fee award, while awards were made in 45% of all civil and contract cases. However, the awards seemed smaller in civil and contract cases. Of the awards made in civil and contract cases, over half (54%) were less than or equal to $5,000. In personal injury cases, only about 24% of the awards were less than or equal to $5,000, while about 27% fell between $10,000 and $20,001.

C. Reasons Rule 82 Fee Awards not Made

The most common reason given for lack of a Rule 82 award was that the case settled (39% of the cases described). In about 7% of the cases, a statute or a contract provision, rather than Rule 82, governed the attorney fee award. In 6% of the cases, the parties waived application of the rule. Approximately 3% of the time, the attorneys said an award was not made because there was no prevailing party.[14]

[14] In about 17% of the cases described, the attorney gave a reason other than those listed to explain why no Rule 82 award was made.

Appendix D

Composition of Case Samples

Appendix D
Characteristics of State and Federal Court Casefiles

A. Composition of State Case File Sample and Federal Cases

In the state court sample, we excluded cases to which Rule 82 does not apply.[1] Figure 1 summarizes the types of cases in the sample. The chart shows that personal injury cases accounted for about a quarter of the 737 case sample, and property damage and real estate matters each accounted for 10%. Injunctive relief, malpractice, and wrongful death accounted for very small percentages. The largest category, labeled "general civil" consists of statutory causes of action, contract cases, employment cases, and others.[2]

Figure 1

State Court Cases

Sample of those closed in 1993 at Anchorage, AK

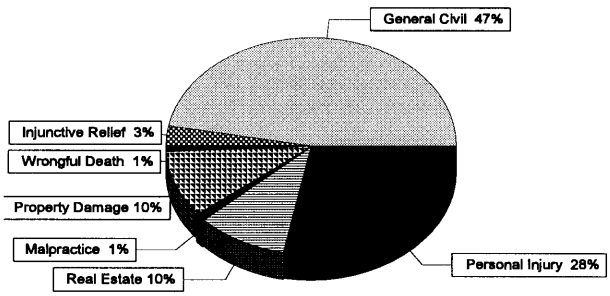
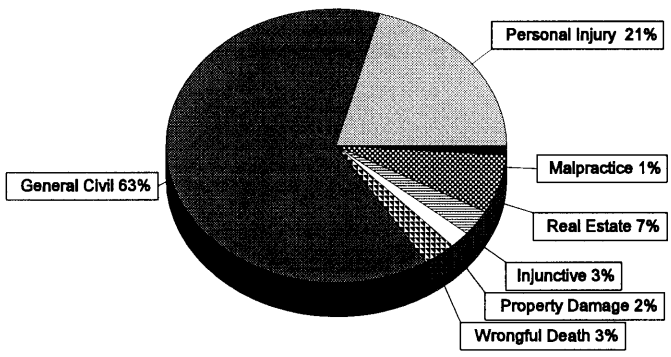


Figure 2

Federal Court Cases

Diversity & federal question closed in 1993 in Anchorage, AK



[1] First we identified all civil cases closed in Anchorage in 1993 (approximately 13,000 superior and district court cases). We then eliminated domestic relations cases because Rule 82 normally does not apply to them. We excluded debt cases because the court administratively closed hundreds of old student loan cases in 1993, resulting in an unusually large number of those types of cases. We eliminated statutory summary eviction cases ("FED cases") because of their differences from other civil cases. We did not analyze small claims cases because some of them fall under a slightly different statute, although Rule 82 can apply. Consult the Methodology in Appendix A for the particulars of how we sampled.

[2] We use the Alaska Court System's categories in grouping the cases. Due to inconsistencies in case characterization, the categories may not be completely accurate. In particular, the "other civil and contract" category may contain cases from excluded categories, such as debt and FED.

We also examined federal cases closed in the District of Alaska in 1993, first eliminating those not likely to involve Rule 82 issues.[3] Figure 2 shows that the 359 federal cases resembled the state court sample in composition. The largest category in the federal group (63%) was "general civil" cases.[4] The second-largest category was personal injury litigation, followed by real estate matters. Wrongful death, injunctive relief, property damage, and malpractice litigation comprised the smallest categories.

B. Dismissals & Settlements

Figures 3 and 4 show dispositions for both the state and federal cases. The most common disposition in both federal and state court was dismissal. About 84% of the state cases were dismissed[5] and settled.[6] About 75% of the federal cases were either dismissed[7] or settled.

Figure 3

State Court Case Dispositions

Dispositions of sample cases closed in 1993

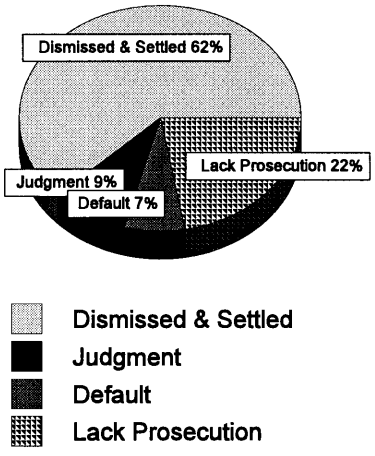
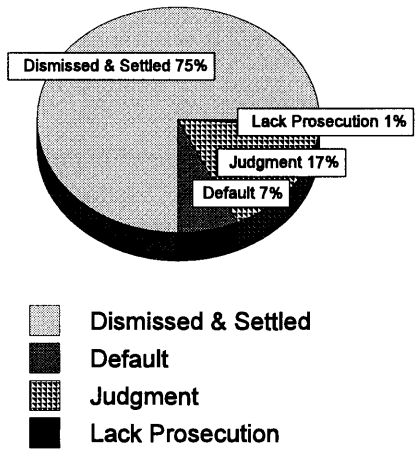


Figure 4

Federal Court Dispositions

Cases closed in 1993



[3] Those excluded were: antitrust, civil rights, ICC rates, RICO, drug forfeiture, air line regulations, Railway Labor Act, ERISA, copyright, patent, securities, commodities exchange, taxes, and Freedom of Information Act cases.

[4] We use the federal court's categories in describing the cases. The federal court and state court categories are not identical, although they may be comparable.

[5] State cases dismissed for lack of prosecution made up about a quarter of all dismissals.

[6] Experience tells us that some number of the cases coded as dismissals were actually dismissed pursuant to a settlement agreement; however, unless the file contained an explicit notice of settlement, the case was coded as dismissed, not settled.

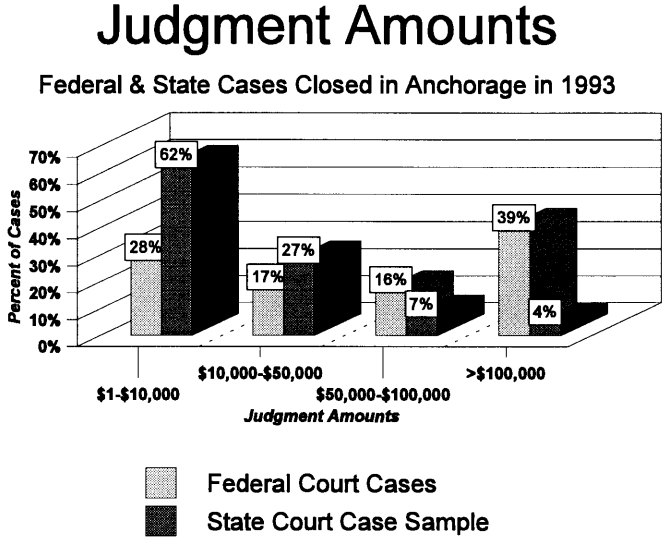
[7] Only four of the 273 federal cases that were dismissed were dismissed for lack of prosecution. The federal court's active approach to case managment probably results in the low number of cases dismissed for lack of prosecution, compared to the state court, which does not put such an emphasis on individual case management.

Sixteen percent of the state court cases ended in a judgment, with about 44% of the judgments being default judgments. About a quarter of the federal court cases ended in a judgment, with about 28% of the federal judgments being defaults.

C. Judgment Amounts

Our state court case sample contained judgment amounts[8] ranging from $0 to $738,408, although most (about 62%) fell between $1 and $10,000. The federal cases contained judgment amounts[9] ranging from $0 to $7,234,840. Almost 40% fell between $100,000 and $500,000, although about 28% were under $10,000. Figure 5 shows the range of case values in the federal cases and the state case sample.

Figure 5



D. Motion Work

The state and federal court data differed in the number of motions filed on average per case, with fewer (mean= 1.7) being filed in state court compared to federal court (mean=3.9). About half (53%) of the state cases in the sample contained no motions. Cases with one or two motions comprised 27% of the state cases. Cases with three, four or five motions comprised 12%, and cases with six or more motions comprised 8% of the weighted sample. In the federal court, only 21% contained no motions, while 29% contained one or two motions. Federal cases with three, four or five motions comprised 20%. Twenty-four percent of the federal cases contained six or more motions.[10]

E. Winners and Losers

Setting aside state court cases that ended in dismissal and cases in which both sides received an award, plaintiffs prevailed more often than defendants (overall, plaintiffs prevailed about 80% of the time). Plaintiffs prevailed 82% of the time in the federal cases.

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[8] For purposes of this discussion, judgment amount is exclusive of costs and attorney's fees.

[9] For purposes of this discussion, judgment amount is exclusive of costs and attorney's fees.

[10] Some of the federal casefiles were too voluminous for the coders to count all motions.

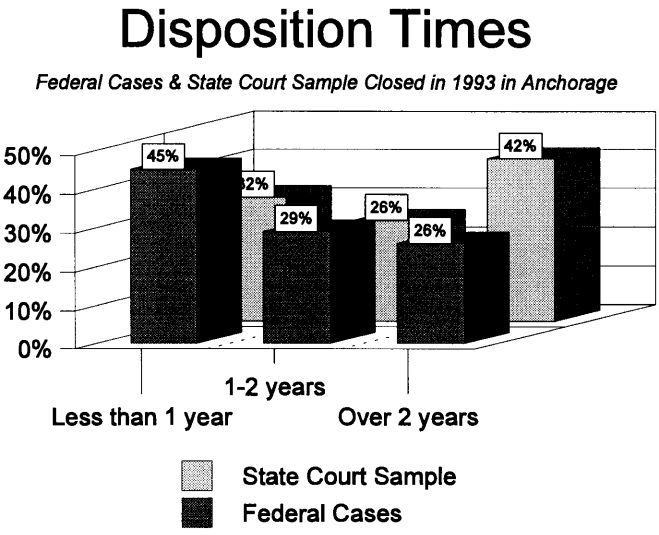
In state court civil and contract cases that did not end in dismissal, plaintiffs prevailed 76% of the time. In state property damage cases, plaintiffs prevailed almost 95% of the time. In state wrongful death cases, plaintiffs prevailed 80% of the time. In state court personal injury and real estate cases, plaintiffs prevailed about 84% of the time. The exceptions to this trend were injunctive relief cases, in which defendants prevailed disproportionately (almost 64% of the time) and malpractice cases, in which plaintiffs and defendants prevailed in equal numbers. In federal civil and contract cases, plaintiffs prevailed 85% of the time. The exception to this trend occurred in the small number (11) of personal injury cases, in which plaintiffs prevailed only half of the time.

However, state court plaintiffs' chances of prevailing decreased significantly if a jury resolved their case. In state court jury trials, plaintiffs and defendants prevailed in equal numbers (exactly 50-50). In non-jury trials, plaintiffs retained their edge but the frequency with which they prevailed decreased from about 80% to about 70%. In cases resolved without a trial (but excluding dismissals and cases in which both sides won something), plaintiffs prevailed about 83% of the time. Federal plaintiffs' chances of prevailing also were best if the case was resolved without trial (94% of the time). In the federal court cases, plaintiffs' chances of winning at trial did not vary significantly by whether the case was judge- or jury-tried. In the four federal jury trials, plaintiffs beat defendants 3 to 1. In non-jury trials, plaintiffs beat defendants about 74% of the time.

F. Time to Disposition

Overall, federal cases were resolved more quickly than state court cases.[11] Almost half of all federal cases were resolved within one year; while only about a third of all state court cases were resolved that quickly. Also, 29% of all state court cases took more than three years to resolve, while only 14% of the federal cases took that long. Figure 6 shows disposition times for cases in the state sample and in federal court.

Figure 6



Cases in the state court sample were resolved on average a little more than two years (774 days) after filing; the

[11] Disposition time could be affected by many factors, including complexity of the case, judicial case management policies, judicial resources, etc. One factor expected to increase the average disposition time in the state court case sample is the absence of debt or FED cases. Because debt and FED cases generally are not complex, they usually are quickly resolved.

federal cases took an average of a little more than a year and a half (588 days). The median time in the state court sample was about 619 days, compared to 426 days for the federal cases.

Appendix E

Attorney's Fees in Alaska Public Interest Litigation

Appendix E

Attorney's Fees in Alaska Public Interest Litigation

Public Interest Litigation Resulting in Judgments Against the State of Alaska Total Costs, Fees, and Interest, FY'89-FY'93*						
	FY'89	**FY'90**	**FY'91**	**FY'92**	**FY'93**	**Total**
Carlson v. State			750.00			**750.00**
Anderson v. ADF&G				5,963.77		**5,963.77**
Dot Lake v. State			6,983.45			**6,983.45**
Finkelstein v. Elections	12,364.01					**12,364.01**
Carpenter v. Hammond	25,829.26					**25,829.26**
Chambers v. State		34,269.79				**34,269.79**
Newman v. State			36,663.98			**36,663.98**
AK/Environment v. DNR				42,242.02		**42,242.02**
Kenai Pen. Borough v. State	54,596.31					**54,596.31**
McDowell v. State		13,350.79	3,250.52	100,094.64		**116,695.95**
Cleary v. Smith	34,695.81	48,065.93	59,358.32	25,687.71		**167,807.77**
Katie John v. State				195,928.61		**195,928.61**
Bobby v. State			196,681.64			**196,681.64**
Trustees/AK v. State	69,124.57	41,045.38		63,307.51	57,401.58	**230,879.04**
Kenaitze Indian Tribe v. State				334,281.75		**334,281.75**
FY'93 Reapport						
Demientieff					43,159.50	**43,159.50**
AK Democratic					130,251.22	**130,251.22**
SE Conference					189,488.69	**189,488.69**
Mat-Su					173,290.30	**173,290.30**
Leavitt					137,632.06	**137,632.06**
Total	**196,609.96**	**136,731.89**	**303,687.91**	**767,506.01**	**731,223.35**	**2,135,759.12**

* Data provided by Alaska Department of Law. Table prepared by Alaska Judicial Council, 4/94.

Appendix F

Alaska Rule of Civil Procedure 82

Appendix F

Alaska Rule of Civil Procedure 82. Attorney's Fees

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

(b) Amount of Award.

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

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

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

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

(A) the complexity of the litigation;

(B) the length of trial;

(C) the reasonableness of the attorneys' hourly rates and the number of hours expended;

(D) the reasonableness of the number of attorneys used;

(E) the attorneys' efforts to minimize fees;

(F) the reasonableness of the claims and defenses pursued by each side;

(G) vexatious or bad faith conduct;

(H) the relationship between the amount of work performed and the significance of the matters at stake;

(I) the extent to which a given fee award may be so onerous to the non-prevailing party that it would deter similarly situated litigants from the voluntary use of the courts;

(J) the extent to which the fees incurred by the prevailing party suggest that they had been influenced by considerations apart from the case at bar, such as a desire to discourage claims by others against the prevailing party or its insurer; and

(K) other equitable factors deemed relevant.

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

(c) Motions for Attorney's Fees. A motion is required for an award of attorney's fees under this rule. The motion must be filed within 10 days after the date shown in the clerk's certificate of distribution on the judgment as defined by Civil Rule 58.1. Failure to move for attorney's fees within 10 days or such additional time as the court may allow, shall be construed as a waiver of the party's right to recover attorney's fees. A motion for attorney's fees in a default case exceeding $50,000 must specify actual fees.

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

(e) Effect of Rule. The allowance of attorney's fees by the court in conformance

with this rule shall not be construed as fixing the fees between attorney and client.

[Amended effective January 15, 1989; January 15, 1990; July 15, 1991; July 15, 1992; repealed and reenacted July 15, 1993.]

Note

Ch. 41, Sec. 9, SLA 1989 provided that AS 46.03.763, as enacted by ch. 41, Sec. 4, SLA 1989, amended Civil Rule 82 by allowing the recovery of full reasonable attorney fees and costs by the state in certain actions involving unpermitted oil discharge.

AS 10.06.435, as enacted by ch. 166, Sec. 1, SLA 1988, amended Civil Rule 82 by changing the criteria for awarding attorney fees to the plaintiff in a shareholder derivative action. AS 10.06.580(e), as enacted by ch. 166, Sec. 1, SLA 1988, amended Civil Rule 82 by changing the criteria for awarding attorney fees in an action to determine the value of a dissenting shareholder's interest in a corporation.

See Civil Rule 23.1(j) concerning attorney fees in shareholder derivative actions.

AS 09.55.601, added by ch. 57, Sec. 5, SLA 1991, amended Civil Rule 82 by requiring an award of full reasonable attorney fees to prevailing victims of certain crimes.

Publishers Note

Laws 1972, c. 18, Sec. 1, which adopted AS 09.60.015, had the effect of changing Rule 82(a) by "specifically providing for attorney fees in small tort actions." Laws 1972, c. 18, Sec. 2.

Laws 1986, c. 139, Sec. 4, which amended AS 09.06.010, had the effect of amending Rule 82 by "prohibiting the award of attorney fees in certain civil actions based on fault, unless allowed by statute or by agreement of the parties or unless the civil action is contested without trial or fully contested." Laws 1986, c. 139, Sec. 8.

Laws 1989, c. 41, Sec. 4, which adopted AS 46.03.763, had the effect of amending Rule 82 "by allowing the recovery of full reasonable attorney fees and costs in certain actions." Laws 1989, c. 41, Sec. 9.

Supreme Court Order No. 1118 amended, dated January 7, 1993, which repealed and reenacted Rule 82, also stated in paragraph 2:

"By adopting these amendments to Civil Rule 82, the court intends no change in existing Alaska law regarding the award of attorney's fees for or against a public interest litigant, see, e.g., *Anchorage Daily News v. Anchorage School Dist.*, 803 P.2d 402, 404 (Alaska 1990); *City of Anchorage v. McCabe*, 568 P.2d 986, 993-94 (Alaska 1977); *Gilbert v. State*, 526 P.2d 1131, 1136 (Alaska 1974), or in the law that an award of full attorney's fees is manifestly unreasonable in the absence of bad faith or vexatious conduct by the non-prevailing party. See, e.g., *Malvo v. J.C. Penney Co.*, 512 P.2d 575, 588 (Alaska 1973); *Demoski v. New*, 737 P.2d 780, 788 (Alaska 1987)."

Laws 1993, c. 35--which enacted AS 45.12.108(d), effective January 1, 1994 (Secs. 125, 131)--amended Rule 82 "by requiring the court to award a specified level of attorney fees without consideration of who prevails in the entire action even if the entitled party is not ultimately the prevailing party in the action, and without reference to the amount of recovery, even if the rule would require that the amount of the award of attorney fees be based on a percentage of the amount of recovery." Laws 1993, c. 35, Sec. 130(b).

Laws 1993, c. 34--which enacted AS 45.14.305(e) and 45.14.404(b), effective January 1, 1994 (Secs. 12, 16)--changed Rule 82 "by changing the criteria for the award of attorney fees in certain circumstances." Laws 1993, c. 34, Sec. 15.

Laws 1993, c. 60, Sec. 2, which enacted AS 45.68.090 amended Rule 82 "by requiring the court to award full attorney fees where appropriate in certain actions under AS 45.68.090." Laws 1993, c. 60, Sec. 4(2).