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OVERVIEW

The attached report details proposed changes to the civil litigation system. The major proposal is aimed at reducing deterrents to pursuing or defending claims with a value of under $25,000 through the implementation of an "economical litigation program". An additional proposal would extend the benefits of this program to larger claims by amending civil rules of court relating to discovery and case scheduling.

A number of judges and attorneys were interviewed concerning these proposals. While opinions varied, one common ground emerged: all agreed on the need to reduce the costs and delay of civil litigation, especially where the amount in controversy is in the "smaller" ranges (i.e., under $25,000). Comments about the special procedures of the economical litigation program, especially the restriction on depositions, ranged from the belief that cases under this amount could adequately be prepared within these limits to the belief that these types of restrictions could allow for recovery in cases where it was factually unjustified. This diversity in opinions underscores the necessity to present the members of the legal and judicial community with the views of persons who have designed these programs and who have practiced in jurisdictions in which an economical litigation program has been in effect.

The American Bar Association's "Action Commission to Reduce Court Costs and Delay" has assisted other jurisdictions in designing economical litigation programs. The Commission is interested in providing technical assistance and advice to jurisdictions interested in the program.

RECOMMENDATIONS OF THE ALASKA JUDICIAL COUNCIL TO THE SUPREME COURT PROPOSING CHANGES TO THE CIVIL RULES TO REDUCE EXCESSIVE COSTS AND DELAYS OF CIVIL LITIGATION

I. INTRODUCTION

Popular perceptions of injustice in the justice system abound. One frequent complaint about the civil litigation system is that the costs and delays attendant on its use deter the prosecution or defense of "medium sized" claims. These so-called "medium sized" or "smaller" claims have a value ranging from above the small claims jurisdictional limit ($1,000 to $2,000) to $20,000 or $25,000. In the past decade, the plight of the middle range civil claimant or defendant has received increasing national attention from legislators, lawyers, judges and court administrators who are beginning to concentrate their efforts on the problems of over-discovery and slow disposition times.[1]

In the past several months the Judicial Council, in fulfillment of its mandate to "make studies for the improvement of the administration of justice",[2] has investigated actions taken in other jurisdictions to alleviate the problems of excessive court costs and delays. The purpose of this investigation has been to identify types of action which appear not only to be addressing these issues but also to be addressing them efficiently, without requiring the creation of new bureaucracies for their implementation.

Various actions have been taken in other jurisdictions to address these problems. In the federal system, the 1979 amendments to the Federal Magistrates Act[3] allow for civil trials by magistrates in all jury and non-jury cases on consent of the parties. This provision enables parties to avoid extended delays in securing a trial date in the district courts and provides various avenues of appeal which are to be implemented by local rules designed to make such appeals both "inexpensive and expeditious". In New York and California, money damage claims over the small claims limit and under a set jurisdictional amount ($6,000 to $15,000) proceed to mandatory arbitration. These programs provide for de novo court review and also provide for elective arbitration of claims over the jurisdictional amount.[4]

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[1] See, Addresses Delivered at the National Conference on the Causes of Popular Dissatisfaction With the Administration of Justice, 70 F.R.D. 79 et seq. (1976).

[2] Alaska Constitution, Article IV, Section 9.

[3] 28 U.S.C. Section 636(c).

[4] See: Weller, Ruhnka and Martin, Compulsory Civil Arbitration: The Rochester Answer to Court Backlogs, 20 JUDGES'JOURNAL 36 (Summer 1981, #3); California Code of Civil Procedure 1141.10 et. seq.

While proposals such as these have merit, they would require the the development of an additional layer of bureaucracy -- the creation of a class of "super-magistrates" with sufficient legal training and experience to conduct trials[5] and the recruitment of a pool of qualified masters or lawyers to serve as impartial arbitrators -- for their implementation.

This paper describes several proposed changes to the civil litigation system which are specifically addressed to the problems of court costs and delays and <u>which can be implemented within the existing court system without adding additional layers of bureaucracy</u>. The major proposal, that an "economical litigation program" be instituted for money damage actions with an amount in controversy of less than $25,000, will require the support and cooperation of the trial judges who will be primarily responsible for its effective implementation. While this proposal addresses the problems of medium sized claimants or defendants, the other proposal suggests rule changes which would effect higher value claimants. It is also recommended that Alaska Civil Rules of Procedure be amended to incorporate certain of the proposed amendments to the Federal Rules of Civil Procedure relating to discovery and pretrial procedures.

II. ECONOMICAL LITIGATION PROGRAM

The economical litigation program addresses the problems of the medium sized plaintiff or defendant in two ways: by limiting discovery and thus reducing costs and attorney's fees associated with conducting discovery and by imposing strict time limits on pretrial activities and case disposition so that recovery, if any, can be had soon after the original dispute. As will be described more fully hereafter, cases subject to the proposed program will be at trial approximately seven months from the date on which the complaint was filed.

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[5]Currently, magistrates need only be United States citizens over the age of 21 with 6 months Alaskan residency. A.S. 22.15.160(b). Federal magistrates authorized to conduct trials must be attorneys with 5 years membership in the state bar. 28 U.S.C. 631(b).

A. Historical Overview

The economical litigation program, as it was originally designed, did not specifically address the problem of court delays.[6] Its major purpose was to decrease the cost of asserting or defending a smaller claim and to thereby reduce a deterrent to pursuing or defending such claims by simplifying pleadings, motions, discovery and court trials. It was based on the belief that the determination as to whether a claim or defense should be pursued should be made on the merits and not on the relative financial positions of the parties. In enacting the first economical litigation program, the California Legislature declared that the costs of civil litigation make it "more difficult to enforce smaller claims even though the claim is valid or make() it economically disadvantageous to defend against an invalid claim."[7]

The problem of court delay was first addressed when the American Bar Association's "Action Commission to Reduce Court Costs and Delay" took up California's economical litigation idea and injected into it a strong judicial case management component. The ABA Commission designed an economical litigation program with both a discovery limitation component and a case management component which was put into effect in the Circuit Court of Campbell County, Kentucky on January 1, 1981. A similar program is planned for Maine.

Discovery Limitations:

Discovery limitations instituted under the economical litigation programs range from the total elimination of interrogatories[8] (an act not proposed here) to a limitation on the number or types of depositions which can be taken. The high cost of discovery can easily consume a good portion of the recovery in a given case. One study conducted of the effectiveness of the economical litigation program in reducing costs to clients found that the typical case within the program area studied was a $15,000 property damage claim with only minor personal injuries which had a reasonable settlement value of $5,000. The economical litigation program reduced the number of discovery events per case by 2.5 events. Estimating that each discovery event costs approximately $500,

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[6]California's Rules for the Economical Litigation Project state that, if possible, a trial date should be assigned within 50 days (municipal court) or 120 days (superior court) after the filing of the at-issue memorandum. These permissive guidelines do not address the problem of delay in the filing of the at-issue memorandum. C.C.P. 1727, 1837.

[7]California Code of Civil Procedure 1823.

[8]This ban on interrogatories has been a major source of dissatisfaction with the California program, which is the only program to have eliminated interrogatories.

the discovery reduction results in a savings of approximately $1,250 or in a 25 percent reduction in the cost of litigation in relation to the amount involved.[9]

Pretrial Exchange of Information:.

To compensate for the limitations placed on discovery under the economical litigation program, a pre-trial exchange of information is required of all parties. The exchange of information is intended to facilitate the informal exchange of information "as opposed to the more expensive and time consuming adversarial discovery proceedings such as deposition."[10] The exchange of this information prior to the pretrial conference should also promote the narrowing of issues and should encourage settlements. The information exchanged includes lists of lay and expert witnesses and descriptions and/or copies of documentary and physical evidence to be used at trial. Failure to provide this information results in a preclusion at trial of the evidence or witness whose existence or name should have been disclosed except for impeachment purposes.

Case Management:

Under the traditional litigation system, judges do not assume a case management role until an attorney for one side files a memorandum to set the case for trial.[11] Frequently, this memo is not filed until a year or more after the complaint has been filed.[12] Even after it is filed, the relative ease of obtaining continuances further aggravates the problem of delay. In 1975, a study of the case management practices of six metropolitan district courts was conducted by the Federal Judicial Center. The median disposition times of the courts studied ranged from 121 days in the Southern District of Florida to 500 days in Massachusetts. The purpose of the study was to examine the procedures and the degree of judicial participation in each of these courts to see if any patterns could be discerned which would explain the disparity in disposition times. The primary finding of the report was that

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9McDermott, Equal Justice at Reduced Rates, 20 JUDGES' JOURNAL, 16, 18 (1981, #2).

10"Special Rules of the Circuit Court for Campbell County, Kentucky, for the Economical Litigation Project, Comment to Rule 5.

11Alaska Rule of Civil Procedure 40(b).

12Although Rule 40(b)(3) requires that the court set the case for a trial setting conference within six months after the complaint has been filed if the attorneys fail to file this of memo within four months after the filing of the complaint, attorneys interviewed stated that this rule is "honored more in the breach than in the observance."

faster case disposition rates were linked to greater and earlier judicial control of civil cases. Faster courts were characterized by stricter control of the cases by precise scheduling of deadlines, including discovery cutoff dates. Routine, automatic procedures were employed to assure that answers were filed in a timely manner and that discovery was completed promptly.[13]

The ABA Commission also recognized the value of early judicial intervention in controlling cases. In order to more quickly move the economical litigation cases to disposition, a series of pretrial hurdles are set up from the time the case is filed. In Kentucky, for example, where the program is designed to dispose of cases within approximately 100 days, the following time frame is used. Within 30 days after the answer is filed, a discovery conference is scheduled to plan discovery and to resolve early motions. Sixty days after this conference, a pretrial conference is scheduled. All discovery is to be completed before this date and the pretrial exchange of information must be made ten days before the conference. If settlement is not reached, a trial date is scheduled for no later than 30 days after the pretrial conference. Continuances are rarely granted and only to prevent manifest injustice.

B. Proposal

It is proposed that for a period of three years, all money damage actions with an amount in controversy of less than $25,000 be subject to special economical litigation procedures. These procedures, which are more specifically set forth in the proposed rules attached as Appendix I, are designed to swiftly and economically resolve money damage contract claims and claims involving personal injury and property damage. The program could be instituted either statewide or within one judicial district and, in this regard, it should be noted that the Area Court Administrator of the First District has specifically expressed an interest in sponsoring the program in that district.

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[13] Peckham, The Federal Judge as a Case Manager: The New Role in Guiding a Case From Filing to Disposition, 69 CALIFORNIA LAW REV. 770, 783 (1981), citing, Federal Judicial Center, Case Management and Court Management in United States District Courts. In his article, Judge Peckham states that the current case management procedures only emphasize preparation for the trial stage--a stage which is reached in only a small proportion of the cases. He advocates the use of early status conferences to plan the pretrial phases such as discovery.

It is further proposed that records be kept of the disposition times and stages of the cases within the program and that, after it has been in operation for one year, attorneys for both plaintiffs and defendants be interviewed in order to obtain their opinions on the program's effectiveness in reducing costs to clients and its impact on case preparation.

Program Components:

Once it is determined that a case falls within the economical litigation program, the special procedures described below will apply. All money damage contract claims and actions for personal injury or property damage filed in the district court are covered by the program.[14] Because the program applies only to cases under $25,000, a jurisdictional statement must be filed for all money damage contract, personal injury or property damage actions filed in superior court. If a claimant states that the amount sought is under $25,000, then the special procedures apply. A statement to this effect will also operate as a waiver of any judgment above that amount.

I. Discovery Limitations

Alaska has already effectively addressed the problem of excessive interrogatories by limiting their number to a single set of thirty.[15] The only major discovery limitation proposed under the economical litigation program is that depositions be allowed as a matter of right only of parties. Additional depositions will be allowed only where it appears likely that a witness will be "unavailable" at the time of trial[16] or by stipulation of the parties. Discovery rules pertaining to requests for admissions and to enter property or to inspect remain unchanged except that the time allowed to respond to such requests is shortened.

14Under A.S. 22.15.030, the district court has jurisdiction of civil cases for the recovery of money or damages when the amount claimed is under $10,000 or, in the case of a motor vehicle tort, under $15,000.

15Alaska Rule of Civil Procedure 26(a).

16The unavailability rule parallels the current rule for the use of depositions in court proceedings. Under that rule, a deposition may be used for any purpose if the court finds that the witness is dead, or unable to attend due to age, illness, infirmity or imprisonment, or is beyond the court's jurisdiction.

The rule relating to physical and mental examination of persons is simplified, requiring only reasonable notice rather than court order.[17] Additional discovery will be permitted only on motion to and approval of the court.

2. Pre-Trial Exchange of Information

The following information must be made available no later than ten days before the pre-trial conference:

a) names and current addresses of witnesses to be called at trial along with a copy of any statement made by the witness and a summary of their expected testimony;
b) descriptions or photographs of any physical evidence which is to be presented at trial;
c) copies of any documents or writings which are to be presented at trial;
d) summaries of the qualifications of expert witnesses to be called at trial along with the expert's report or statement setting forth the facts and opinions and the grounds for the opinions to which the expert is expected to testify;
e) statements summarizing each contested issue of law and of fact and each contention in support of the party's claims or defenses along with the facts upon which the contentions are grounded;
f) offers of stipulation.[18]

Parties have a continuing duty to timely supplement prior discovery and pretrial disclosures.

3. Case Management

According to the 1980 Annual Report of the Alaska Court System, the average disposition time of "other civil" cases, a category comprised primarily of contracts, personal injury and property damage cases, filed in the superior courts was 615 days. Half of these cases were disposed on in 441 days, with 54% of the cases taking over 15 months to disposition. In the district courts, this same category of cases took an average of 283 days to disposition. Half of these cases were disposed of in 123 days with 24% taking over 12 months to reach disposition.[19]

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[17] Alaska Rule of Civil Procedure 35 currently requires that the party requesting the examination of another party or person under the custody or control of another party obtain a court order after a showing of good cause.

[18] The rejection of an offer of stipulation which is subsequently proven at trial subjects the rejecting party to sanctions.

[19] 1980 Annual Report of the Alaska Court System, at S-35, S-99.

Under the proposed economical litigation program, these cases would reach disposition in roughly 7 months. The following time frame is suggested:

-Under current rules, a non-governmental defendant has 20 days to answer after service of summons and complaint. Both governmental and out-of-state defendants who have designated an officer or agent of the state to receive service of process are allowed forty days to answer. An additional 20 days is allowed to answer a cross-claim or a counterclaim.[20]

-Thirty days after the last date on which an answer can be filed, a discovery conference will be held. This conference is "essentially a planning conference"[21] at which the progress of discovery is planned, the period necessary to complete discovery established and the date for the pretrial conference is set. Although the time to complete discovery may be shortened according to the complexity of the case, three months should be the maximum time allowed.

-Pretrial exchange of information is made after the close of discovery and ten days before the pretrial conference.

-The pretrial conference should be set at the discovery conference for twenty days after the close of discovery.

-A trial date should be assigned at the pretrial conference for no more than 30 days after that conference.

Using this time frame, an action against an in-state, non-governmental defendant where no cross-claim is filed should be at trial within 190 days after service of the complaint. Where an out-of-state or governmental defendant is involved, the case should be at trial within 210 days. At the discovery conference, the parties should have a fair idea of how soon a case will go to trial. If the maximum time for discovery is needed, they will know that the case will be at trial in 140 days. If the case appears not to require the full three months allotted for discovery, an earlier trial date can be anticipated. Because settlements occur more frequently when a trial date is imminent, it can be anticipated that many cases will settle earlier than the maximum time allowed for disposition.

20Alaska Rule of Civil Procedure 12(a).

21"Special Rules of the Circuit Court for Campbell County, Kentucky, for the Economical Litigation Program", Comment to Rule 5.

C. Program Conference

The American Bar Association's Action Commission to Reduce Court Costs and Delays is eager to assist new jurisdictions who are considering instituting an economical litigation program. The Commission will provide their expertise and technical assistance in tailoring such a program to the needs of a particular jurisdiction. The executive director[22] of the Commission has expressed a willingness to come to Alaska, at the Commission's expense, to present this idea to the members of the judicial and legal community. In addition, they can arrange to have both plaintiffs' and defendants' attorneys come to Alaska to give their views on the advantages and disadvantages of this program.

This conference could be used to fully explain the components of the program and to garner support for its implementation. Thereafter, a subcommittee of judges and lawyers could be created to study and to revise the proposed rules as necessary. It has been suggested that practical guidelines be written for the rules to clarify the manner of their operation and the subjects to be discussed at the discovery and the pretrial conferences. These guidelines could best be drawn by a subcommittee of lawyers and judges who are familiar with the practices of individual districts.

D. Program Evaluation

In order to ascertain if the economical litigation program is accomplishing its objectives, it should be evaluated after a full year of operation by interviewing attorneys who have brought cases within the program's jurisdiction. Specifically, attorneys should be asked if it has been their experience that the program has reduced the costs of case preparation; if these costs have been passed on to the clients or if the savings have been absorbed by the addition of alternate methods of discovery; if they feel that the quality of case preparation has been impaired; and if they favor the continuation of the program or have practical suggestions for its improvement.

22Both Paul Nejelski, the former executive director of the Commission, and Joy Chapper, the current executive director, have been extremely helpful in providing materials and support for this proposal.

E. Conclusion

It is important to note that experimentation with new methods is important in and of itself. Even if, after a trial period, it is the consensus that the economical litigation program be substantially revised or rescinded, it will, by its very existence, stimulate thought on efficiency and economy in dispute resolution. One state which adopted an economical litigation program declared a compelling state interest in experimentation with new procedures in order to achieve the goal of reducing the expenses of litigation to the litigants.[23] A similar commitment to this goal in Alaska could produce unexpected benefits to both litigants and to the court system as new procedures are attempted and refined.

III. AMENDMENTS TO THE CIVIL RULES

In June 1981, the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States published a preliminary draft of proposed amendments to the Federal Rules of Civil Procedure.[24] These amendments were proposed at the conclusion of studies by the Committee into the reform of procedures for the scheduling and management of litigation by trial judges and the control of discovery abuse.

Like many other jurisdictions, Alaska's rules of civil procedure are virtually identical to the Federal Rules of Civil Procedure. It is proposed that Alaska Rules of Civil Procedure 16 and 26 be amended to conform with these proposed federal amendments. While the full text of these amendments is set out in Appendix II, their practical effects are briefly described below.

1. Rule 16:

The proposed amendments to Federal Rule of Civil Procedure 16, the pretrial conference rule, were designed "to meet the demands of modern litigation, including the need for early exercise of judicial control, scheduling, and planning according to the needs of each case, with the object of eliminating unnecessary expense and delay."[25] The amended rule makes scheduling and case management an express goal of pretrial procedure "by shifting the emphasis away from a

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23 California Code of Civil Procedure 1823.

24 Public hearings on the proposed amendment were held in October and early November.

25 June 20, 1981 letter of Walter R. Mansfield, Chairman, Advisory Committee on Civil Rules, Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure.

conference focused solely on the trial and toward a process of judicial management that embraces the entire pretrial phase, especially motions and discovery."[26] Under both the current and the proposed rule, a pretrial conference is permitted but not required in every case. The proposed amendment addresses the need for the early exercise of judicial control by requiring that, in all cases,[27] a scheduling order be issued by the court no later than 90 days after a complaint is filed. If the parties are interested in attending a scheduling conference they may do so. However, if they do not wish to attend such a conference, the judge must consult with the parties or their attorneys and then issue a scheduling order which limits the time allowed to join other parties and to amend the pleadings; to serve and hear motions; and to complete discovery. The order may also address other relevant issues. The schedule will not be modified except for good cause. In addition, the amended rule expressly provides sanctions for failure to obey a scheduling or pretrial order or for failure to appear at or substantial unpreparedness at a scheduling or pretrial conference, including an award of costs for reasonable expenses incurred due to noncompliance.

2. <u>Rule 26</u>:

Rule 26 is the general rule relating to the methods, scope and limits of discovery. The Advisory Committee Note to Proposed Rule 26 states that:

> The purpose of discovery is to provide a mechanism for making relevant information available to the litigants. ...Thus the spirit of the rules is violated when advocates attempt to use discovery tools as tactical weapons rather than to expose the facts and illuminate the issues by overuse of discovery or unnecessary use of defensive weapons or evasive responses. All of this results in excessively costly and time-consuming activities that are disproportionate to the nature of the case, the amount involved, or the issues or values at stake.[28]

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[26]Advisory Committee Note to Proposed Rule 16.

[27]The proposed rule does recognise that a mandatory scheduling order may be counterproductive in certain types of cases and allows for the promulgation of local rules exempting certain categories of cases where the burden of issuing the order will outweigh the benefits achieved.

[28]Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure, Advisory Committee Note to Proposed Rule 26, p. 25.

With the exception that it limits the number of written interrogatories allowed to thirty questions, Alaska's Rule 26 does not limit the frequency of use of discovery methods.[29] The proposed amendments to Rule 26 would permit the court to limit the frequency and extent of use of any of the discovery methods if it finds that the discovery sought is unreasonably cummulative or duplicative, or that it is obtainable from a more convenient, less burdensome or less expensive source or that the party seeking the discovery has already had ample opportunity to obtain the information. The court may also limit the frequency or use of discovery methods if they are unduly burdensome or expensive in light of the needs of the case, the amount in controversy, the available resources of the parties and the values at stake in the litigation. The Advisory Committee states that this amendment is designed to encourage judges, who may raise this question on their own initiative, to identify instances of needless discovery and to limit the use of the various discovery devices accordingly. In using this rule, however, the court must be careful not to deprive parties of discovery which is reasonably necessary to develop and prepare a case.

The proposed amendment also includes a certification requirement for all discovery requests, responses and objections. By signing these papers, attorneys or unrepresented parties certify that they have made a reasonable inquiry into the factual basis of the response, request or objection. Sanctions for violations of the rule include orders to pay the other party the amount of reasonable expenses, including attorney's fees, incurred as a result of the violation.

3. Conclusion :

The proposed amendments to the rules of civil procedure extend some of the benefits sought under the economical litigation program to cases involving potentially higher recoveries or judgments. Although open discovery should be allowed in higher value cases, it may not always be necessary; thus the proposed amendment to Rule 26 provides a mechanism for limiting the frequency or use of discovery methods according to the actual needs of the case. In addition, attorneys interviewed indicated that delays were frequently a greater problem than over-discovery and that cases could be resolved faster if time limits were enforced. Court imposed time limits would ease another, related problem mentioned in interviews: that of the attorney who wishes to go ahead but who does not wish to alienate opposing counsel by refusing an extension of time or opposing a motion for a continuance.

29Alaska Rule of Civil Procedure 26(a).

The mandatory issuance of a scheduling order would help to eliminate this problem, especially where the court makes it known that deviation from the order will not easily be granted.[30]

IV. CONCLUSION

These three proposals address the problem of court costs and delay for litigants with small, medium and large claims. By increasing the small claims limit, persons with claims under $3,000 will have the option of choosing the faster, more economical forum of small claims court. Those with money damage claims under $25,000 will have their cases resolved within 7 months with a potential of reduced costs and attorney's fees for case preparation. In higher value, more complex cases, scheduling orders issued within three months after the complaint is filed will stimulate earlier pretrial preparation and a mechanism will exist for tailoring discovery needs to a particular case.

Another action which might be considered by the Council is the enactment of a limited discovery rule such as has recently been done in Colorado. This rule was designed as an alternative to the more comprehensive procedures set forth in the economical litigation program and simply provides for limited discovery in any type of case, regardless of the amount in controversy, on the request of the parties. If one party objects to the application of the rule, the court must resolve the issue by balancing factors similar to those described in the proposed amendments to Rule 26.[31] Although a rule of this type might accomplish some of the goals sought by the economical litigation program, it is suggested that comprehensive, mandatory procedures such as those described in the economical litigation program are necessary if any lasting benefits to litigants are to be achieved.

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30 It has been suggested that a standard form scheduling order be drafted for use by all judges.

31 Colorado Rule of Civil Procedure 26.1.

APPENDIX I
PROPOSED RULES FOR THE ECONOMICAL LITIGATION PROGRAM

The following proposed rules are modeled principally on Kentucky's "Special Rules of the Circuit Court for Campbell County for the Economical Litigation Project".

RULE 1. APPLICATION.

The following special rules apply to all money damage contract, personal injury and property damage cases where the amount in controversy is under $25,000. A jurisdictional statement must accompany all money damage contract, personal injury and property damage cases filed in the Superior Court. This statement must concisely set forth the amount of damages sought. If the amount stated is under $25,000 such statement will act as a waiver of any judgment in excess of that amount and the following rules shall apply.

RULE 2. DISCOVERY CONFERENCE AND TIME FOR COMPLETION OF DISCOVERY.

Within thirty (30) days after the last day on which the last responsive pleading could have been filed under Alaska Rule of Civil Procedure 12(a), or the actual filing date of that responsive pleading if it occurs first, a discovery conference shall be set by the court for all of the parties and the trial judge. The conference shall be for the purpose of planning discovery and determining the period of time necessary to complete discovery. All discovery shall be completed within three months. A date for the pretrial conference shall be set for not more than one hundred and ten (110) days following the discovery conference. However, in the judge's discretion this may be extended to meet the needs of the individual case.

RULE 3. DEPOSITIONS.

Depositions are permitted as a matter of right of parties only. The plaintiff shall be required to give his/her deposition before any other discovery takes place unless the defendant elects not to depose the plaintiff or the court otherwise directs. Except as otherwise ordered by the court or by stipulation of the parties, depositions of witnesses shall be permitted only if they may be introduced at trial according to the provisions of Civil Rule 32(a).

COMMENT: Depositions are to be taken only of parties and of witnesses who will not appear at trial and whose depositions may be introduced at trial under the provisions of Civil Rule 32(a).

RULE 4. INTERROGATORIES.

The scope and manner of discovery by means of interrogatories shall be governed by Civil Rules 26 and 33.

COMMENT: Interrogatories allowed under the economical litigation program are governed by existing rules.

RULE 5. PRODUCTION OF DOCUMENTS AND THINGS AND ENTRY UPON LAND FOR INSPECTION AND OTHER PURPOSES.

Procedures respecting the production of documents and things and entry upon land for inspection and other purposes shall be as provided in Civil Rule 34, except that notwithstanding the provisions of Rule 34(b), the party upon whom the request is served shall permit the inspection or copying of documents or other things or allow the entry upon land as the case might be within fifteen (15) days after service unless an objection is filed within the period. If objection is made to part of an item or category, the part shall be specified. The party submitting the request may move for an order under Civil Rule 37(a) with respect to any objection to or other failure to respond to the request or any part thereof or any failure to permit inspection as requested.

RULE 6. REQUESTS FOR ADMISSION.

Procedures respecting requests for admissions shall be governed by Civil Rule 36 except that the party to whom the request is directed must serve upon the requesting party a written answer or objection within 15 days after service of the request or the matter will be deemed admitted.

COMMENT: Rules 5 and 6 shorten the time allowed to respond to requests for admission, exchange, access to and inspection of evidence. The court intervenes only upon objection.

RULE 7. PHYSICAL AND MENTAL EXAMINATION OF PERSONS.

In a controversy where the physical or mental condition of a party or a person in the custody or control of a party is at issue an adverse party may obtain an examination of such party or person by giving reasonable written notice of the examination. The notice shall contain the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made. The notice shall be served upon all parties. Such examination may be avoided by the person or party only upon motion for a good cause shown. The rights of parties with respect to the receipt of the report of the examining physician shall be governed by Civil Rule 35(b).

COMMENT: This rule alters the current requirement that the party seeking such an examination obtain a court order to do so. Again, the court intervenes only upon objection.

RULE 8. EXCHANGE OF INFORMATION.

(1) Not later than ten days prior to the pretrial conference each party shall disclose the following material to all other parties:

a) Name, address and telephone number of any witness whom the party may call at trial together with a copy of any statement of such person or if there is not such statement a summary of the testimony the person is expected to give.

b) A description, drawing or photograph of any physical evidence which is to be presented at trial.

c) A copy of any document or writing which is to be presented at trial.

d) A brief summary of the qualifications of any expert witness the party may call at trial together with a report or statement of any such expert witness which sets forth the subject matter of the expert witnesses' anticipated testimony, the substance of the facts and opinions to which the expert is expected to testify, and a summary of the grounds for each opinion.

e) A statement summarizing each contention in support of every claim or defense which the party will present at trial and a brief statement of the facts upon which the contentions are based.

f) Offers of stipulation.

g) A concise statement of each issue of law and each issue of fact recognized by the party.

(2) Each party is under a continuing duty to timely supplement all prior discovery or pretrial disclosures rendered pursuant to this rule with any after acquired information concerning such matters.

(3) Parties are required to refine issues that are to be tried in the case. If an offer of stipulation is rejected and the matter is subsequently proven at trial, the rejecting party shall be subject to sanctions according to Rule 11.

(4) Except for impeachment or rebuttal purposes, parties who fail to make the exchange of information are precluded from introducing the information which should have been disclosed into evidence or from calling the witness whose name should have been disclosed to testify.

COMMENT: The Economical Litigation Project is intended to promote prompt and inexpensive discovery. Failure to make this exchange subjects the non-complying party to sanctions set forth in Rule 37(b)(2)(B) which prohibits the introduction into evidence of those matters which were not disclosed.

RULE 9. PRETRIAL CONFERENCE.

In all cases a pretrial conference shall be scheduled at the discovery conference for no more than one hundred and ten days (110) days after the discovery conference. This conference is for the purpose of:

a) Simplifying the issues and agreeing upon the issues of law and the issues of fact to be tried.
b) Exploring the possibility of settlement.
c) Disposing of all remaining motions.
d) Considering amendments to pleadings.
e) Exploring possible admissions of fact and documents which will avoid unnecessary proof.
f) Limiting the number of expert witnesses.
g) Any other matter which will aid in disposition of the case.

RULE 10. TRIAL DATE:

A firm trial date shall be set at the pretrial conference for not more than thirty (30) days thereafter. Continuances shall be allowed only for good cause shown and any motion therefore shall include notice to the client by copy of the motion.

RULE 11. SANCTIONS:

If a party fails to comply with the rules of the economical litigation program, the trial judge may impose as appropriate any of the sanctions specified in Civil Rule 37(b), in the same manner as if an order of the court had been violated.

COMMENT: It is anticipated that the sanctions will be principally those prescribed in Civil Rule 37(b), which provides: "In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses including the attorney's fees, caused by failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust." However, see Comment to Rule 7 dealing with failure to exchange information.

RULE 12. PRESENCE OF COUNSEL.

Trial counsel of record must be present in order to make binding stipulations and set firm hearing dates at all hearings under this program. Alternate counsel may be designated only if that counsel is empowered to stipulate on matters and has counsel of record's office calendar information so that s/he may firmly bind counsel of record in event setting and other decisions.

Timetable:
Economical Litigation Program

I. In-state, non-governmental defendant

Action	Day	Elapsed Time (Days)
Complaint filed/served	0	0
Answer	20*	20
Discovery Conference	30	50
Discovery Completed	90	140
Exchange of Information	10	150
Pretrial Conference	10	160
Trial	30	190*

II. Out-of-State or governmental defendant

Action	Day	Elapsed Time (Days)
Complaint filed/served	0	0
Answer	40*	40
Discovery Conference	30	70
Discovery Completed	90	160
Exchange of Information	10	170
Pretrial Conference	10	180
Trial	30	210*

*Under Rule 12 (a), an additional 20 would be added if the plaintiff is served with a counterclaim or a party served with a cross-claim. An additional 40 days are allowed for a governmental party or a non-governmental party who has designated an agent or officer of the state to receive service for them to answer a cross-claim or counterclaim.

APPENDIX II
PROPOSED AMENDMENTS TO CIVIL RULES

The text of the proposed amendments to the rules of civil procedure is printed below. Portions of the current rules which would be eliminated by the amendments are enclosed in brackets. New text is underlined.

RULE 16

The proposed amendments to Rule 16 would revise subsections (a) and add new subsections (b) and (c). Current subsections (b) through (f) would remain the same but would be relettered (d) through (h). Only subsections (a) through (c) are set forth below.

Rule 16. Pretrial Conferences; Scheduling; Management
[Pre-Trial Procedure; Formulating Issues]

a. IN GENERAL. In any action, a pretrial conference on a day certain may be ordered pursuant to the motion of any party or by the court upon its own motion, for such purposes as [to consider the following]:

1. expediting the disposition of the action;
2. establishing early and continuing control so that the case will not be protracted because of lack of management;
3. discouraging wasteful pretrial activities;
4. improving the quality of the trial through more thorough preparation, and;
5. facilitating the settlement of the case.

b. SCHEDULING AND PLANNING. Except in categories of actions exempted by court rule as inappropriate for scheduling conferences or orders, the judge, after consultation with the attorneys for the parties and any unrepresented parties, shall enter a scheduling order that limits the time

(1) to join other parties and to amend the pleadings;
(2) to serve and hear motions; and
(3) to complete discovery.

The scheduling order also may include

(4) the date or dates for a further scheduling conference, other conferences before trial, the final pretrial conference, and trial; and
(5) any other matters appropriate in the circumstances of the case.

The order shall issue as soon as practicable after filing of the answer but in no event more than 90 days after filing of the complaint. A schedule shall not be modified except by leave of the judge upon a showing of good cause.

c. SUBJECTS TO BE DISCUSSED AT PRETRIAL CONFERENCES. The participants at any conference under this rule may consider

(1) the formulation and simplification of the issues; including the elimination of frivolous claims or defenses;
(2) the necessity or desirability of amendments to the pleadings;
(3) the possibility of obtaining admissions of fact and of documents [which will avoid unnecessary proof];
(4) the avoidance of unnecessary proof and of cumulative evidence;
(5) the [limitation of the number of expert] identification of witnesses and documents, the need and schedule for filing and exchanging pretrial briefs, and the date or dates for further conferences and for trial;
(6) the advisability of a preliminary reference of issues to a master for findings to be used as evidence when the trial is to be by jury;
(7) the possibility of settlement or the use of extrajudicial procedures to resolve the dispute [settlement of the case];
(8) the form and substance of the pretrial order;
(9) the disposition of pending motions;
(10) the need for adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems; and
(11) such other matters as may aid in the disposition of the action.

RULE 26

The proposed amendments to Rule 26 would revise subsections (a) and (b) and add a new subsection (f). Other subsections would remain the same and are not set out below.

Rule 26: GENERAL PROVISIONS GOVERNING DISCOVERY.

a. DISCOVERY METHODS. Parties may obtain discovery by one or more of the following methods: depositions; written interrogatories; production of documents or things on permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission. Written interrogatories pursuant to Rule 33 of these rules are limited to thirty questions, which shall include paragraphs and subparagraphs. Upon application to the court, the court may with good cause appearing, permit further written interrogatories. [Unless the court orders otherwise under subsection (c) of this rule, the frequency of use of methods of discovery other than written interrogatories is not limited.]

b. <u>DISCOVERY SCOPE AND LIMITS</u> [Scope of Discovery]: Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

1. In General. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

<u>The frequency or extent of use of the discovery methods set forth in subdivision (a) may be limited by the court if it determines that: (i) the discovery sought is unreasonably cummulative or duplicative, or obtainable from some other source that is either more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the discovery is unduly burdensome or expensive, given the needs of the case, the amount in controversy, the parties' available resources, and the values at stake in the litigation. The court may act upon its own initiative or pursuant to a motion under subdivision (c).</u>

***

<u>(f) SIGNING OF DISCOVERY REQUESTS, RESPONSES, AND OBJECTIONS. Every request for discovery, or response or objection thereto, made by a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the request, response, or objection and state his address. The signature of the attorney or party constitutes a certification that he has read the request, response, or objection, and that it is (1) to the best of his knowledge, information, and belief formed after a reasonable inquiry consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; (2) interposed in good faith and not primarily to cause delay or for any other improper purpose; and (3) not unreasonable or unduly burdensome or expensive, given the nature and complexity of the case, the discovery already had in the case, the amount in controversy, and other values at stake in the litigation. If a request, response, or objection is not signed, it shall be deemed ineffective.</u>

<u>If a certification is made in violation of the rule, the court, upon motion or upon its own initiative, shall impose upon the person who made the certification, the party on whose behalf the request, response, or objection is made, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses occasioned thereby, including a reasonable attorney's fee.</u>

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VAUGHN S. ARMSTRONG

The Honorable Ralph E. Moody
Presiding Judge of the Superior Court
Third Judicial District
303 "K" Street
Anchorage, Alaska 99501

Dear Sir:

In response to your invitation to submit proposals which we consider acceptable as means to alleviate and hopefully eliminate the backlog of pending civil cases, the undersigneds respectfully recommend the following:

A. Establishment of sequential self-executing pre-trial procedures as per the attached recommendations to assist counsel to more promptly and thoroughly prepare all cases for trial. (See Section A)

B. Establishment of criteria to identify major case litigation as per the attached recommendations in order to invoke mandatory pre-trial conferences pursuant to ARCP 16. (See Section B)

C. Interim establishment of pro-tem adjudicators as per the attached recommendations to be available upon stipulation of the parties to assist in eliminating the current backlog of pending civil cases. (See Section C)

D. Additional consideration be given to procedures for moving domestic relations cases through the court system in a more efficient manner.

E. Re-examination of master vs. individual calendaring and re-consideration of departmentalization of the Superior Court bench into civil, criminal and doemstic relations sections with Judges rotating on a periodic basis. If a master calendaring system is retained, individual calendaring should be used for major case litigation.

F. Legislative appropriation for one or more additional Superior Court Judges in Anchorage.

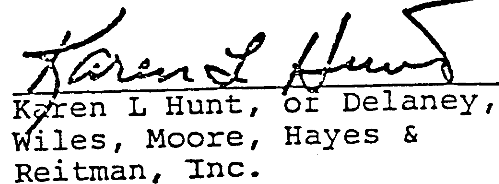
These recommendations are based upon our recognition of the trial court's desire not only to relieve the backlog and expedite the processing of all civil cases, but also its desire to establish procedures whereby counsel are assisted in thorough preparation of cases either for early settlement and/or for more efficient trial. These recommendations are also based upon the desire of the civil trial attorneys not only to accomplish those goals, but also to assist the trial court in maintaining control over trials and the enforcement of trial preparation proceedings. However, at the same time, we wish to avoid unneccessary court involvement in those trial preparation procedures which can be accomplished best by cooperation among counsel.

Above all, we seek to eliminate the trailing of cases for trial. The expense incurred by our clients when trailing occurs is rapidly eliminating meaningful access to the courts by the citizens of Alaska.

Attached please find endorsements of the Committee's recommendations by trial lawyers.

Consideration of the attached by the Judges of the Superior Court bench is greatly appreciated.

Respectfully submitted this 18th day of September, 1979.



Karen L Hunt, of Delaney,
Wiles, Moore, Hayes &
Reitman, Inc.

KLH/sjc

cc: Superior Court Judges, Anchorage
Supreme Court Justices
James Arnold, Area Court Administrator
Arthur Snowden, Court Administrator

A. <u>Establishment of sequential, self-executing pre-trial procedures to assist counsel to promptly and thoroughly prepare all cases for trial*</u>

1. No sooner than 30 days after service of the Complaint and upon one party's written notice to all parties, the following procedures commence.

2. 30 days after service of written notice, plaintiff files and serves a witness list which includes names and addresses of all potential witnesses known to plaintiff.

3. 50 days after service of written notice, defendant files and serves a witness list with same information.

4. Not later than 60 days after written notice, all counsel meet in office of plaintiff's counsel to agree upon and to stipulate to the following;

   a) scope of discovery

   b) discovery schedule

   c) A future week during which trial-setting conference would be desirable.

   d) Trial Court Administrator's office is called and a date is assigned for trial-setting conference.

   e) Counsel file stipulation with the court listing all items agreed upon in meeting including assigned date for trial-setting conference.

   f) If agreement cannot be reached re: week for a trial-setting conference, the stipulation so states and the presiding judge then assigns a trial-setting conference date which date is not less than 25 nor more than 45 days after stipulation is filed.

   g) If Major Case Litigation (MCL) status is desired by all parties, the stipulation so states and shows applicability of criteria to the case.

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* These procedures with shortened time periods may be applicable only to domestic relations cases which have a custody issue.

h) Upon MCL status being assigned by the Presiding Judge, ARCP 16 becomes applicable replacing the following procedures.

5. Not later than 20 days before the scheduled trial setting conference, the parties shall file and serve a witness list which includes the names and addresses of all witnesses intended to be called at trial indicating whether witness is to be called live or by deposition. Subject matter to be testified to by expert witnesses, if any, should be concisely stated. A mere designation of "liability" or "damages" should be deemed non-compliance.

6. At the trial-setting conference, a trial date is assigned which date is not longer than 90 days from date of trial-setting conference. The following is also ordered:

   a) Date is assigned for exchange of final lists of witnesses who will be called at trial including whether witness is to be called live or by deposition.

   b) Trial briefs or a brief, concise statement of the issues to be presented at trial is mandatory and should be filed not later than 15 days before assigned trial date.

   c) Boilerplate instructions need not be filed. All special instructions are filed and served 5 days prior to trial.

   d) Exhibits are marked three days prior to trial.

   e) Final date is determined by which all discovery is to be completed. This date should be strictly enforced by court unless parties subsequently stipulate differently.

   f) Final date for filing dispositive motions should be determined.

   g) A list of pro tem adjudicators available for trial and/or settlement conference is given all counsel. The parties may stipulate to use one adjudicator for trial and one or two adjudicators for settlement conference. Counsels' decision is stated on trial-setting order.

7. Any case that trails for five days should be removed the trial calendar and immediately rescheduled for trial by the Trial Court Administrator for a priority date not longer than 120 days from date of removal. No re-opening of discovery, amended pleadings, or further witness list modification should be permitted unless stipulated by all parties.

8. A courtesy copy of all stipulations to dismiss and/or voluntary dismissals filed after trial-setting conference should be filed with office of Area Court Administrator.

B. Establishment of criteria to identify Major Case Litigation (MCL) in order to invoke mandatory pre-trial conferences pursuant to ARCP 16

1. Specific criteria should be established to determine if MCL status is appropriate. Suggested criteria include: case requires more than 7 days for trial; or number of witnesses; or number of parties; or number of theories of recovery and/or defenses; or size of claims; or existence of counter, cross, and/or third-party claims.

2. MCL status is assigned to a case either by

   a) Stipulation of the parties. If at the meeting in plaintiffs counsel's office, the parties stipulate to MCL status, a copy of the stipulation is sent to Area Court Administrator's office. Stipulation must state why parties consider MCL criteria to be applicable. Presiding Judge accepts or rejects stipulation.

   or

   b) If agreement cannot be reached as to MCL status, any party may file a motion showing cause as to why MCL status is appropriate. Presiding Judge rules on such motions.

3. If MCL status is ordered, the Area Court Administrator promptly assigns case to Judge for individual calendaring and within 5 days a copy of the order and Judge assignment is mailed to all counsel.

4. The Judge determining MCL status is not considered an "assigned" Judge for purposes of ARCP 42 (pre-emption).

5. ARCP 16 procedures should be mandatory for Major Case Litigation and the procedures should be strictly enforced.

6. Individual calendaring should be utilized for MCL.

7. Within 30 days after assignment of MCL, the Judge schedules a preliminary conference for purposes of scheduling ARCP 16 pre-trial conference and a trial date certain. The Judge's calendar is considered and if a backlog exists which prevents trial date certain within a reasonable time, counsel may stipulate to use a pro-tem adjudicator for trial and/or one or more pro-tem adjudicators for settlement conference.

8. The group recommends encouragement of settlement conference before pro-tem adjudicators or Judges, but does not recommend mandatory settlement conferences.

9. Only one MCL should be scheduled for same trial date before the assigned Judge.

10. No MCL should trail longer than 5 days unless by agreement of the parties.

11. Immediately upon removal from trial calendar, MCL is given first available and appropriate trial date on assigned Judge's calendar unless parties agree to re-assignment to a different Judge. No discovery is re-opened, etc unless by agreement of the parties.

C. <u>Interim establishment of pro-tem adjudicators to be available upon stipulation of the parties to assist in eliminating the current backlog of pending civil cases</u>

1. The group recommends that the following system be established for limited duration by order of the Supreme Court as an interim solution to civil trial court backlog.

2. If the procedures suggested in sections A and B above are adopted, a backlog exists when, because of court congestion, a non-MCL case cannot be tried within 90 days of the date upon which the trial-setting conference is held or when the Judge assigned to MCL cannot try the case within a reasonable time.

3. If the procedures suggested in sections A and B above are not adopted, a backlog exists when, because of court congestion, a case cannot be tried within nine months of the date upon which a trial-setting conference is requested.

4. Group members will assist the court system to lobby legislators for appropriation.

5. Procedures:

   a. Lawyers with experience required to apply for Superior Court Judge voluntarily submit their names to Trial Court Administrator indicating willingness to serve as pro-tem adjudicators.

   b. Anchorage attorneys be given written notice of availability of pro-tem adjudicators for either trial or settlement conference.

   c. At trial-setting conference or the preliminary conference with the assigned Judge on MCL, a list of available pro-tem adjudicators is to be given all counsel. The parties may stipulate to use one adjudicator for trial and one or two adjudicators for settlement conference.

   d. Court pays selected lawyer $60.00 per hour.

   e. In order to achieve purposes for utilizing pro-tem adjudicators, they must have full force and effect of a trial judge. Therefore, parties stipulate to waive right of appeal to Superior Court.

   f. If stipulation is for use of pro-tem adjudicators in settlement conference, parties each select one from voluntary list (selected adjudicators are paid $60.00 per hour by the Court System). Parties arrange all settlement conference procedures, dates, places, etc. directly with adjudicators without any Court System involvement.

D. The following procedures were rejected:

1. Any requirement for disclosure or summary of witness testimony other than those requirements established by current rules of civil procedure.

2. The filing of affidavits re: witness testimony.

3. Unless the parties stipulate, settlement conferences should not be held before assigned trial Judge or trial pro-tem adjudicator.

4. Mandatory settlement conferences.

COMMITTEE MEETING'S REPORT DATED SEPTEMBER 13, 1979 and
COMMITTEE MEETING'S REPORT DATED SEPTEMBER 17, 1979